The End of the Law: Human Evolution, Neurolaw, and the Soul

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Introduction

This Dissertation pursues three related goals. First, it explores basic methodological questions in the sub-field of "theology and science." Second, it tackles one of the most difficult issues in Christian "theology and science" discourse: the question "who was Adam," a question that encompasses the problems of human uniqueness, human sin, and the redemption of humanity. Third, it offers a theological and philosophical critique of certain jurisprudential claims made by some scholars in the emerging discipline of "neurolaw," that is, the application of neuroscience to the law.

The question of "neurolaw" provides a framework for entry into the broader underlying issues of theological anthropology and theological method. My central argument is that "law" is the key to unlocking the question "who was Adam" – that "law" is an essential part of what makes humans unique, that "law" highlights the depth of human sinfulness, and that the internalization of "law" through faith in the true Adam, Christ, is essential to human redemption. On the way to making this argument I address the modern contention that "law," like any other human cultural artifact, is merely the byproduct of our evolutionary history. To address that question, I suggest that recent work in theological epistemology that draws from phenomenology and narrative theology, including some thinkers associated with "Radical Orthodoxy" and "postliberalism," offers important resources for considering such questions. More directly, I suggest that the lineaments of Christian orthodoxy – the Triunity of God, the absolute ontological difference between God and creation, and Chalcedonian Christology – best frame how we should think of human beings, who are at once creatures with a long biological evolutionary history and agents who stand "before the law."

Chapter 1 begins with "method." In some ways this Chapter follows the conventional heuristic that categorizes approaches to "theology and science" along a continuum ranging from conflict to consilience. But this Chapter also seeks to problematize the "and" in "theology *and* science." It offers one of the most comprehensive discussions in the faith and science literature of how "narrative" or "postmodern" theologies that seek to break down dichotomies between "faith"

and "reason" might help overcome the perception that either "theology" or "science" must remain distinct enterprises even while perhaps grudgingly conceding some ground to each other.

Chapters 2 and 3 survey the problem of "neurolaw" as presented by human evolutionary history and neurobiology. Consistent with the methodological perspective developed in Chapter 1, I accept the overwhelming evidence for the long history of human biological evolution and for the intimate connection between our neuro-chemical systems and what we call "mind" and "will," but I reject any reductionism in which the phenomena of human uniqueness and human agency could be represent "nothing but" evolution and neurobiology.

Chapters 4 and 5 provide philosophical, theological and historical critiques of reductive concepts of neurolaw. These Chapters show why reductive neurolaw fails, through analytic philosophical arguments as well as through phenomenological accounts of human experience, consistent with how Christian theology historically has thought about the sources of law. These Chapters also trace connections between the concept of the "laws of nature" and trends against reductionism, particularly in the "new Aristotelianism" among some philosophers of science.

Chapter 6 responds to a possible objection to my connection between "law" and the goodness of creation, which is the problem of originary violence. In any historical human society, positive law is established and maintained against "criminal" elements by force of arms – that is, by violence. The doctrine of creation, however, tells us that God created human beings out of love, without any coercion, and the doctrine of redemption tells us that God invites humans into restored fellowship with Himself but compels no one. I argue in these chapters that law in the "Garden" originally was not coercive, that Christ's fulfillment of the law in his atoning death restores law to its rootedness in love, and that Christ's resurrection, which anticipates our future resurrection, seals the promise of a law of love embedded again in every redeemed human heart, without violence. These Chapters also explore some implications for the theological anthropology developed throughout the text for political theology and ethics, particularly concerning concepts of human freedom.

Chapter 1: Method

The questions I am asking in this dissertation about human agency, law, and jurisprudence in light of contemporary knowledge about human evolution imply more basic questions about the relationship between theology and the natural sciences, or even more fundamentally, about the relationship between "faith" and "reason." As Jeffrey Stout and others have noted, modern theology, particularly when it attempts to engage the natural sciences, always entails a significant amount of methodological "throat clearing."[1] This chapter surveys the salient historical and philosophical background of the theology and science literature but also seeks to push beyond the settled paradigms to question the "and" in the relation between "theology *and* science." My view is that problems of the sort I am trying to address in this dissertation entail metaphysical truths that imply and *require* theology as a given framework. "Natural science," if it is to operate from an epistemologically stable base, already presumes a doctrine of creation. Therefore, "natural science" is a subdivision of "philosophy," which is always related to and contained within "theology."[2]

This kind of posture, however, raises significant issues in light of the history of the natural sciences in relation to Christian theology. From the Galileo affair to contemporary "scientific creationism" and "intelligent design" arguments, Christians have too often advanced claims in the name of theology that ironically undermine the essential Christian conviction that creation is a contingent reality with an inherent stability, rationality and consistency resulting from God's continual sustenance of the created order. In response to this extreme response, many modern "theology and science" scholars propose models that seem to relegate theology to the

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[1] Stout said that "[p]reoccupation with method is like clearing your throat: it can go on for only so long before you lose your audience." Jeffrey Stout, *Ethics After Babel: The Languages of Morals and Their Discontents* (Princeton: Princeton Univ. Press 2001), 163. Similarly, although William Placher argued that theologians should "abandon their preoccupation with method and get on with the business of doing theology," he acknowledged the need to discuss method. William C. Placher, *Unapologetic Theology: A Christian Voice in a Pluralistic Conversation* (Louisville: WJK 1989), 7. Placher acknowledged the irony: "Prolegomena to Prolegomena! Worse and worse!" *IbIbid.* Similarly, David Kelsey has noted that "in today's methodologically hyper-self-conscious world of technical academic theology," any kind of "broadly methodological judgment" will prove controversial and should be identified. David H. Kelsey, *Eccentric Existence; A Theological Anthropology, Volume One* (Louisville: WJK 2009).
[2] *See* Thomas Aquinas, *ST* I.6, Reply 1 and 2 (stating that "[s]acred doctrine derives its principles not from any human knowledge, but from the divine knowledge, through which, as through the highest wisdom, all our knowledge is set in order. . . . The principles of other sciences either are evident and cannot be proved, or are proved by natural reason through some other science.").

background or that significantly modify the orthodox conception of God as the transcendent creator and sustainer of all things.[3] The method I wish to follow seeks to avoid these twin dangers by proposing a robust doctrine of God and creation that leads to an equally robust anthropology and epistemology. While such a method cannot convince skeptics who require basic belief in God to be justified on supposedly neutral terms, I hope it at least demonstrates that the Christian belief in God and creation is consistent with a meaningful concept of "reason." In fact, after laying the methodological groundwork, I will argue that the Christian doctrines of God and creation supply far richer notions of human agency, reason, and "law" than any reductively materialist doctrine.

1. From Convergence to Conflict

The field of "science and religion" has become an important sub-discipline in modern theology.[4] This development parallels the rapid ascendancy of "science" as the paradigm of trustworthy authority in modernity and the related development of the "conflict" or "warfare" narrative of the relation between science and religion.[5] The rise of secularism is intimately related to the social and intellectual authority commanded by "science" in modernity.[6]

Theology in the Christian, Jewish and Muslim traditions historically interacted fruitfully with the "science" of the day, at least prior to the seventeenth century. The Hebrew creation narratives

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[3] For a discussion of the Christian doctrine of creation, *see, e.g.*, David Fergusson, *Creation* (Eerdmans: Grand Rapids, 2014); Hans Swartz, *Creation* (Eerdmans: Grand Rapids 2002); David Fergusson, "Creation," in John Webster, Kathryn Tanner and Iain Torrance, eds., *The Oxford Handbook of Systematic Theology* (OUP: Oxford 2007); Alister E. McGrath, *The Foundations of Dialogue in Science & Religion* (Blackwell: Oxford 1998), 36-79; Wolfhart Pannenberg, *Toward a Theology of Nature: Essays on Science and Faith* (Louisville: Westminster / John Knox 1993), 29-49; David Bentley Hart, *The Beauty of the Infinite: The Aesthetics of Christian Truth* (Eerdmans: Grand Rapids 2003), 249-318.

[4] See, e.g., Rachel Muers and Mike Higton, *Modern Theology: A Critical Introduction* (London: Routledge 2012), Chapter 11; Peter Harrison, ed., *The Cambridge Companion to Science and Religion* (Cambridge: CUP 2010); Alister McGrath, *Science & Religion: A New Introduction* (Hoboken: Wiley-Blackwell 2nd ed. 2010).

[5] See McGrath, *Science & Religion: A New Introduction*, 9-11.

[6] *See, e.g.,* Charles Taylor*, Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard Univ. Press 1989), Chapter 19; A Secular Age (Cambridge: Harvard Univ. Press 2007), Chapter 7; Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Cambridge: Harvard Univ. Press 2012), Chapter One; Jonathan I. Israel*, Radical Enlightenment: Philosophy and the Making of Modernity 1650-1750* (Oxford: OUP 2002); John Hedley Brooke, "Science and Secularization," in Peter Harrison, ed*., The Cambridge Companion to Science and Religion* (Cambridge: CUP 2010).

in the Biblical book of Genesis both absorb and distinguish the ancient near eastern cosmologies of Assyria, Babylon and Egypt.[7] The Church Fathers adapted and transformed Platonic philosophy and cosmology, and medieval Muslim, Christian, and Jewish theologians adapted the insights of Aristotle after the rediscovery of the Aristotelian corpus by Islamic scholars.[8]

In 1616, however, the Copernican view of heliocentrism, confirmed and popularized by Galileo, was condemned by the Catholic Church.[9] Galileo himself was condemned and his works were banned by Papal decree in 1633.[10] The Papal Decree of Condemnation asserted that

> The proposition that the Sun is the center of the world and does not move from its place is absurd and false philosophically and formally heretical, because it is expressly contrary to Holy Scripture.
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> ….
>
> The proposition that the Earth is not the center of the world and immovable but that it moves, and also with a diurnal motion, is equally absurd and false philosophically and theologically considered at least erroneous in faith. [11]

There is considerable scholarly debate about the circumstances of Galileo's condemnation. As Charles Hummel describes it, "Galileo's trial of 1633 was not the simple conflict between science and religion so commonly pictured. It was a complex power struggle of personal and professional pride, envy, and ambition, affected by pressures of bureaucratic politics."[12] Galileo's own acerbic personality, as well as the crisis of the Reformation, the Counter-Reformation, and the Thirty

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[7] *See* John F. Walton, *Ancient Near Eastern Thought and the Old Testament: Introducing the Conceptual World of the Hebrew Bible* (Grand Rapids: Baker Academic 2006); M. Conrad Hyers, *The Meaning of Creation: Genesis and Modern Science* (Louisville: Westminster John Knox 1984).

[8] *See* Hans Boersma, *Heavenly Participation: The Weaving of a Sacramental Tapestry* (Grand Rapids: Eerdmans 2011); David B. Burrell, *Freedom and Creation in Three Traditions* (South Bend: Univ. of Notre Dame Press 1993); David C. Lindberg, "The Fate of Science in Patristic and Medieval Christendom," in *The Cambridge Companion to Science and Religion*; Conor Cunningham, *Darwin's Pious Idea: Why the Ultra-Darwinists and Creationists Both Get it Wrong* (Grand Rapids: Eerdman's 2010), Chapter Seven.

[9] *See* Charles E. Hummel, *The Galileo Connection: Resolving Conflicts Between Science & The Bible* (Downers Grove: InterVarsity Press 1986); "Famous Trials: The Trial of Galileo" webpage, available at http://law2.umkc.edu/faculty/projects/ftrials/galileo/galileo.html.

[10] Hummel, *The Galileo Connection*, 108-118; "The Trial of Galileo" webpage, text of Papal Condemnation, available at http://law2.umkc.edu/faculty/projects/ftrials/galileo/condemnation.html.

[11] "The Trial of Galileo" webpage, text of Papal Condemnation, available at http://law2.umkc.edu/faculty/projects/ftrials/galileo/condemnation.html.

[12] Hummel, *The Galileo Connection*, 116.

Years' War, are also often cited by defenders of the Church as contextual factors around Galileo's condemnation.[13] Even after Galileo's condemnation, heliocentrism continued to be taught as a mathematical concept, and by 1835, the heliocentric texts of Copernicus and Galileo were removed from the Catholic Church's Index of Forbidden Books.[14] In 2000, Pope John Paul II formally apologized for the Church's treatment of Galileo, along with apologies for historic mistreatment of Jews, the Crusades, and other matters.[15]

Notwithstanding these qualifications, the Galileo affair represents a touchstone event for the relationship between theology and science. The heliocentric cosmos challenged not only the interpretation of a few Biblical passages, but also the broader Aristotelian cosmology that informed the medieval synthesis of "science" and theology.[16] When Newtonianism subsequently questioned Aristotelian causation and the sense of a great chain of being more broadly, Lyellian geology questioned the antiquity of the Earth and the "days" of creation recorded in Genesis 1, and Darwinism questioned anthropocentric biology, theology faced an even more significant challenge.[17] At the same time, scientific methods of textual analysis, archeology and historiography were being applied to the Biblical texts in ways that questioned the fundamental integrity of the Bible.[18]

Nineteenth century Christian thinkers reacted to the Newtonian, Lyellian and Darwinian challenges inconsistently. During the ascendency of Newtonianism, many opted for a kind of mechanistic Deism that was at odds with the Christian view of a God who is intimately

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[13] *See* The Vatican Observatory Website, "The Galileo Affair," available at http://vaticanobservatory.org/index.php?option=com_content&view=article&id=197%3Athe-galileo-affair&catid=89%3Ahistory-of-astronomy&Itemid=242&lang=en.

[14] *Ibid.*

[15] The theological basis for these apologies is set forth in the International Theological Commission's December 1999 document *Memory and Reconciliation: The Church and the Faults of the Past*, available at http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html, approved by then-Cardinal Josef Ratzinger acting as Prefect of the Congregation for the Doctrine of the Faith.

[16] *See* Hummel, *The Galileo Connection*, Chapter 1.

[17] *See* Rachel Muers and Mike Higton, *Modern Theology: A Critical Introduction* (London: Routledge 2012), Chapter 11. As Conor Cunningham argues, it is not at all clear that any of these developments do, in fact, challenge all notions of a chain of being or of human uniqueness. Cunningham, *Darwin's Pious Idea*, 2-3. This perspective will be developed later in this Chapter.

[18] *See* Mark S. Gignilliat, *A Brief History of Old Testament Criticism: From Benedict Spinoza to Brevard Childs* (Grand Rapids: Zondervan 2012).

providentially involved with creation.[19] In Christian theology's first encounters with Darwinism, notwithstanding the perhaps exaggerated accounts of the clash between Samuel Wilberforce and Thomas Henry Huxley, the majority responded with cautious appraisal and appropriation of both Lyell and Darwin, while working with notions of providence that attempted to accommodate both the Biblical picture and Newton.[20] Their efforts sometimes led to theological aberrations such as William Paley's "watchmaker" natural theology, but they nevertheless worked from a framework that assumed the "book of scripture" and the "book of nature" spoke complementary truths.[21]

The Fundamentalist-Modernist controversy that erupted among American Protestants in the early twentieth century, however, ignited a tinderbox of conflict, highlighted in the infamous "Scopes Monkey Trial" of 1925 in Dayton, Tennessee.[22] Fundamentalists rejected Darwinian science *in toto*, and further rejected *in toto* the historical-critical inquiry of the Biblical sources.[23] The rise of Protestant Fundamentalism supported the development of "creation science," which asserts that the Bible can be read as an inerrant scientific text and that God literally created the universe in six days around 6,500 years ago.[24] The enormous cultural influence of "creation science," particularly in North America but increasingly world-wide, is evidenced by the multi-

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[19] *See* Taylor, *A Secular Age* (Cambridge: Harvard Univ. Press 2007), Chapter 7.

[20] From a Protestant perspective, for example, see Mark A. Noll and David N. Livingstone, eds., *B.B. Warfield, Evolution, Science, & Scripture: Selected Writings* (Grand Rapids: Baker 2000). For a typical account of the Huxley-Wilberforce conflict as a watershed crisis moment for Christian theology, see Muers and Highton, 212-215. For a more careful account of the Huxley-Wilberforce encounter, David Livingstone, "That Huxley Defeated Wilberforce in Their Debate Over Evolution and Religion," in *Ronald L. Numbers, ed. Galileo Goes to Jail and Other Myths About Science and Religion* (Cambridge: Harvard Univ. Press 2009); J.R. Lucas, "Wilberforce and Huxley: A Legendary Encounter," The Historical Journal 22:313-330 (June 1979). For an account that limits the immediate significance of the debate but underscores the genuine theological tensions felt by Wilberforce over the problem of human evolution, see Frank James, "On Wilberforce and Huxley," Astronomy and Geophysics (1) 2005.

[21] *See* McGrath, *Science & Religion: An Introduction*, 31; John Henry, "Religion and the Scientific Revolution," in *The Cambridge Companion to Science and Religion*, 52-55.

[22] *Ibid.*, 220-221.

[23] *See* George Marsden, *Understanding Fundamentalism and Evangelicalism* (Grand Rapids: Eerdmans 1990), Chapters 6, 9.

[24] See Ronald L. Numbers, *The Creationists: From Scientific Creationism to Intelligent Design* (Cambridge: Harvard Univ. Press 2006); "Answers in Genesis" website, available at http://www.answersingenesis.org.

million dollar "Creation Museum" in Kentucky.[25] In the view of "creation science," there is a clear conflict between theology and modern evolutionary science.

Neo-Calvinist presuppositionalism is a living reaction to the fundamentalist-modernist controversy, a dispute that began in American Presbyterianism in the 1920's. "Modernist" Presbyterians embraced the new critical Biblical scholarship and the new natural sciences, and accepted the challenges geology, paleontology, and evolutionary biology presented for "literal" readings of scripture. Traditionalist Presbyterians insisted on adherence to the essential tenets of the Westminster Confession of Faith, including, perhaps most notably, the infallibility or inerrancy of scripture.[26] Ironically, the "traditionalist" Bibliology of many early figures in this debate, including B.B. Warfield, was not hostile to scientific developments. Warfield, whose writings on the inerrancy of scripture still inform conservative and fundamentalist Evangelical theology today, argued that the modern geology and biology, including biological evolution, could be compatible with an inerrant Bible, even if he drew lines around the possibility of human evolution.[27] Nevertheless, disputes over the inspiration of the Bible and other "fundamentals" of the faith caused the traditionalist and modernist Presbyterians to divide, with the modernists gaining control over Princeton Theological Seminary and the traditionalists forming a new school, Westminster Theological Seminary, in Philadelphia.[28]

The fundamentalist-modernist division was in significant part a reaction to the disruptions caused by German "higher" Biblical criticism of the nineteenth century.[29] Biblical scholars such as Julius Wellhausen built on approaches dating back to the Renaissance in an effort to discern the "true" and "historical" meaning of the Biblical texts apart from the constraints of received dogma. Wellhausen and others challenged prior beliefs about the unity and integrity of the Biblical sources. Wellhausen argued, for example, that the Pentateuch was a redaction of three theologically and narratively disparate and even contradictory sources, rather than a unified,

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[25] *See* Creation Museum Website, available at http://creationmuseum.org/.
[26] *See* George Marsden, *Understanding Fundamentalism and Evangelicalism* (Grand Rapids: Eerdmans 1990).
[27] *See* Mark A. Noll and David N. Livingstone, B.B. Warfield, *Evolution, Science, and Scripture: Selected Writings* (Grand Rapids: Baker Books 2000).
[28] *See* Marsden, *Understanding Fundamentalism and Evangelicalism*.
[29] *Ibid.*

essentially historically accurate account from the inspired pen of Moses. Their philological methods were combined with spectacular advances in the nascent disciplines of archeology and epigraphy, such as the discovery of the tablets containing the Epic of Gilgamesh by Hormuzd Rassam in 1853.[30]

The "higher" critics painted a picture of the Bible as a thoroughly contingent human document that was derivative of the mythologies of its surrounding cultures, rather than a pristine account of universal origins essentially dictated by God. Their understanding of the Bible coincided with philosophical trends, particularly German Romanticism, that in turn influenced academic theology. German Protestant scholars such as Friedrich Schleiermacher and, later, Rudolph Bultmann, attempted to demystify the faith and to recast doctrines once thought basic to orthodoxy, such as the virgin birth, original sin, the vicarious atonement, the particularly of Christ in salvation, and the inspiration of scriptures, in merely experiential terms.[31] When conservative scholars and pastors began publishing the volumes known as "The Fundamentals" in 1910, they believed – with some justification – that they were responding to an intellectual crisis that went to the very heart – the "fundamentals" – of historic Christian faith.[32]

But the Fundamentalists who took up the mantle of defending the faith from the modernists in the early twentieth century typically were less flexible than predecessors such as B.B. Warfield who could cautiously incorporate at least some of the empirical data of the new natural sciences and the new Biblical scholarship into his understanding of Biblical inspiration and inerrancy. Significant portions of The Fundamentals were devoted to attacks on higher criticism and Darwinism that lacked any texture or nuance.[33] A line was drawn: any accommodation to Darwin's theory of evolution was a surrender of the essentials of Christian faith.

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[30] *See* Steven L. McKenzie and Stephen R. Haynes, eds., *To Each its Own Meaning: Biblical Criticisms and Their Applicatio*n (Louisville: Westminster John Knox 1999).

[31] *See* Rachel Muers and Mike Higton, *Modern Theology: A Critical Introduction* (London: Routledge 2012), Section A.

[32] *See* Marsden, *Understanding Fundamentalism and Evangelicalism.*. Full text scans of The Fundamentals are available at the Internet Archive, https://archive.org/details/fundamentalstest17chic.

[33] *See, e.g.,* the following essays in *The Fundamentals*: Griffith Thomas, "Old Testament Criticism and New Testament Christianity"; Dyson Hague, "History of the Higher Criticism"; Franklin Johnson, "Fallacies of the Higher Criticism,"; Henry Beach, "The Decadence of Darwinism"; George Frederick Wright, "The Passing of Evolution;" An

In America, of course, Christianity and popular concepts of democratic governance have also been closely intertwined. It is not surprising that the early twentieth century Fundamentalists became alarmed about the teaching of evolutionary biology in public schools and sought to limit that activity through legislation. These efforts resulted in the infamous "Scopes Monkey Trial" in 1925.[34] Although Scopes was convicted under Tennessee's Butler Act of unlawfully teaching evolution in a public school, the performance of the State's witnesses, including attorney William Jennings Bryan, who also prosecuted the case, was widely ridiculed.[35] The Fundamentalist side began to withdraw from wider cultural engagement and to focus on separatist institutions that would preserve the purity of their movement.

This trend coincided with the popularization within Fundamentalist groups of the eschatology of dispensational premillenialism.[36] The Fundamentalist's predecessors, including Warfield, had mostly belonged to a strain of Reformed theology that espoused an optimistic post-millennial eschatology. Warfield and his compatriots understood themselves as participants in an ideological fight, but they believed their ideas would gradually but inexorably triumph as the Kingdom of God expanded. The neo-Calvinists who adopted some form of Cornelius Van Til's presuppositionalism tended towards an "amillennial" eschatology, and partly for that reason occupy a rarified space in theology-and-science discussions. In stark contrast, dispensational

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Occupant in the Pew, "Evolutionism in the Pulpit." It should be noted that The Fundamentals contained a few notable examples of more careful thought about Christian faith and natural science, including James Orr's essay "Science and Christian Faith." Orr noted that, in the Bible, "[n]atural things are taken as they are given, and spoken of in simple, popular language, as we ourselves every day speak of them. The world it describes is the world men know and live in, and it is described as it appears, not as, in its recondite researches, science reveals its inner constitution to us. Wise expositors of the Scriptures, older and younger, have always recognized this, and have not attempted to force its language further." *Ibid.* Orr further argued that "few are disquieted in reading their Bibles because it is made Certain that the world is immensely older than the 6,000 years which the older chronology gave it. Geology is felt only to have expanded our ideas of the vastness and marvel of the Creator's operations through the aeons of time during which the world, with its teeming populations of fishes, birds, reptiles, mammals, was preparing for man's abode — when the mountains were being upheaved, the valleys being scooped out, and veins of precious metals being inlaid into the crust of the earth." Unfortunately the weight of essays in The Fundamentals did not follow Orr's measured approach. Nevertheless, even Orr insisted on the special, recent creation of Adam and Eve. *See Ibid.*

[34] *See* George Marsden, *Fundamentalism and American Culture* (Oxford: OUP 2d ed. 2009), Chapter XXI.

[35] *See Ibid.*; Ronald L. Numbers, *The Creationists: The Evolution of Scientific Creationism* (Berkeley: Univ. Calif. Press 1992), 72-73.

[36] *See* Matthew Avery Sutton, *American Apocalypse: A History of Modern Evangelicalism* (Cambridge: Harvard Univ. Press 2014).

premillenialists believed that they were living in the "end times," a dark period of increasing evil and apostasy immediately preceding the "Great Tribulation," a time of intense and terrible judgment equated with the Biblical "Day of the Lord." Only after the Great Tribulation would Christ establish his Millennial Kingdom, during which he would reign on David's throne for one thousand years of peace on Earth, to be concluded with a final human-demonic rebellion that would result in Christ's destruction of this world and the final judgment. The dispensationalist belief that the present times were the "end times" before the Tribulation reinforced the Fundamentalists' strategic retreat after the Scopes trial. The broader world was irredeemably corrupt and headed for fiery judgment. The only safe place was aboard the Ark of a putatively literalist Biblical faith.[37]

The populist dynamism of the American evangelical movement, however, could not long permit evangelical Fundamentalists to remain on the cultural sidelines. The period following World War II in particular witnessed a resurgence in world missions along with a new cultural visibility and prominence for American Evangelicals eager to retain the theological underpinnings of The Fundamentals while distancing themselves from the isolationism of post-Scopes fundamentalism. Evangelical leaders such as Carl Henry, J.I. Packer, Bernard Ramm, and Francis Schaeffer, and institutions such as Wheaton College, promoted political engagement and "the integration of faith and learning." Although they were not yet prepared to grant the validity of Darwinian evolution, neo-Evangelical intellectuals mostly accepted Lyellian geology and the mainstream scientific consensus about the vast age of the Earth. Ramm's 1954 book "The Christian View of Science and Scripture," which argued for the validity of "framework" or "day-age" interpretations of Genesis 1, was highly influential over the American Scientific Affiliation, a conservative Evangelical organization devoted to finding harmony between their theology and the natural sciences.[38]

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[37] *See* Marsden, *Understanding Fundamentalism and Evangelicalism*. For a fascinating original source on dispensational theology, see Clarence Larkin, *Dispensational Truth, or God's Plan and Purpose in the Ages* (1920).
[38] Bernard Ramm, *The Christian View of Science and Scripture* (Grand Rapids: Eerdman's 1954). For a discussion of the American Scientific Affiliation and the disputes between progressive creationists and young earth creationists, see Numbers, *The Creationists*, 159-181.

Not all who wished to identify as culturally engaged Evangelicals, however, were willing to accept even Lyellian geology. In 1961, largely in response to Ramm, Henry Morris and John Whitcomb published *The Genesis Flood*, a powerful apology for "scientific creationism."[39] Morris and Whitcomb believed that a "literal" reading of the Bible, including the conclusion drawn from Biblical chronology that the Earth is less than 10,000 years old, could be supported through the proper application of scientific methods. They promoted a "catastrophic" rather than "uniformitarian" view of geology, under which most of the features mainstream geologists attribute to long, gradual processes could instead be explained with reference to a world-wide deluge at the time of Noah. *The Genesis Flood* was an immediate sensation and remains a basic text for young earth creationists ("YEC") today. Sociologically, it divided, and continues to divide, American Evangelicals among those who insist upon YECism and some version of "flood geology" and those who do not. More importantly for Christian theology broadly considered, the YEC model promoted in *The Genesis Flood* supplied, and still supplies, much of the fuel for culture war debates over "science and religion" around the world. From the 1960s through the present, American courts, including the Supreme Court, have heard challenges to public school science curricula mounted by YEC or Intelligent Design ("ID") advocates, and presently the multi-million dollar "Creation Museum" in Kentucky does brisk business and underpins a vast YEC educational network popularized by the "Answers in Genesis" organization.[40]

A somewhat more sophisticated version of this sort of creationism is the "Intelligent Design" movement, which attempts to disprove the theory of evolution through scientific evidences for "design" in creation through statistical gaps and probabilities and information theory.[41] Although many ID proponents do not identify with scientific creationism's insistence on reading the book of Genesis literally, they likewise presume that the Biblical revelation must somehow conform to

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[39] John C. Whitcomb and Henry M. Morris*, The Genesis Flood: The Biblical Record and its Scientific Implications* (Phillipsburg: P&R Publishing 1961).

[40] For significant case law, see Epperson v. Arkansas, 393 U.S. 97 (1968); Edwards v. Aguillard, 428 U.S. 578 (1987); Kitzmiller v. Dover Area School District, 400 F. Supp.2d 707 (2005). For the Creation Museum, see the Creation Museum website, available at http://creationmuseum.org/. For Answers in Genesis, see the Answers in Genesis website, https://answersingenesis.org/.

[41] See *Ibid.*; William A. Dembski, *Intelligent Design: The Bridge Between Science & Theology* (Downers Grove: IVP Academic 2002); "Uncommon Descent" website, available at http://www.uncommondescent.com.

and be confirmed by "science."[42] And because of this presumption, ID advocates generally argue that the findings of evolutionary biology fundamentally conflict with Christian theology.[43]

The extraordinary cultural influence of "new atheists" such as Richard Dawkins represents another extreme node of this warfare thesis.[44] Darwinism is here elevated to an all-encompassing worldview. For example, David Sloan Wilson, Distinguished Professor of Biological Sciences and Anthropology at Binghamton University, argues that Darwinian evolution fully explains everything, including every aspect of human nature.[45] Anyone who thinks otherwise, even "intellectuals" who are not religious, is a kind of fundamentalist, an "'academic creationist.'"[46] Religion, for these ultra-Darwinists, is like a pernicious virus that must be eradicated by science.[47]

2. Independence and NOMA

In contrast – or apparent contrast – to these conflict models, many opt for an "independence" model in which "science" and "religion" occupy entirely separate, non-overlapping domains.[48] The late biologist Stephen Jay Gould introduced the concept of "nonoverlapping magisteria" (NOMA) that purported to separate scientific claims from moral truth.[49] This perspective is

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[42] *See* Conor Cunningham, *Darwin's Pious Idea*, 278-280.

[43] Hence the double meaning in the title of one of William Dembski's recent books: *The End of Christianity: Finding a Good God in an Evil World* (Grand Rapids: Baker Academic 2009), in which Dembski argues that Christianity fails without a scientifically demonstrable chronology for the Fall from Eden. Dembski's attempt to provide such a chronology is certainly far more sophisticated than that of creation science. He accepts the geological age of the Earth and even the broad outlines of biological evolution (albeit punctuated in some way by infusions of Divine "design" apart from the ordinary processes of nature), but he argues that the Fall had retroactive effects because time can run forwards and backwards. Absent this sort of mathematical construction of the retroactive effects of time, however, it seems that Dembski would agree with the ultra-Darwinists that Christianity has been *scientifically* falsified.

[44] See, e.g., Richard Dawkins, *The God Delusion* (Boston: Mariner Books 2008). See also Cunningham, *Darwin's Pious Idea*, 272-275 ("Our Auntie Jean and Richard Dawkins").

[45] David Sloan Wilson, *Evolution for Everyone: How Darwin's Theory Can Change the Way We Think About Ourselves* (New York: Delacorte Press 2007).

[46] *Ibid.* at 3 (quoting The Nation, "The New Creationism: Biology Under Attack," 1997).

[47] Dawkins, *The God Delusion*.

[48] McGrath, 46-47.

[49] Stephen Jay Gould, "Nonoverlapping Magesteria," Natural History 106:16-22 (March 1997). See the discussion of NOMA in Cunningham, Darwin's Pious Idea, 270-272.

reflected, to a certain extent, in the U.S. National Academy of Sciences statement on the compatibility of science and religion:

> Science and religion are based on different aspects of human experience. In science, explanations must be based on evidence drawn from examining the natural world. Scientifically based observations or experiments that conflict with an explanation eventually must lead to modification or even abandonment of that explanation. Religious faith, in contrast, does not depend only on empirical evidence, is not necessarily modified in the face of conflicting evidence, and typically involves supernatural forces or entities. Because they are not a part of nature, supernatural entities cannot be investigated by science. In this sense, science and religion are separate and address aspects of human understanding in different ways. Attempts to pit science and religion against each other create controversy where none needs to exist.[50]

"Independence" models, however, seem inevitably to devolve into "conflict," in which "faith and evidence" and "natural and supernatural" are put at odds, as the NAS statement above reflects.

3. Strong Integration: Process Theology

In contrast to these conflict models, the mainstream science and religion literature emphasizes "dialogue" between and/or "integration" of scientific and religious perspectives.[51] Strong Integrationist models tend towards a willingness to reconfigure religious categories in ways that seem required by the natural sciences. Process theology, which tends to identify Godself as part of the developing and emerging cosmos, is a prime example of this sort of move.[52] For process theology, reality is fundamentally a dynamic process.[53] Rather than envisioning God as the transcendent source of the universe, for process theology, "God is not the exception to the dynamic nature of the universe, but rather the dynamic God-world relationship is the primary

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[50] National Academy of Sciences website, "Evolution Resources," "Compatibility of Science and Religion," available at http://www.nationalacademies.org/evolution/Compatibility.html.

[51] *See* McGrath, 47-49.

[52] *See* John Cobb and David Ray Griffin, *Process Theology: An Introductory Exposition* (Louisville: Westminster John Knox 1996).

[53] *See* Bruce G. Epperly, *Process Theology: A Guide for the Perplexed* (London: T&T Clark 2011), 20.

example of creaturely experience in its many expressions."[54] In this view, "[i]n our dynamic and ever-changing world, God is the most dynamic and ever-changing reality; God's becoming embraces the eternal, temporal, and everlasting in an ever-creative, self-surpassing dialogue with the universe."[55]

Because God is a dynamic and evolving reality, process theology eschews the classical notion of God's perfections.[56] Process theologians view the claim that God is omniscient and omnipotent as remnants of Greek thought best left behind.[57] They argue that a God who is omniscient and omnipotent must be responsible for evil and that both scripture and Christian experience disclose God in relational terms.[58] They further argue that God's classical perfections would destroy the possibility of human creativity and creaturely freedom.[59] Many process theologians argue, in particular, that evolutionary theory elides the classical understanding of God's perfections:

> While some Christians believe that God has directed the course of the universe from the very beginning, determining every detail without creaturely input, and is guiding the universe toward a pre-determined goal, process theology imagines an open-ended universe, in which God's vision is also open-ended and subject to change in relationship to creaturely decision-making and accidental occurrences.[60]

A thread that ties these claims together within process theology is the integration of theology and science.[61] Indeed, "[p]rocess theology is firmly rooted in an evolutionary understanding of the universe."[62] Thus process theology also eschews the concept of creation *ex nihilo*, arguing that, instead, "[e]ven before the big bang, God was interacting with the primordial elements of this universe or another universe from which this universe may have emerged, as some

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[54] *Ibid.* at 21.
[55] *Ibid.*
[56] *Ibid.* at 33-44.
[57] *Ibid.* at 34.
[58] *Ibid.* at 38-44.
[59] *Ibid.* at 83-91.
[60] *Ibid.*, 97.
[61] *Ibid.* at 92-102.
[62] *Ibid.* at 97.

cosmologists suggest. God has never been without a world, which provides opportunities for, and limitations of, the embodiment of God's creative vision."[63]

This vision of emerging reality also affects process theology's anthropology. Human beings are not metaphysically special but rather are "fully embedded in the evolutionary process."[64] Human beings are not impacted by any sort of "original" sin but rather have always partaken in a bilateral relationship of call-and-response with God.[65] In fact, "[t]o the surprise of many more traditional theologians, process theologians recognize that deviation from God's moment by moment vision is not always bad: it may inject new possibilities into the creative process."[66] Moreover, process theology tends to identify the human "soul" not with particular individuals, but rather with human society extended over time.[67] The "soul" is "in every sense a part of nature, subject to the same conditions as all other natural entities."[68] Further, "the body, and specifically the brain, is the immediate environment of the soul."[69] Because of the embeddedness of the human person and specifically the human brain in the flux of evolutionary history, the human soul is intimately connected with the entire universe:

> The soul is, then, in immediate contact with some occasions of experience in the brain and with the mental poles of experiences of other souls…. Indirectly, but intimately, the soul also prehends the whole society that constitutes its body and still more indirectly, but still very importantly, the wider environment that is the whole world. At the same time, the soul contributes itself as an object for feeling by other souls, the contiguous occasions in the brain, and indirectly by the whole future world.[70]

4. Presuppositionalism and Reformed Epistemology

Process theology entails a methodology that seems to privilege modern science as a broad epistemology. Other methods that involve some degree of conflict and some degree of

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[63] *Ibid.* 98.
[64] *Ibid.* at 99.
[65] *Ibid.* at 100-101.
[66] *Ibid.* at 101.
[67] *See* John B. Cobb, Jr., *A Christian Natural Theology Based on the Thought of Alfred North Whitehead* (Louisville: Westminster John Knox 2d ed. 2007).
[68] *Ibid.,* 19.
[69] *Ibid.,* 21. *See also Ibid.* at 43-49 for Cobb's refinement of Whitehead's views on this point.
[70] *Ibid.,* 23.

consilience between theology and science challenge the epistemological grounds for what is sometimes called "scientism." As we have seen, this kind of move is employed in a crude form by the young earth creationists. But it is also employed in a more sophisticated way by some theologians and philosophers in the Reformed tradition.

For example, Cornelius Van Til's "presuppositionalism" reflected a particular sort of adjustment between "faith" and "reason" within neo-Calvinist theology.[71] Van Til argued that all human knowledge claims are based on faith-based presuppositions. Because human beings are fundamentally sinful, their presuppositions are often wrong. A key function of scripture, in Van Til's system, was to provide a means of correcting sinful human presuppositions with Divine revelation. Scripture supplied propositional content that must inform proper human reasoning. Among the basic propositional truths of scripture was that the universe is God's creation, not merely a chance product of evolution.

Van Til's epistemology can lead to young earth creationism, but that is not always the case. Indeed, one of the leading Reformed presuppositionalist thinkers today, who is a stalwart faculty member at Westminster Seminary in Philadelphia, is Vern Poythress, who argues in his book "Redeeming Science" that some version of evolutionary biology could be consistent with scripture, though he is also partial to certain kinds of intelligent design theories.[72] One of the subtleties here is that, while presuppositionalists such as Poythress insist on the propositional inerrancy of scripture, their epistemology precludes any claim that the propositional truth of scripture is self-evident to unaided reason. Thus, they refer to the "self-attestation" of scripture, which is related to the "illumination" of scripture by the Holy Spirit.[73]

These notions of self-attestation and illumination secure the inerrancy of scripture prior to any effort at interpretation and allow interpreters to find alternative inerrant meanings when the literal sense of scripture seems to contradict other well-established facts, such as the facts of the

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[71] *See* Cornelius Van Til, *The Defense of the Faith* (Phillipsburg: P&R 4th ed. 2008).
[72] Vern S. Poythress, *Redeeming Science: a God-Centered Approach* (Wheaton: Crossway 2006).
[73] *See, e.g.,* Roger R. Nicole and J. Ramsey Michaels, eds., *Inerrancy and Common Sense* (Grand Rapids: Baker Books 1980); Moises Silva, "Old Princeton, Westminster, and Inerrancy," in Harvey M. Conn, ed., *Inerrancy and Hermeneutic: A Tradition, a Challenge, a Debate* (Grand Rapids: Baker Books 1988), 67 (stating that "I happen to believe that the essential historicity of Genesis 1-3 is a fundamental article of Christian orthodoxy").

modern natural sciences. Because they are propositionalists, however, these Reformed thinkers do not advocate a return to the traditional four-fold sense of scripture, by which the literal sense might be superseded by an allegorical or tropological sense.[74] An apparent conflict between scripture and science, for them, requires a more careful examination of both scripture and science until a set of non-contradictory propositions about the nature of the universe that accounts both for the propositions stated in the "book of scripture" and propositions adduced by observation of the "book of nature" can be ascertained.[75] At the same time, within their theological system, some propositions that seem evident in scripture are of such importance that for more "conservative" interpreters they are treated as essentially inviolate – notably the special creation of a literal "Adam" and "Eve."[76] Still, in recent years, some conservative Reformed presuppositional theologians attempting to reconcile faith and science have suggested that "Adam" and "Eve" may have been the first humans specially created in a *spiritual* sense and may even have co-existed with other humans not biologically descended from them.[77]

A more sophisticated and formidable kind of presuppositionalism informs the "Reformed Epistemology" of Alvin Plantinga, Nicholas Wolterstorff, and other notable American philosophical theologians. Plantinga contends that "knowledge" is a function of properly "warranted" belief, and that among the properly basic warrants are assumptions about the regularity and continuity of the universe along with the assumption that God exists.[78] In in his book *Warranted Christian Belief*, Plantinga emphasizes the internal witness of the Holy Spirit, which provides a form of epistemic certainty about the existence of God.[79] Plantinga argues that

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[74] *See* Henri de Lubac, *Medieval Exegesis: The Four Senses of Scripture*, Vol. 1 (Grand Rapids: Eerdmans 1998).

[75] *See Ibid.*

[76] *See, e.g.,* John Jefferson Davis, "Genesis, Inerrancy, and the Antiquity of Man," in *Inerrancy and Common Sense*, 137-159.

[77] *See* C. John Collins, *Did Adam and Eve Really Exist? Who They Were and Why You Should Care* (Wheaton: Crossway 2011).

[78] See Alvin Plantinga, *Warrant: The Current Debate* (Oxford: OUP 1993); *Warrant and Proper Function* (Oxford Univ. Press 1993); *Warranted Christian Belief* (Oxford: OUP 2000); *Where the Conflict Really Lies: Science Religion, and Naturalism* (Oxford: OUP 2011).

[79] *Warranted Christian Belief*, Chapters 8 and 9.

it is "[b]y faith – the whole process, involving the internal instigation of the Holy Spirit – something becomes *evident* (i.e., acquires warrant, has what it takes to be knowledge.").[80]

But Plantinga does not merely argue for a form of fideism. Rather, he suggests that the warrants of faith are shown to be sensible and reasonable in light of the entire context of the beliefs those warrants produce, and, indeed, that those beliefs make more sense than the possibility of atheism. This sounds like a form of coherentism, but Plantinga explicity rejects "pure and unalloyed" coherentism as well as Bayesian coherentism.[81] Instead, Plantinga is partial to what he calls "BonJourian Coherentism," after the work of Laurence BonJour.[82] Plantinga suggests that BonJour's work presents a "chastened coherentism" that does not require either the foundationalist premises of "pure and unalloyed" coherentism or the mathematical foundations (with their own epistemic limits) of Bayesian coherentism.[83]

From this basis, Plantinga suggests that a better starting point is the question of "proper function."[84]   The notion of "proper function," Plantinga says, "is inextricably involved with another: that of the *design plan* of the organ or organism in question – the way the thing in question is supposed to work, the way it works when it works properly, when it is subject to no dysfunction."[85] There are then, according to Plantinga, four conditions for a belief having proper warrant:

> a belief *B* has warrant for you if and only if (1) the cognitive faculties involved in the production of *B* are functioning properly (and this is to include the relevant defeater systems as well as those systems, if any, that provide *propositional* inputs to the system in question); (2) your cognitive environment is sufficiently similar to the one for which your cognitive faculties are designed; (3) the triple of the design plan governing the production of the belief in question involves, as purpose or function, the production of true beliefs (and the same goes for elements of the design plan governing the production of input beliefs into the system in question);

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[80] *Ibid.*, 265.

[81] *Warrant: The Current Debate*, Chapters 4, 6-7; for the "pure and unalloyed" comment, see p. 87. For a general discussion of coherentist models, see *Stanford Encyclopedia of Philosophy*, "Coherentist Theories of Epistemic Justification," available at http://plato.stanford.edu/entries/justep-coherence/.

[82] *Ibid.*, Chapter 5.

[83] *Ibid.*, Chapter 4.

[84] *Ibid.*, 213.

[85] *Ibid.*

and (4) the design plan is a good one: that is, there is a high statistical or objective probability that a belief produced in accordance with the relevant segment of the design plan in that sort of environment is true.[86]

In *Warranted Christian Belief*, and in his more popularly accessible work on faith and science, Plantinga attempts to show how these conditions are met concerning what he considers the core beliefs of Christian faith, and addresses what he considers possible "defeaters" to his account of the warrants for Christian belief.[87] In Plantinga's lexicon, "[a] defeater for a belief A is another belief *B* such that once you come to accept *B,* you can no longer continue to accept *A* without falling into irrationality."[88] In particular, Plantinga takes on arguments by prominent atheists such as Richard Dawkins and Daniel Dennett, who argue that evolution and theism are incompatible because there is a lack of evidence for design in the universe.[89] Plantinga suggests that "classical theists" generally believe statements about Divine action and providence such as those found in the Heidleberg Catechism:

> Providence is the almighty and ever present power of God by which he upholds, as with his hand, heaven and earth and all creatures, and so rules them leave and blade, rain and drought, fruitful years and lean years, food and drink, health and sickness, prosperity and poverty – all things, in fact, come to us not by chance but from his fatherly hand.[90]

This picture of Divine action and providence, Plantinga suggests, is disrupted by Newtonian and Laplacian science, but is no longer problematic in light of quantum mechanics.[91] Given his presuppositional approach and his theological views about Divine action, Plantinga also expresses support for fine tuning arguments and, at least to some extent, for Intelligent Design theory.[92] He suggests that the evidence of fine tuning in the universe and the discourse of Intelligent Design are consistent with the "design plan" of human noetic capabilities, while the

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[86] *Warrant and Proper Function*, 194.
[87] *See Warranted Christian Belief*, Parts III and IV; *Where the Conflict Really Lies; Science and Religion: Are they Compatible?.*
[88] *Warranted Christian Belief*, Preface xiii.
[89] See *Where the Conflict Really Lies*, Chapters 1 and 2; Daniel C. Dennett and Alvin Plantinga, *Science and Religion: Are They Compatible?* (Oxford: OUP 2011).
[90] Heidelberg Catechism, Question 27; Where the Conflict Really Lies, 65.
[91] *Where the Conflict Really Lies*, Chapters 3 and 4.
[92] *Where the Conflict Really Lies*, Chapters 7 and 8

atheistic belief that all of this apparent design arose through chance is highly implausible.[93]   The best Dawkins and Dennett can do, Plantinga suggests, is show that the development of life by chance is not entirely impossible, while theism can do far better by showing a more complete and plausible picture of how theistic beliefs are warranted.   But, as Plantinga acknowledges, his arguments do not represent an effort to prove the truth of Christian belief on Christian grounds. He agrees that "[e]verything [in his arguments] really depends on the *truth* of Christian belief," but hopes that he can at least refute "the common suggestion that Christian belief, whether true or not, is intellectually unacceptable."[94]

5. Dialogue and Critical Realism

Many proponents of "dialogue" models between science and religion identify themselves as "critical realists," and this may be the dominant paradigm in the contemporary "religion and science" literature, at least among "conservative" scholars.[95]   A critical realist approach recognizes that all human knowing is mediated through human thought and language forms, including both scientific and theological knowing – and thus it is "critical."[96] Nevertheless, critical realists assert that there is a reality extrinsic to human thought and language that is capable of sustained investigation, and that human beings are capable of making progress towards fuller understanding of that extrinsic reality.[97]   The theological realities that theologians attempt to investigate and the natural realities that scientists attempt to investigate must each be approached with tools appropriate to their respective domains.[98]   As Alister McGrath argues, "[b]oth the scientific and religious communities can be thought of as attempting to wrestle with

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[93] *Ibid.*

[94] *Warranted Christian Belief*, Preface, xiii.

[95] *See, e.g.,* McGrath, *Science & Religion*, 78-79, 82-83. McGrath identifies Thomas Torrance, Ian Barbour, Arthur Peacocke, and John Polkinghorne, as well as himself, as critical realists. *Ibid.*, 82-83. Portions of this section appear in my paper "Deconstructing Jefferson's Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy," 49 Jurimetrics 203 (2009).

[96] *See* McGrath, *Science & Religion*, 78-89, 82-83.

[97] *Ibid.*

[98] *See* 2 Alister McGrath, *A Scientific Theology: Reality* at 226.

the ambiguities of experience, and offering what are accepted as the 'best possible explanations' for what is observed."[99]

McGrath develops his model of critical realism in science and theology in significant part from the philosophical contributions of Roy Bhaskar and Michael Polanyi.[100] For critical realists in the tradition of Bhaskar, society is *both* a preexisting given *and* a product of human activity.[101] Individuals do not create society, but they do continually reproduce and transform society.[102] Society is neither a reified structure that exists apart from human activity nor an entirely voluntary creation of individuals.[103] Bhaskar likens this "transformational model of social activity" to a sculptor who creates something out of the materials and tools available to her.[104] The result is that society emerges from, but is not reducible to, the choices of individuals.[105] Society is "a complex totality subject to change both in its components and their interrelations."[106]

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[99] Alister McGrath, *The Foundations of Dialogue in Science & Religion* (London: Wiley Blackwell 1988).

[100] 2 Alister McGrath, *A Scientific Theology: Reality* at 226.

[101] *See generally* Roy Bhaskar, *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences* (London: Routledge 3d ed. 1998) (1979).

[102] *Ibid.* at 36.

[103] *Ibid.* at 39 (stating that "society must be regarded as an ensemble of structures, practices and conventions which individuals reproduce or transform, but which would not exist unless they did so.").

[104] *Ibid.* at 37.

[105] *Ibid.* at 37–44.

[106] *Ibid.* at 41. In many respects, critical realism's transformational model of society sounds like the New Chicago School's model of law and norms. The difference is that for cyberlaw scholars in the New Chicago School tradition, the architectural "code" that makes up online spaces is entirely socially constructed—whether code-infrastructure is "open" or "closed" is entirely contingent on the individuals who participate in the digital commons. *See* Part II, *supra.* In contrast, in the critical realist view, "culture," "code" and "infrastructure" are not entirely the voluntary creations of autonomous individuals. Bhaskar's treatment of language and grammar is intriguing here. The rules of grammar, Bhaskar observes, are not infinitely malleable—they impose real, given limits on our speech. Bhaskar, The Possibility of Naturalism, 36. The rules of grammar, however, do not determine what we say; meaning is not reducible to the rules of grammar. *Ibid.*

Critical realists recognize that knowledge has both social and physical dimensions.[107] There is a reality external to human perception, language, and cognition.[108] Human perception, language, and cognition, however, limit our direct epistemic access to reality.[109] Human perception of reality is a "transitive" dimension because it is subject to change based on human language, history, and culture.[110] Reality itself, however, is "intransitive."[111] According to Roy Bhaskar, reality is stratified and can be conceived as three layered: empirical (observable by human), actual (existing in time and space), and real ("transfactual and enduring more than our perception of it").[112]

Bhaskar thus emphasized the social aspects of human knowledge without reducing all of reality to a human construction. An important aspect of Bhaskar's social theory of knowledge is his rejection of "methodological individualism"—the notion that societies are reducible to individuals.[113] A "social atomism" in which the analysis of societies can be reduced to the preferences of individuals will never adequately explain social action.[114] But neither is society merely the result of collective pressures on individuals, or a simple dialectic between these two poles.[115] Rather, society has a dual character: social groups provide the ground through which

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[107] Roy Bhaskar states that

> Any adequate philosophy of science must find a way of grappling with this central paradox of science: that men in their social activity produce knowledge which is a social product much like any other, which is no more independent of its production and the men who produce it than motor cars, armchairs or books, which has its own craftsmen, technicians, publicists, standards and skills and which is no less subject to change than any other commodity. This is one side of 'knowledge'. The other is that knowledge is 'of' things which are not produced by men at all: the specific gravity of mercury, the process of electrolysis, the mechanism of light propagation. None of these 'objects of knowledge' depend on human activity. If men ceased to exist sound would continue to travel and heavy bodies fall to the earth in exactly the same way, though ex hypothesi there would be no-one to know it.

Bhaskar, *The Possibility of Naturalism*, 21.
[108] *See Critical Realism: Essential Readings* ix–xiii (Margaret Archer, et al. eds., 1998) (noting that "critical realism claims to be able to combine and reconcile *ontological realism*, *epistemological relativism*, and *judgmental rationality*.") (emphasis in original).
[109] Bhaskar, The Possibility of Naturalism, 21.
[110] *Ibid.*
[111] *Ibid.*
[112] Ibid. at 21–62.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*

individuals reproduce and sometimes transform society.[116] A level of reality can emerge from a more basic level without being reducible to the more basic level.[117]

Like Bhaskar, Michael Polanyi sought to mitigate the destructive tendencies of positivism without destroying the normativity of science. One of Polanyi's primary concerns was the danger of authoritarian control over science extant in the then communist East. [118] Polanyi was keen to demonstrate that science is an inherently social enterprise just like any other human project, and that as a social enterprise science must be subject to democratic control.[119] Also like Bhaskar, Polanyi recognized that reality is stratified.[120] Each level of reality operates under the 'marginal control' of higher levels, but the higher levels are not reducible to the lower.[121]

Polanyi recognized that positivism fails because it relies on some unverifiable foundations. As Polanyi noted, "It is indeed logically impossible for the human mind to divest itself of all uncritically acquired foundations. For our minds cannot unfold at all except by embracing a definite idiom of beliefs, which will determine the scope of our entire subsequent fiducial development."[122] The notion of positivism itself, then, depends on an idiomatic structure that is neither verifiable nor self-evident.

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[116] *Ibid.*

[117] *Ibid.* at 113 (stating that "the operations of the higher level cannot be accounted for solely by the laws governing the lower-order level in which we might say the higher-order level is 'rooted' and from which we might say it was 'emergent.'").

[118] Polanyi explains this concern at the beginning of one of his key works, *The Tacit Dimension*. Describing the denial of independent science under communism, Polanyi says "I was struck by the fact that this denial of the very existence of independent scientific thought came from a socialist theory which derived its tremendous persuasive power from its claim to scientific certainty. The scientific outlook appeared to have produced a mechanical conception of man and history in which there was no place for science itself." *Ibid.* at 3. Polanyi's views, of course, were not entirely unique; they fit nicely into a constellation of contemporary philosophers of science who deconstructed the positivism that emerged following the collapse of Baconian science, including figures such as Thomas Kuhn, Imre Lakatos, and to some extent Paul Feyerabend. Michael Polanyi, *Scientific Thought and Social Reality* (Madison: International University Press 1974), 76; s*ee, e.g.,* Imre Lakatos, *The Methodology of Scientific Research Programmes* (Cambridge: CUP 1978); Paul Feyerabend, *Against Method* (New York: Verso 3d ed. 1993) (1975).

[119] Polanyi, *Scientific Thought and Social Reality*, 3.

[120] *Ibid.*

[121] *Ibid.* For a discussion of how Polanyi's thought might relate to Bhaskar's on this point, *see* 2 Alister McGrath, *A Scientific Theology: Reality*, 226 (2002). Interestingly, the stratification of reality can also be observed in Thomas Aquinas' approach to law. *See* William S. Brewbaker II, "Thomas Aquinas and the Metaphysics of Law," 58 Ala. L. Rev. 575, 600–02 (2007). It is noted that "Thomas assumes that a single scientific method is insufficient to enable investigation of all types of reality, and this assumption affects his account of law." *Ibid.* at 600.

[122] Polanyi, *Scientific Thought and Social Reality*, 76.

Polanyi also emphasized the communal nature of scientific practice and the "tacit" knowledge involved in such communal information transfers. As he noted, "[t]he transmission of beliefs in society is mostly not by precept, but by example . . . [t]he whole practice of research and verification is transmitted by example and its standards are upheld by a continuous interplay with criticism within the scientific community."[123] Thus, scientific knowledge is a set of socially constructed analogical models that are developed through practices acquired and implemented in unique social networks.

Finally, Polanyi realized that the social networks through which scientific practices are transferred, like all social networks, incorporate elements of social control. One of the principal means of control over scientific information networks is peer review. Polanyi observed that scientific journal referees "are the chief Influentials, the unofficial governors of the scientific community. By their advice they can either delay or accelerate the growth of a new line of research."[124] Nevertheless, within this social matrix, science can make genuine progress in understanding.

Similarly, theology, critical realists argue, seeks to interpret experienced reality within the context of a traditioned community.[125] In this respect, many critical realists are sympathetic to Alasdair MacIntyre's account of the role of community and tradition in the shaping of philosophical inquiry.[126] For Christians, of course, the central experienced reality that requires theological interpretation is the incarnation, death, and resurrection of Christ, and the

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[123] *Ibid.* at 61.
[124] *Ibid.* at 20. Polanyi stated that:

> The referees advising scientific journals may also encourage those lines of research which they consider to be particularly promising, while discouraging other lines of which they have a low opinion. The dominant powers in this respect are, however, exercised by referees advising on scientific appointments, on the allocation of special subsidies, and on the award of distinctions. Advice on these points, which often involve major issues of the policy of science, is usually asked from and tendered by a small number of senior scientists who are universally recognized as being the most eminent in a particular branch. They are the chief Influentials, the unofficial governors of the scientific community. By their advice they can either delay or accelerate the growth of a new line of research.

Ibid. Cf. Lee Smolin, *The Trouble with Physics: The Rise of String Theory, the Fall of a Science, and What Happens Next* (Houghton Mifflin Company 2006).
[125] McGrath, *The Foundations of Science & Religion*, 160-64.
[126] *See Ibid.*, citing Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Duckworth 1988).

interpretive community is the Church.[127] Christian theology and doctrine develop as the Christian community reflects on this central experience. Just as in the natural sciences, massive paradigm shifts in the understanding of theology and doctrine should be rare, but some degree of revision must always remain a possibility because the reality that lies behind the experience is only ever partially understood.

This emphasis on the event of revelation in Christ among many Christian critical realists is not surprising, as many of them (including, notably, Alister McGrath), are connected to Karl Barth through the work of Thomas Torrance.[128] Barth, consistent with his understanding of revelation and philosophy, resisted any systematic definition of God:

> The equation of God's Word and God's Son makes it radically impossible to say anything doctrinaire in understanding the Word of God. In this equation, and in it alone, a real and effective barrier is set up against what is made of proclamation according to the Roman Catholic view and of Holy Scripture according to the later form of older Protestantism, namely, a fixed sum of revealed propositions which can be systematized like the sections of a corpus of law. The only system in Holy Scripture and proclamation is revelation, i.e., Jesus Christ.[129]

But Barth – who, after all, over the course of thirty-five years wrote a Church Dogmatics comprised of about six million words of dense text – did not mean we can say nothing truthful about God. After resisting what he understood as the Catholic and Scholastic Reformation's too-neat methods of systematization, Barth emphasized the importance of words and speech:

> Now the converse is also true, of course, namely that God's Son is God's Word. Thus God does reveal Himself in statements, through the medium of speech, and indeed of human speech. His word is always this or that word spoken by the prophets and apostles and proclaimed in the Church. The personal character of God's Word is not, then, to be played off against its verbal or spiritual character. It is not at all true that this second aspect under which we must

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[127] See T.F. Torrance, *Reality & Evangelical Theology: The Realism of Christian Revelation* (Downers Grove: InterVarsity Press 1999), 84-120.

[128] See McGrath, *The Foundations of Science & Religion*, 34 (citing Thomas F. Torrance, Theological Science (Oxford: OUP 1969)).

[129] CD I.1.§5.2.

> understand it implies its irrationality and thus cancels out the first aspect under which we must understand it.[130]

Barth's concern throughout his discussion of the Word in Volume I of the Church Dogmatics was to preserve the freedom and integrity of theology against Enlightenment rationalism.[131] Barth was particularly concerned with the way rationalism gave rise to nineteenth century liberal demythologizing Protestant thought. Barth also resisted how rationalism underwrote both Protestant fundamentalism and the Scholastic Thomism of much Catholic nineteenth century Catholic thought. Torrance worked from these basic Barthian premises to modify Barth's famous "*nein*" to natural theology with a qualified "yes."

The critical realist approach to theology and science results in a paradigm in which the disciplines of theology and natural science remain distinct but can contribute to each other at higher levels. McGrath summarizes his version of this program as follows:

1. The natural sciences and the religions are quite distinct in terms of their methodologies and subject matters. It is quite improper to attempt to limit them, for example by suggesting that the sciences have to do with the physical world and the religions with a distinct spiritual world. The distinction between 'science' and 'religion' concerns more than subject-matter.

2. At points, despite their clear differences, those working in the fields of science and religion find themselves facing similar issues, especially in relation to issues of representation and conceptualization. At point after point, those interested in science and religion find themselves facing very similar questions, and even adopting similar approaches in the answers which they offer.

3. At points of major importance, the methods and theories of the natural sciences are genuinely illuminating to those concerned with religious matters. Equally, there are points where religious

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[130] *Ibid.*

[131] For discussion of the influences and sources of Barth's theology, *see, e.g.,* John Webster, "Introducing Barth," in *The Cambridge Companion to Karl Barth* (Cambridge: CUP 2000); Bruce L. McCormack, *Orthodox and Modern: Studies in the Theology of Karl Barth* (Grand Rapids: Baker Academic 2008); George Hunsinger, *Evangelical, Catholic and Reformed: Doctrinal Essays on Barth and Related Themes* (Grand Rapids: Eerdmans 2015); George Hunsinger, *Reading Barth With Charity: a Hermeutical Approach* (Grand Rapids: Baker Academic 2015).

beliefs and approaches cast considerable light on issues of scientific method. The investigation of these convergences is mutually enlightening and significant.[132]

6. Fides et Ratio?

It is useful to compare McGrath's critical realism with Pope John Paul II's views on faith and science. The comparison demonstrates some residue of the old Protestant-Catholic debates about the effectiveness of human reason after the Fall. But the comparison also highlights ways in which both branches of the Western Church converge on the centrality of the doctrine of creation as the ground of the possibility of "science."

The Roman Catholic approach to faith and science, exemplified in the Pontifical Academy of the Sciences, is sometimes said to represent a "dialogue" approach.[133] There is of course not only one "Roman Catholic approach" to the relation between theology and science, and many Catholics working in this field would identify themselves as critical realists or assume the posture of critical realism without identifying it.[134] Indeed, Pope John Paul II famously stated that "[s]cience can purify religion from error and superstition; religion can purify science from idolatry and false absolutes. Each can draw the other into a wider world, a world in which both can flourish."[135]

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[132] McGrath, *The Foundations of Science & Religion*, 34.

[133] *See* McGrath, 47-48; Pontifical Academy of the Sciences website, available at http://www.casinapioiv.va/content/accademia/en.html.

[134] *See, e.g.*, John F. Haught, *Making Sense of Evolution: Darwin, God, and the Drama of Life* (Louisville: Westminster John Knox 2010); Michael Heller, *Creative Tension: Essays on Science and Religion* (West Conshohocken: Templeton Foundation Press 2003). Haught argues as follows:

> Christian theology, I firmly believe, cannot responsibly take refuge in pre-Darwinian understandings of these concepts [of design, descent, and diversity]. Instead, it must look for theological reflection broad enough to assimilate all that is new in scientific research without in any way abandoning the substance of Christian teaching. This theological task requires a deep respect for traditional creeds and biblical texts, but it also assumes that in the light of new experience and scientific research, constant reinterpretation of fundamental beliefs is essential to keep any religion alive and honest. This is especially the case with Christianity after Darwin.

Haught, *Making Sense of Evolution*, xvii.

[135] Letter of His Holiness John Paul II to Rev. George V. Coyne, S.J. Director of the Vatican Observatory, June 1, 1988, available at http://www.vatican.va/holy_father/john_paul_ii/letters/1988/documents/hf_jp-ii_let_19880601_padre-coyne_en.html

This oft-quoted statement of John Paul II was part of a longer letter to Jerry Coyne, Director of the Vatican Observatory, in preparation for a study week celebrating the three hundredth anniversary of Newton's *Philosophiae Naturalis Principia Mathematica.*[136] The Pope stressed in that letter that the model he envisioned was one of dialogue rather than integration:

> By encouraging openness between the Church and the scientific communities, we are not envisioning a disciplinary unity between theology and science like that which exists within a given scientific field or within theology proper. As dialogue and common searching continue, there will be grow towards mutual understanding and a gradual uncovering of common concerns which will provide the basis for further research and discussion. Exactly what form that will take must be left to the future. What is important, as we have already stressed, is that the dialogue should continue and grow in depth and scope. In the process we must overcome every regressive tendency to a unilateral reductionism, to fear, and to self-imposed isolation. What is critically important is that each discipline should continue to enrich, nourish and challenge the other to be more fully what it can be and to contribute to our vision of who we are and who we are becoming.[137]

Theologians, the Pope noted, can utilize the best science of their times to help them understand and articulate theological truths, but science cannot simply dictate terms to theology:

> Now this is a point of delicate importance, and it has to be carefully qualified. Theology is not to incorporate indifferently each new philosophical or scientific theory. As these findings become part of the intellectual culture of the time, however, theologians must understand them and test their value in bringing out from Christian belief some of the possibilities which have not yet been realized. The hylomorphism of Aristotelian natural philosophy, for example, was adopted by the medieval theologians to help them explore the nature of the sacraments and the hypostatic union. This did not mean that the Church adjudicated the truth or falsity of the Aristotelian insight, since that is not her concern. It did mean that this was one of the rich insights offered by Greek culture, that it needed to be understood and taken seriously and tested for its

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[136] *Ibid.*

[137] Letter of His Holiness John Paul II to Rev. George V. Coyne, S.J. Director of the Vatican Observatory, June 1, 1988, available at http://www.vatican.va/holy_father/john_paul_ii/letters/1988/documents/hf_jp-ii_let_19880601_padre-coyne_en.html

value in illuminating various areas of theology. Theologians might well ask, with respect to contemporary science, philosophy and the other areas of human knowing, if they have accomplished this extraordinarily difficult process as well as did these medieval masters.[138]

Likewise, the Pope stated, the practice of natural science is neither to be equated with theology nor isolated from it:

> For science develops best when its concepts and conclusions are integrated into the broader human culture and its concerns for ultimate meaning and value. Scientists cannot, therefore, hold themselves entirely aloof from the sorts of issues dealt with by philosophers and theologians. By devoting to these issues something of the energy and care they give to their research in science, they can help others realize more fully the human potentialities of their discoveries. They can also come to appreciate for themselves that these discoveries cannot be a genuine substitute for knowledge of the truly ultimate.[139]

The Catholic "dialogue" approach, at least on some readings of it, already assumes that all investigation of truth is theological. The possibility of "natural reason" is given precisely because of prior theological claims about the gift of created human nature and its capacity to participate in the truth of God.   In his introductory discussion of the relation between theology and philosophy, *Fides et Ratio*, for example, Pope John Paul II states that all knowledge, whether derived from philosophy or faith, depends first on God, who makes knowledge possible by grace. "Underlying all the Church's thinking," John Paul II said, "is the awareness that she is the bearer of a message which has its origin in God himself (cf. 2 Cur 4:1-2)." [140]   The Church did not receive this message through its own power or abilities, nor was the message communicated through abstract intellectual means. Rather, John Paul II said, it stems from a personal encounter with God in Christ:

> At the origin of our life of faith there is an encounter, unique in kind, which discloses a mystery hidden for long ages (cf. *1 Cor.* 2:7; *Rom* 16:25-26) but which is now revealed: "In his goodness and

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[138] *Ibid.*

[139] *Ibid.*

[140] *Fides et Ratio*, ¶7.

wisdom, God chose to reveal himself and to make known to us the hidden purpose of his will (cf. *Eph.* 1:9), by which, through Christ, the Word made flesh, man has access to the Father in the Holy Spirit and comes to share in the divine nature".[141]

Further, God's self-revelation in Christ was entirely a free act of grace: "[t]is initiative is utterly gratuitous, moving from God to men and women in order to bring them to salvation. As the source of love, God desires to make himself known; and the knowledge which the human being has of God perfects all that the human mind can know of the meaning of life."[142]

Therefore there is no question of philosophy superseding faith. There is no sharp division, in *Fides et Ratio*, between "nature" and "grace": all that pertains to "nature," to God's creative design, is also the gift of "grace," of God's ecstatic, self-giving love. Nevertheless, for John Paul II, "nature" involves empirical realities that are susceptible to human knowledge through a form of reasoning appropriate to the object. "Philosophy" therefore possesses an inherent integrity, structure, and grammar. "The truth attained by philosophy and the truth of Revelation," John Paul II said, "are neither identical nor mutually exclusive":

> There exists a twofold order of knowledge, distinct not only as regards their source, but also as regards their object…. Based upon God's testimony and enjoying the supernatural assistance of grace, faith is of an order other than philosophical knowledge which depends upon sense perception and experience and which advances by the light of the intellect alone. Philosophy and the sciences function within the order of natural reason; while faith, enlightened and guided by the Spirit, recognizes in the message of salvation the "fullness of grace and truth" (cf. *Jn* 1:14) which God has willed to reveal in history and definitively through his Son, Jesus Christ (cf. *1 Jn* 5:9; *Jn* 5:31-32).[143]

John Paul II therefore sees a positive role for "philosophy" as a complement to "faith." Indeed, for John Paul II, "natural reason," apart from revelation, is capable of showing that there is a God who created the universe. Nevertheless, it is finally our *faith* in God's creative goodness that establishes confidence in the capacities of "natural reason" to comprehend creation, and it is our

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[141] *Ibid.*
[142] *Ibid.*
[143] *Fides et Ratio*, ¶9.

faith in God's transcendence that establishes the proper bounds of reason.   These themes of transcendence and participation as applied to the relation between theology and science are perhaps reflected more clearly in an introduction John Paul II wrote for a 2004 Pontifical Academy of Sciences report in the Academy's four hundredth anniversary, where he stated

> I am more and more convinced that scientific truth, which is itself a participation in divine Truth, can help philosophy and theology to understand ever more fully the human person and God's Revelation about man, a Revelation that is completed and perfected in Jesus Christ. For this important mutual enrichment in the search for the truth and the benefit of mankind, I am, with the whole Church, profoundly grateful.[144]

7. Postliberalism and Other Narrative Theologies

"Postliberal" theology represents an effort to move beyond classical theological liberalism through "a return to a premodern faith rooted in the faith community, while fully realizing the impossibility of a full return to premodern dogma."[145] Although postliberal theology is a diverse movement, "it always stresses the narrative of scripture along with the community of the church and its practices."[146]   Postliberal theology has been described as non-foundationalist, intra-textual, socially centered, respectful of plurality and diversity, and inclined towards an ecumenical "generous orthodoxy."[147] In this respect, postliberal theology reflects the "linguistic turn" and the influence of philosophers such as Ludwig Wittgenstein, Alasdair McIntyre and Thomas Kuhn, along with theologians such as Augustine, Aquinas, and Barth.[148]

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[144] Address of John Paul II to the Members of the Pontifical Academy of Sciences, The Pontifical Academy of Sciences, ACTA 17, The Four Hundredth Anniversary of the Pontifical Academy of Sciences (Vatican City 2004), 14-15.

[145] Ronald T. Michener, *Postliberal Theology: A Guide for the Perplexed* (London: Bloomsbury T&T Clark 2013), 2. George Lindbeck who along with Hans Frei is one of the fathers of the "Yale School" of postliberal theology, summarized this ethos in the Forward to the original edition of his classic The Nature of Doctrine: "The difficulties [with modern theology] cannot be solved by, for example, abandoning modern developments and returning to some form of preliberal orthodoxy. A third, a postliberal, way of conceiving religious doctrine is called for." George Lindbeck, *The Nature of Doctrine: Religion and Theology in a Postliberal Age* (Louisville: Westminster John Knox 2009, 25th Anniversary Ed.), xxxiii.

[146] Michener, *Postliberal Theology: A Guide for the Perplexed*, 4.

[147] *Ibid.*

[148] *See Ibid.*, Chapter 2.

Because postliberal and related narrative theologies focus on the constitutive character of theological language – that is, because they reflect the linguistic turn in philosophy – they can seem disinterested in any sort of modern "faith and science" project. Nevertheless, some key figures in these movements have made contributions to conversations about natural theology, including David Kelsey, Stanley Hauerwas, and Sarah Coakley.

David Kelsey has written extensively on method in theology and science, in connection with his two volume theological anthropology, *Eccentric Existence*.[149] Kelsey understands "theology" as a kind of ecclesial practice, "one of several practices that make up the common life of some self-identified communities of Christian faith," that is, of the Church.[150] Kelsey's use of the term "practice" is meant to evoke Alasdair MacIntyre's *After Virtue*, and includes "any form of socially established human interactivity that is conceptually formed, is complex and internally coherent, is subject to standards of excellence that partly define it, and is done to some end but does not necessarily have a product."[151] Although such practices are internally defined, however, they are necessarily "public," because they are socially established.[152] And, because the socially established communities in which such practices arise are historically embedded, the shape of those practices may change over time.[153] In particular, such change "may take the form of new historical knowledge of the cultural contexts in which authoritative Scriptures and theological formulations should be interpreted, and thereby change their bearing on the theological claims they were once thought to authorize."[154] Moreover, because these practices are subject to historically embedded standards of excellence, they will have some reference beyond the internal community towards other communities of practice with which they interact.[155] For example, Kelsey suggests, when theological practices "incorporate arguments in a number of very different argument-making practices (e.g., history, literary criticism, philology, and

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[149] David H. Kelsey*, Eccentric Existence: A Theological Anthropology, Volume One* (Knoxville: WJK 2009) and Volume Two (Knoxville: WJK 2010).
[150] *Ibid.*, Volume, One, 13.
[151] *Ibid.* at 14.
[152] *Ibid.*, 17.
[153] *Ibid.*, 20-21.
[154] *Ibid.*, 21.
[155] *Ibid.*, 23.

metaphysics)" then the theological practices are to that extent subject to the standards of excellence of those other practices.[156] So, Kelsey argues, "[f]or example, when a proposal in secondary theology is defended as a historical proposal (say, 'Jesus of Nazareth was crucified by the Romans'), the arguments advanced in support of the proposal must count as good arguments in the practice of history (e.g., arguments based on what counts as good evidence in the practice of history)."[157]

Given his ecclesio-centric view of the practice of theology and his affinity for MacIntyre, Kelsey recognizes that part of the practice of theology entails understanding the historical theological tradition. However, as theology continues to be enacted in time and as it continues to interact with other developing traditions of practice, it will inevitably change. Therefore, Kelsey says, "the contents of the theological tradition, part of that-which-is-handed-over, are to be taken very seriously by enactments of secondary theology as formulations from which important insights may be learned, but not taken uncritically or as unreformable, much less infallible."[158]

When Kelsey applies this methodology to the question "who was Adam," the results are perhaps predictably stark. Kelsey describes the "premodern" view as embedded in the theological *loci* of creation and salvation, and describes it as follows: "Adam and Eve were historical figures created *ex nihilo* as fully actualized adult human beings, perfects specimens in every way, and . . . the fall was a disaster in their personal lives whose consequences include the necessity of hard labor for physical survival, social injustice and oppression, disease, pain in childbirth, and the death of the body."[159] In contrast, Kelsey says, "[t]he notion of there being an individual or a pair who began the species *Homo sapiens* as fully actualized human beings *ex nihilo*, without living antecedents, is unintelligible in the context of an evolutionary view of the origin of every living species. It is no longer believable that a unique fall ever happened or that it happened to anyone like Adam and Eve."[160] For Kelsey, the theological project of "faith seeking understanding" must comprise an effort not to produce proofs of now implausible historic Christian beliefs such as belief in Adam

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[156] *Ibid.*
[157] *Ibid.*
[158] *Ibid.,* 26.
[159] *Ibid.,* 34.
[160] *Ibid.,* 35.

and the fall, but to "exhibit[] the intelligibility of practice that compose the common life of communities of Christian faith by identifying the ways in which they are conceptually formed, the 'end' to which they are enacted, their 'standards of excellence,' and how they hang together – that is, the patterns of their relationships with one another – all in order to assess critically whether the community's enactments of the practices are adequate."[161]

Stanley Hauerwas is another postliberal theologian who has written about natural theology, with results that seem different than Kelsey's. Hauerwas is an unlikely entrant in the faith and science conversation, but he gave the Gifford Lectures in 2001, which were published as *With the Grain of the Universe: The Church's Witness and Natural Theology*.[162] Hauerwas' central theme in those lectures was that "natural theology divorced from a full doctrine of God cannot help but distort the character of God and, accordingly, of the world in which we find ourselves."[163] This claim resonates with much of what the Radical Orthodoxy thinkers profiled in the next section have to say about natural theology. Indeed, Hauerwas here quotes John Milbank's quip that "'the pathos of modern theology is its false humility,'" and notes that "I hope Milbank's warning about false humility explains why I cannot help but appear impolite, since I must maintain that the God who moves the sun and the stars is the same God who was incarnate of Jesus of Nazareth."[164] Hauerwas argues, with John Howard Yoder, that the cross is the center of reality and that "those who bear crosses work with the grain of the universe."[165] The cross, Hauerwas says, is central to God's being, and Christians cannot sidestep the cross in the interest of apologetics. Moreover, since the cross is central to God's being, it is also central to ecclesiology, "or the politics called church. . . ."[166]

Hauwerwas then moves on to tackle the modern presumption that philosophy and other sciences stand alongside or above theology, rather than *under* the claims of *sacra doctrina* and theology. He argues that Aquinas understood "natural reason" and "revelation" as rational complements,

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[161] *Ibid.* at 41.
[162] Stanley Hauerwas, *With the Grain of the Universe: The Church's Witness and Natural Theology* (Ada: Brazos Press 2001).
[163] *Ibid.* at 15.
[164] *Ibid.* at 16.
[165] *Ibid.* at 9.
[166] *Ibid.* at 16.

not as "epistemological alternatives," such that "those who attempt in the name of Aquinas to develop a 'natural theology – that is, a philosophical defense of 'theism' as a propaedeutic for any further 'confessional' claims one might want to make – are engaged in an enterprise that Aquinas would not recognize."[167] Hauerwas cites as support for this view one of the "reformed epistemologists" we mentioned in a previous section, Nicholas Wolterstorff. Aquinas, Hauerwas says, was engaged in a Trinitarian projected "from beginning to end," imbued with the Aristotelian idea that we can only make sense of effects by trying to understand their causes.[168]

While Hauerwas seeks to retrieve the sense of holism and transcendence in pre-modern thought, he does not seek a naïve return to the Middle Ages. According to Hauerwas,

> The assumption that the Middle Ages represents a time when Christians 'got it right' not only doe an injustice to the complexity of the times and places so named, but also betrays the gospel requirement that even in a world that understands itself to be Christian, faithful witness is no less required for the truth that is Christ to be known. . . . The very attempt to tell the story of modernity as one of decline from a genuinely Christian world ironically underwrites the assumption that the story that Christianity *is* is inseparable from the story of Western culture."[169]

Hauerwas is also reluctant to offer a precise genealogy of modernity. He suggests the fact "[t]hat we live in an age in which the church is but another voluntary agency and theology, at best one subject among others in the curriculum of universities is the result not just of mistakes in the thirteenth century but of the effect of innovations such as the clock that intellectuals (exactly because we are intellectuals) are prone to discount."[170] He ties this to a critique of what he takes as the Constantinian notion that Christian *belief* can be imposed as an intellectual system rather than received only through lived practices.

After this prolegomenon, Hauerwas profiles three previous Gifford lecturers, William James, Reinhold Niebuhr, and Karl Barth. For the purpose of this Dissertation, the most interesting of

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[167] *Ibid.* at 17. Hauerwas here is offering a critique of another of his favorite conversation partners, Alasdair MacIntyre.
[168] *Ibid.* at 28.
[169] *Ibid.* at 24.
[170] *Ibid.* at 27.

these is Hauerwas' engagement of Barth, given the way in which Barth is also central to "critical realism" in theology and science. Hauerwas suggests that "Barth, in spite of his disavowal of natural theology, provides the resources necessary for developing an adequate theological metaphysics, or, in other words, a natural theology," if "'natural theology' simply names how Christian convictions work to describe all that is God's good creation."[171]

One of the keys to Hauerwas' reading of Barth is Christology, and particularly the *humanity* of Christ as it relates to our humanity. Humans are distinct from the rest of creation because we can express our gratitude to God through knowledge and service, and we are capable of taking an active part in God's work of redemption through the building of culture.[172]

A final thinker in this group of postliberal theologians, though that label may not fit her precisely, is Sarah Coakley. In her 2012 Gifford Lectures, "Sacrifice Regained, Evolution, Cooperation and God," Coakley laid out a methodological and practical program for a revitalized natural theology.[173] In those lectures, Coakley sometimes sounds like a critical realist and sometimes like a postliberal, so she serves as a useful bridge between these groups.

Coakley tries to show that current arguments in the philosophy of science, in particular the philosophy of biology, about altruism and cooperation, are consonant with certain kinds of teleological perspectives on creation drawn from the Christian theological tradition. At the same time, she wishes to resist any suggestion that teleology is something superadded to nature by God or that evolution is a story about nature "getting better."[174] With Michael Polanyi and Simon Conway Morris, Coakley suggests that there might be some sort of "'irreducible structure' to evolutionary life itself," which invites philosophical and theological reflection.[175] She wishes to avoid the Kantian option in which God is a not a subject of reason but merely an "as if" that

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[171] *Ibid.* at 134.
[172] *Ibid.* at 134.
[173] Coakley's Gifford Lectures are available at http://www.abdn.ac.uk/gifford/about/2012-giff/.
[174] *See* Lecture 5, "Teleology Revisited: A New 'Ethico-Teleological Argument for God's Existence,'" 12.
[175] *Ibid.*

guarantees the moral law.[176] She also, however, wishes to avoid "*any* trace of the extrinsic God competing for space with the processes of His own creation. . . ."[177]

The path forward, Coakley believes, is in "neo-Aristotelian accounts of both biological processes and moral virtues," which ask about the purposes of phenomena such as cooperation and altruism.[178] Such neo-Aristotelian accounts, Coakley suggests, "cohere more illuminatingly" with the phenomena of evolution than the kinds of consequentialism or emotivism that many evolutionary psychologists prefer.[179] Yet Coakley does not suggest that theology is only something that might provide some perhaps pleasant addendum to the magisterium of science. She notes that "[t]he era of a confident announcement of the existence of God based solely on de-contextualized rational argumentation . . . is one we now recognize as a mistaken philosophical 'blip' -- it was a rearguard modernist attempt to beat Kant at his own game, to reassert the truth of 'theism' according to supposedly universalistic and a-historical canons of truth."[180] At the same time, however, she argues that "[t]he art of giving a reasoned, philosophically-and-scientifically-related, account of the 'hope that is in us' in a public space is a Christian *duty*, and it may take a great variety of forms."[181]

Coakley's methodological proposal entails six related "hallmarks": (1) "the rejection of 'flat-plane' foundationalism"; (2) "the resistance to non-realism and the fact/value split"; (3) "retrieving creation ex nihilo: God as Being"; (4) "the rejection of falsely-denuded 'deism' and 'theism'"; "(5) the alignment of will and reason in response to 'natural theology' arguments"; and (6) "the spiritual senses and the ascetic capacity to 'see' God in the world."[182] Coakley recognizes that "both evolutionary theory and Christian theology are founded in irreducible *narratives* of

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[176] *Ibid.*, 14.
[177] *Ibid.*, 18 (emphasis in original).
[178] *Ibid.*, 20.
[179] *Ibid.*
[180] Lecture 6, "Reconceiving 'Natural Theology': Meaning, Sacrifice and God," available at
http://www.abdn.ac.uk/gifford/documents/Gifford_Lecture_6_-_lecture_text.pdf, 5-6.
[181] *Ibid.*, 3. She states further that "this task is not about the soap-box, but it's not for the faint-hearted or defensive either. It has to be as philosophically and scientifically sophisticated as it is spiritually and theologically cogent; in short, it must not merely dazzle; it must truly invite and allure." *Ibid.*, 4.
[182] *Ibid.*, 5-15.

unfolding change and movement," such that neither are totally "objective" or free of context.[183]

Nevertheless, Coakley eschews the claim that recognizing our dependence on context renders us incapable of reasoned claims about scientific and philosophical realism.[184] Such realism, Coakley suggests, requires a return to the theological notion of God as Being, which involves more careful attention to the question of Divine action.[185] Coakley cites Aquinas as a key example of how to think about God's "relation" to the world without engaging in onto-theology or constraining God within time as in open theism or process theology.[186] To avoid these mistakes, Coakley notes, it is essential to make specific *doctrinal* claims and not merely to argue for a generic kind of "theism."[187] In particular, the doctrine of the Trinity and careful attention to Christology are essential to Christian claims about Divine action and the purposes of creation.[188] Finally, Coakley suggests that there is a necessary affective dimension to how (or whether) we "see" God in the world and that spiritual and ascetic practices can progressively enable us to see Him better.[189]

Throughout her Gifford Lectures, Coakley focuses on the question of extraordinary altruism as an application of her method. She suggests that great moral figures such as Mother Theresa and Dietrich Bonhoeffer explode the usual game theoretic categories of "altruism" and "cooperation" in ways that suggest something beyond those categories. [190] Such examples, she suggest, have "seemingly passed beyond *mere* cultural evolution and become a manifestation of response to a transcendent realm of grace and 'supernormality'" and ultimately can best be explained with reference to Christology and the hope of the resurrection.[191]

8. Radical Orthodoxy's Critique of the Secular

Like postliberal theology, Radical Orthodoxy seems to bring resources to the faith and science conversation that have only recently entered the debate, for example in Conor Cunningham's

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[183] *Ibid.*, 5.
[184] *Ibid.*, 6.
[185] *Ibid.*, 8.
[186] *Ibid.,* 8-9.
[187] *Ibid.*, 10.
[188] *Ibid.,*, 10-11.
[189] *Ibid.,* 11-13.
[190] *See* Lecture 5,, 18-20.
[191] *Ibid.*, 18; Lecture 6, 13.

Darwin's Pious Idea, Michael Hanby's *No God, No Science: Theology, Cosmology, Biology*, and David Bentley Hart's *The Experience of God: Being, Consciousness, Bliss.*[192] One of Radical Orthodoxy's core assertions is that all truth claims are theological – that narratives finally rooted in the being of the Triune God will ring true and narratives located elsewhere will ring hollow or worse will prove nihilistic.[193] In relation to the natural sciences, some thinkers influenced by Radical Orthodoxy (such as Cunningham, Hanby, and Hart) accept the basic empirical conclusions of the modern natural sciences but argue that the natural sciences themselves make no sense except in relation to sound theologies of God, creation and the human person. In contrast with many postliberal theologians, Radical Orthodoxy emphasizes a recovery and revitalization not only to the *language* of premodern faith but also of the *metaphysics* of the Patristic Christian-Platonic synthesis.

Radical Orthodoxy's intervention into the rhetoric of "theism" and "atheism" in the realms of epistemology and politics seems to offer a promising way beyond this looming collapse back into fundamentalism. At first blush, Radical Orthodoxy itself seems like a more sophisticated form of fundamentalism (and this is precisely what it is, some of its critics would argue). Radical Orthodoxy insists that there is no neutral "secular" knowledge, that all arguments finally imply the metaphysics of being, and that the metaphysics of being are always theological. The question of God cannot be bracketed, set aside, or otherwise avoided. But the question of "God," for Radical Orthodoxy, is not a broad claim about "theism." It is, finally, the question of the Triune

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[192] Conor Cunningham, *Darwin's Pious Idea: Why the Ultra-Darwinists and Creationists Both Get it Wrong* (Grand Rapids: Eerdman's 2010); Michael Hanby, *No God, No Science: Theology, Cosmology, Biology* (London: Wiley-Blackwell 2013); David Bentley Hart, *The Experience of God: Being, Consciousness, Bliss* (New Haven: Yale Univ. Press 2013).

[193] *See, e.g.,* John Milbank, Catherine Pickstock, and Graham Ward, "Introduction, Suspending the Material: the Turn of Radical Orthodoxy," in Milbank, Pickstock and Ward, eds., *Radical Orthodoxy: A New Theology* (London: Routledge 1999),, 3 (stating that "[t]he central theological framework of radical orthodoxy is 'participation' as developed by Plato and reworked by Christianity, because any alternative configuration perforce reserves a territory independent of God….. Underpinning the present essays, therefore, is the idea that every discipline must be framed by a theological perspective; otherwise these disciplines will define a zone apart from God, grounded literally in nothing."); Conor Cunningham, *Genealogy of Nihilism* (London: Routledge 2002); Simon Oliver, "What is Radical Orthodoxy," in John Milbank and Simon Oliver, eds., *The Radical Orthodoxy Reader* (London: Routledge 2009),, 6 (noting that "Milbank's crucial point is that the secular is not simply the rolling back of a theological consensus to reveal a neutral territory where we all become equal players, but the replacement of a certain view of God and creation with a different view which still makes theological claims, that is, claims about origins, purpose and transcendence.").

God revealed in Jesus Christ. This is the source of both the "Radical" and the "Orthodoxy" in "Radical Orthodoxy." "Theism" and "Atheism" are then each seen as sides of the same heterodox or heretical coin. It is not that subjects such as mind, will, consciousness and neuroscience can best be explained by the assumption of at least some god. It is that these phenomena finally *only* can be understood in connection with reference to the ecstatic relationality and unity of the Triune God who gives creation as a gift of love, who creates the human person in His own image, and who in Christ redeems and fulfills the true nature of humanity.

It is not always clear, however, when these theological and philosophical claims might dictate or at least favor an empirical, propositional assertion at odds with the consensus of the modern natural sciences. As with the other varieties of Christian epistemology introduced above, one of the core tensions is whether the Biblical narrative of "Adam and Eve" and the "fall" are in any sense "literal."[194] Can Radical Orthodoxy here offer only yet another kind of admixture of fideism and rationalism?

The founding charter for Radical Orthodoxy is John Milbank's *Theology and Social Theory* ("TST"), which is a sustained critique of the presumed neutrality of the modern social sciences.[195] In a chapter on "Science, Power, and Reality," Milbank attempts to distinguish social science, which describes human behavior, from natural science.[196] Social science, Milbank argues, differs from natural science in that "human interaction in all its variety can only be narrated, and not explained / understood after the manner of natural science."[197] Milbank's critique of social science sounds like the longstanding argument in the broader academy about whether disciplines such as sociology, political science, economics and psychology can truly be considered "scientific."[198] He adopts a phenomenological / narratival perspective on persons and cultures:

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[194] *See* Paul Tyson, "Can Modern Science Be Theologically Salvaged? Reflections on Conor Cunningham's Theological and Metaphysical Evaluation of Modern Evolutionary Biology," 2 Radical Orthodoxy: Theology, Philosophy, Politics 1:118 (2014), available at http://journal.radicalorthodoxy.org/index.php/ROTPP/article/view/67 (arguing that Cunnigham's "mythologizing" of Adam and the fall separates theology and science in a way that causes insuperable dissonance).

[195] John Milbank, *Theology and Social Theory: Beyond Secular Reason* (London: Blackwell 2d ed. 2006).

[196] *Ibid.,,* 259-277.

[197] *Ibid.,,* 259.

[198] *See* Kevin A. Clarke and David M. Primo, "Overcoming Physics Envy," The New York Times, March 30, 2012, available at http://www.nytimes.com/2012/04/01/opinion/sunday/the-social-sciences-physics-envy.html?_r=0;

"'Narrating,'" he says, "turns out to be a more basic category than either explanation or understanding: unlike either of these it does not assume particular facts or discrete meanings. Neither is it concerned with universal laws, nor universal truths of the spirit."[199] Narrative "is the final mode of comprehension of human society," and "[t]o understand or explain a social phenomenon is simply to narrate it...."[200]

But this does not only apply to the *social* sciences. Even for the natural sciences, Milbank argues, "[a]s the phrase 'natural history' suggests, natural science does not rid itself of narrative, and indeed, it is just as possible to tell a story in which the characters are atoms, plants, animals, or quasars, as one where they are human beings."[201] The modern natural sciences have largely lost this sense of narrative because of the influence of reductive positivism.[202] Citing Paul Feyerabend's *Against Method*, Milbank notes that the observation of "data" is never a merely neutral activity because the act of constructing the context of an observation already requires a theoretical structure.[203] All data is interpreted and there is no method without theory.

Therefore, for Milbank, scientific investigation always involves narrative. Milbank can then set aside as pretentious the claim of the modern social sciences to provide an objective, "scientific" account of society that atomizes social relations into discrete quantities, which always in the end implies relationships of competition and violence.[204] And, following Alasdair MacIntyre's account of traditioned inquiry, Milbank can offer an alternative narrative, that of Christian charity, in which human society is encompassed in an ontology of relational peace that begins with the ecstatic plenitude of the Triune God's self-giving in creation.[205]

Gary Gutting, "How Reliable are the Social Sciences," New York Times Opinionator Blog, May 17, 2012, available at http://opinionator.blogs.nytimes.com/2012/05/17/how-reliable-are-the-social-sciences/. In general, the analytic social sciences focus on the statistical analysis of quantitative "variables" as a mode of "scientific" analysis. *See* Christian Smith, *What is a Person* (Chicago: Univ. Chicago Press 2010), Chapter Five. *See also* Gary King, Robert O. Keohan, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton Univ. Press 1994).

[199] *TST,*, 267.
[200] *Ibid.*
[201] *Ibid.*,, 269.
[202] *Ibid.*,, 270.
[203] *Ibid.*,, 270-271, and Note 13.
[204] *Ibid.*
[205] *See Ibid.*, Chapters 11, 12, 13.

It is unclear precisely how Milbank's account of the natural sciences in TST contrasts with McGrath's critical realism. Milbank's references to the philosophy of science literature are extremely limited – in addition to Feyerabend, he refers only to Descartes, Kant, Whewell, Mill, Popper and Lakatos (and that all in one sentence!).[206] Much of what Milbank says in TST about the social and pre-empirical theoretical basis for the conduct and interpretation of experiments is entirely consistent with Polanyi's critically realist personalism, which Polanyi fleshes out it much greater detail. Perhaps there are two basic differences: (1) Milbank's narratival approach does not accord the sciences a methodologically separate space from theology even at a pre-integrative level; and (2) Milbank's approach makes less space – although some space does seem to be given – for the alteration of the Christian theological narrative at a higher level of integration with discrete truths gleaned from the sciences. At a basic level, it is a difference between an analytic (critical realism) and phenomenological (narrative) frame of reference.

A more sustained effort to address the natural sciences from a theologian associated with Radical Orthodoxy is Conor Cunningham's *Darwin's Pious Idea* ("DPI").[207] Cunningham does not offer an explicit methodology for "faith and science" in DPI. DPI is primarily a critique of materialism and the extreme naturalism of contemporary ultra-Darwinists, blended with a critique of scientific creationism and Intelligent Design theory.[208] Cunningham seeks to demonstrate that each of these positions – materialism, extreme naturalism, scientific creationism and ID theory – encode common philosophical presumptions that undermine belief not only in the God of traditional Christian theology, but also in the ability of human beings to conduct an enterprise such as "science."[209] In fact, Cunningham argues, materialism and extreme naturalism make it impossible to believe in "human beings" or even in "evolution" itself.[210] In contrast, Cunningham argues, "orthodox Christianity can offer an account of life and of nature that avoids such contemporary nihilism, and in so doing restore our commonsense world, and thus with it the possibility of beauty, truth, goodness, and lastly, our belief in evolution."[211] Thus Cunningham's

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[206] *Ibid.*,, 270-271.
[207] Cunningham, Darwin's Pious Idea.
[208] *See Ibid.*, xix.
[209] *See Ibid.*
[210] *Ibid.*
[211] *Ibid.*

implicit method is similar to Milbank's but also diverges from Milbank. Cunningham argues that reductive natural science is descendant of twisted theologies, particularly nominalism, and he adopts a metaphysical and phenomenological stance that seeks to demonstrate how Christianity not only "out narrates" but also is demonstrably true and necessary over materialism and naturalism even with respect to the nature and meaning of biological evolution.[212]

Cunningham's argument in DPI is "theological" throughout, but in the book's final chapter he makes a sustained move towards what the mainstream theology and science literature might call "integration."[213] In that chapter, he tackles what many consider to be the central challenge proposed by biological evolution to Christianity: the meaning of "Adam" and the Fall. For mainstream Christian scholars interested in relating some account of Adam and the Fall to evolutionary biology, the most common approach is towards a neo-orthodox reading of the Biblical text: the Biblical story of Adam has no referent in natural history and is rather a story of "everyman."[214]

Cunningham seems to make a similar move at the outset of this chapter: he notes that "[m]any people believe there has been a cosmic Fall as a result of the 'sin' of the first humans, and death was a consequence of this supposed Fall."[215] Cunningham refers to Patristic exegesis of the Genesis creation accounts, which was far more sophisticated than contemporary "creationist" readings, and which emphasized the typological and allegorical senses of the text.[216] In this reading, the Biblical story of Adam and the Fall is in fact the story not of a discrete moment in time that concerned a historical ancient human being who sinned, but rather it is the story of

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[212] Cunningham's references to nominalism in *DPI* are somewhat scattered and indirect. For example: "Why were they so against group selection? One can speculate that it was probably because it went against nominalist ontology." *Ibid.,*, 40. It might be difficult for a reader not familiar with theological debates over nominalism to catch some of these references. They are far more direct and clear in Cunningham's *Genealogy of Nihilism*. *See* Conor Cunningham, *Genealogy of Nihilism: Philosophies of Nothing and the Difference of Theology* (Routledge 2002), Chapters 1 and 2.
[213] *See DPI*, Chapter Seven.
[214] *See, e.g.,* Daniel Migliore, *Faith Seeking Understanding: An Introduction to Christian Theology* (Grand Rapids: Eerdmans 2004),, 149-1544; Peter Enns, *The Evolution of Adam: What the Bible Says and Doesn't Say About Human Origins* (Ada: Brazos Press 2012).
[215] *DPI,*, 377.
[216] *Ibid.,*, 377-400.

Christ.[217] The account of the "Garden" is not of a literal ideal state existing in the past, but rather is a form of eschatology as protology: human beings are made for union with God, yet we each experience disunion in our concrete circumstances. As Cunningham argues,

> Salvation is therefore true hominization, and thus real humanism: man becomes man only in Christ.
>
> A logical but sometimes overlooked consequence of this is that there is, in truth, only one Adam. By contrast, the entire idea of the Fall (original sin, etc.) is premised by the assumption that there could be more than one Adam. Yet Christ himself *is* the two trees in the Garden of Eden, while our sin and fallenness consist in every attempt, even as a possibility, to be human outside Christ. Genesis, we contend, is nothing less than a prophecy of the incarnation and passion of the Christ.[218]

The Fall, then, is *felix culpa*: "[y]es, creation was intended to be perfect, and this eternal intention is its true nature; but God's foreknowledge of man's sin eschatologically ordered creation toward Christ and thus to perfection."[219]

Although this reading sounds neo-orthodox on the surface, Cunningham resists the kind of dualism that would render "Adam" and "the Fall" merely in nominalist or Pelagian terms for a passing emotion that might be overcome through education or effort. The problem with such nominalist or Pelagian renderings is that they posit a stark dualism between "nature" and "grace" that cannot be maintained.[220] Following Henri de Lubac, Cunningham argues that there is no pure nature (*natura pura*), no space in which "nature" is not also already given as "grace."[221] Thus each "natural" human being also already participates in grace, in the "supernatural." And thus the participation of the entire human family in the sin of Adam, as well as the universal efficacy of the salvation made possible in Christ, are not merely individual instances of isolated experience, but involve the transcendence of human nature, which is given in creation.[222] The

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[217] *Ibid.*
[218] *Ibid.,,* 392.
[219] *Ibid.,,* 399.
[220] *Ibid.,,*
[221] *Ibid.*
[222] *See Ibid.*

apex of creation, the concrete realization of nature-and-grace and natural-and-supernatural is Christ.[223] It is only, then, in Christ that we are even capable of seeing "Adam."[224]

9. Towards An Integrated Methodological Perspective

I am unconvinced by approaches to "theology and science" that represent extremes, either in declaring a "war" between theology and science (as in materialistic atheism, young earth creationism, and some forms of Reformed presuppositionalism) or in merging theology and science as in process theology. I am likewise unconvinced by "NOMA" approaches that cabin "theological" and "scientific" thought into discrete categories, usually resulting in the marginalization of theology. Integrative approaches represented by Alister McGrath's "critical realism" or John Paul II's "*fides et ratio*" are more compelling, and perhaps represent the best kind of analytic method. But such analytic methods, reflecting their debt to Anglo-American analytic philosophy, can leave us intellectually and spiritually deracinated. The truth, we suspect, cannot so easily be broken into discrete analytic units, even if that sort of analytic process often yields important insights into our mental biases and limitations.

The strong integrationist program represented by process theology is in some ways appealing. It does take seriously the claims of the natural sciences. However, the way in which process theology tends to envision the "soul" as coincident with the universe itself as a conscious entity, perhaps as *the* conscious entity, finally strays far afield from the claims and methods of contemporary natural science. Although even some materialists explain will and consciousness as emergent properties of the lower order realities of physical laws, they would not ascribe some super-added metaphysical status to those emergent properties.[225]   It is unclear, then, whether process theology really *integrates* theology and science or whether process theology is at best *compatible* with some emergentist perspectives within the natural sciences.

Process theology also takes very seriously the problem of evil and the problem of creaturely freedom. Perhaps what the world religions have traditionally thought of as "God" is also an

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[223] *See Ibid.*
[224] *See Ibid.*
[225] *See, e.g.,* Daniel Dennett, *Consciousness Explained* (New York: Back Bay Books 1992).

emergent property of the physical universe. Perhaps the physical universe itself is "alive," a growing consciousness in which we each, in our own small way, are a part, and which as a whole is expanding towards its own universal omega point. Perhaps the suffering of the world, our suffering, is neither meaningless nor tied up with an inscrutable and arbitrary Providence, but rather is the birth pang of a universal mind, a "God" if we wish to use that term, in the process of its own delivery, a new, whole, fresh, unblemished child.[226] There are obvious similarities here to some articulations of Christian eschatology, particularly among the Greek Fathers, but there are also echoes of other religious and theological traditions – Gnosticism, Hinduism, Buddhism, and some strains of Jewish and Islamic thought. Wouldn't this reflect another advantage over Christian theological orthodoxy? Would some kind of universal process theology built on emergent naturalism permit the world's religions finally to coexist in peace? While this sounds like a promising new line of questioning rooted in innovative concepts of emergence, it is rooted in pre-Christian Platonism, and it suffers from the same defects as pre-Christian Platonism. Among the most basic of those defects is the question of "justice" and the related questions of "law" and "persons."

There is something compelling, of course, in the notion that human suffering is not without purpose, that our suffering is contributing to the birth of something better. But that might be little relief to the person who pauses to reflect on the fact that he or she will know nothing of this, will receive no *personal* justice or benefit aside from perhaps some present psychic comfort. The countless masses whose heads were blown apart by Nazi pistols or who choked on Zyklon B, who were forced to kneel before Cambodian machine guns or were sliced by Rwandan hatchets, who were seared by American Napalm or vaporized by silent killer drones, along with every other person whose sufferings might have been greater or smaller – were they just the compost that feeds the sprouting Great Emergent Mind, a science-fiction answer to the questions of Dostoyevsky's Grand Inquisitor?

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[226] *See, e.g.,* Thomas Nagel, *Mind and Cosmos: Why the Materialist Neo-Darwinian Concept of Nature is Almost Certainly False* (Oxford: OUP 2012).

Even the small present consolation of knowing that one is *at least* serving as compost requires some sense of certainty about the future's outcome. If emergence is the best hope, it is a frail hope, and really no hope at all. An emergent process by definition is uncertain. Emergence can only happen out of chaos. It is precisely the stochastic nature of the most basic level of physical reality – that of quantum physics – that might allow undetermined, supervenient realities to emerge. This is the difference between the Newtonian universe and the Einsteinian: Einstein (via Heisenberg) makes room for uncertainty. This uncertainty means that the universe's omega point might not be anything we would consider "good" at all. The emerging universal mind might be a fiery consuming monster. In fact, uncertainty means there can be *no* omega point. An omega point, a *final* end, would entail a *certain* end. The Canaanite Leviathan, the beast that emerges from of the primordial waters of chaos to swallow the world, cannot be tamed with hooks. (Cf. Job 41.) The Leviathan is without justice and without law.

Further, process theology's representation of the classical view of God's perfections in relation to creation *ex nihilo* and creaturely freedom tends towards parody and straw man claims. It is unclear, for example, who comprises the Christians referenced by Epperly who "believe that God has directed the course of the universe from the very beginning, determining every detail without creaturely input."[227] In his *Guide for the Perplexed* on process theology, Epperly uses popular evangelical preacher Rick Warren's reference to God's providence in Warren's popular book *A Purpose Driven Life* as representative of the classical view.[228] To suggest that Warren lacks the sophistication of Gregory of Nyssa, Augustine, Aquinas or Barth on these problems is more than an understatement, and Warren himself would not argue otherwise.

Among more significant representatives of the Christian tradition, perhaps some versions of Calvinism or Jansenism would frame this sort of statement, but orthodox Christian theology has always recognized creaturely freedom, and particularly human moral freedom, within the ambit of God's providence and in response to God's grace. Classical Christian orthodoxy is not deterministic fatalism. Indeed the Second Council of Orange, though it condemned semi-

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[227] *Ibid.,*, 97.
[228] Epperly,, 41-44 (citing Rick Warren, *A Purpose Driven Life* (Grand Rapids: Zondervan 2002)).

Pelagianism, nevertheless held that human beings can participate or not participate in God's grace: "We not only do not believe that any are foreordained to evil by the power of God, but even state with utter abhorrence that if there are those who want to believe so evil a thing, they are anathema."[229] For example, the Catechism of the Catholic Church today states that "[f]reedom is the power, rooted in reason and will, to act or not to act, to do this or that, and so to perform deliberate actions on one's own responsibility. By free will one shapes one's own life. Human freedom is a force for growth and maturity in truth and goodness; it attains its perfection when directed toward God, our beatitude."[230] The Catechism further states that

> The grace of Christ is not in the slightest way a rival of our freedom when this freedom accords with the sense of the true and the good that God has put in the human heart. On the contrary, as Christian experience attests especially in prayer, the more docile we are to the promptings of grace, the more we grow in inner freedom and confidence during trials, such as those we face in the pressures and constraints of the outer world. By the working of grace the Holy Spirit educates us in spiritual freedom in order to make us free collaborators in his work in the Church and in the world….[231]

The Catechism therefore concludes that "[t]he right to the exercise of freedom, especially in religious and moral matters, is an inalienable requirement of the dignity of man."[232]   It seems, then, that process theology is overstating a case against a mythical opponent. In the end, the "God" of process theology, as well as its vision of the human "soul," tends to devolve into a kind of pantheistic spiritualism that ultimately vindicates neither contemporary science nor natural theology.

Critical realism as a model for interaction between theology and science seems far more promising than process theology.   Unlike NOMA approaches, critical realism does not hermetically seal the boundary between "science" and "religion." Critical realism does not represent a Kantian move in which religious or moral feeling is cordoned off from "pure reason,"

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[229] Canons of the Second Council of Orange, available at http://www.fordham.edu/halsall/basis/orange.txt.
[230] Catechism of the Catholic Church, § 1731, available at
http://www.vatican.va/archive/ccc_css/archive/catechism/p3s1c1a3.htm.
[231] *Ibid.*, § 1742.
[232] *Ibid.,* § 1747.

and this is a genuine advance over the Kantian bent of much of the modern scientific establishment – as evidenced, for example, in the National Academies of Science statement on NOMA quoted previously. Moreover, critical realism creates genuine space for theological reform and development when certain theological claims plainly clash with reality. Without some space in which the observations of the natural sciences can influence theology, it is impossible to avoid the intellectual and moral disaster of fundamentalist systems such as young earth creationism. Certainly, if we seek to be faithful to the spirit of the Church Fathers, we will want to do theology with a keen eye towards the creation as it is given to us.[233]

However, within critical realism, the interaction between the two disciplines of science and theology tends to be pictured as happening only at a higher level of integration. In this way, a kind of modest foundationalism underpins the entire project, even though many critical realists, including McGrath, strongly eschew foundationalism. This hidden modest foundationalism establishes the boundaries in which the theological and scientific disciplines do their own original work and in which any integrative work happens. But if the Christian confession truly is "realist," then there can be no autonomous space for a "science" that is not already "theological" in what it presumes about the nature of the universe, and there can be no neutral rule of correspondence that would adjudicate "between" theology and science.

Indeed, McGrath's own effort at constructing a natural theology is expressly non-foundationalist and presumes as a first principle "that the *logos* through which the world was created is embedded in the structures of the created order, above all the human person, and incarnated in Christ."[234] Natural theology, for McGrath, is not an effort to obtain neutrally rational "proofs" of God's existence, but rather to demonstrate "that there is an accumulation of considerations which, though not constituting logical proof (how could experience *prove* anything in such a way?), is at the very least consistent with the existence of a creator God."[235] Nevertheless, two basic questions linger: (1) from the perspective of Christian theology itself, does critical realism

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[233] For a discussion of how some of the Fathers interpreted Biblical texts concerning creation, see Peter Bouteneff, *Beginnings: Ancient Christian Readings of the Biblical Creation Narratives* (Grand Rapids: Baker Academic 2008).
[234] Alister McGrath, *The Open Secret: A New Vision for Natural Theology* (London: Blackwell 2008).
[235] *Ibid.*

envision a sufficiently *theological* account of "reason" that enables "natural science" in the first instance?; and (2) does critical realism propose an understanding of "nature" that resembles a kind of *natura pura* – a realm of pure nature that is not also already a realm of grace?

This reference to "nature" and "grace" highlights the potential distinction between McGrath's critical realism and some Roman Catholic perspectives: in particular, what should we make of the *analogia entis*? The subtle difference between this Roman Catholic vision as expressed by John Paul II and McGrath's more Reformed-oriented critical realism mirrors, in interesting ways, the dialogue between the two great Swiss theologians who continue to inform many of the differences between broadly Catholic and broadly Protestant approaches to natural theology: Barth and Balthasar.[236] The modified, qualified critically realist natural theology of Protestant thinkers such as T.F. Torrance and McGrath, who take their initial cues from Barth, is perhaps more cautious about the *analogia entis*, and therefore ends up with an integration of faith and reason only after a somewhat prolonged process of methodological separation.[237] A Catholic thinker such as John Paul II might more readily see analogical correspondences between God and nature.

Nevertheless, for a Catholic thinker such as John Paul II, even if, as Balthasar argued, "[n]ature cannot include grace at one moment and then exclude it the next," grace cannot be "necessarily derived" from nature, and the use of Aristotelian terminology to describe the movement of the creature towards the goal of the beatific vision as a sort of "natural" movement is only analogical.[238] Balthasar went so far as to argue that Barth's rejection of natural theology and the *analogia entis*, if properly understood, was consistent with the decrees of the First Vatican Council on natural knowledge of God, again if properly understood.[239] And, similarly, the

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[236] *See* Hans Urs von Balthasar, *The Theology of Karl Barth* (San Francisco: Communio Books 1992).

[237] *See* Erich Pryzwara, John R. Betz, and David Bentley Hart, *Analogia Entis: Metaphysics – Universal Structure and Universal Rhythm* (Grand Rapids: Eerdmans 2014). For an excellent discussion of how Barth developed his own thinking on the analogy of being, see Bruce L. McCormack, "Karl Barth's Version of an 'Analogy of Being': A Dialectical No and Yes to Roman Catholicism," in Thomas Joseph White, O.P., *The Analogy of Being: Invention of the Antichrist or the Wisdom of God?* (Grand Rapids: Eerdmans 2011).

[238] Balthasaar, *The Theology of Karl Barth,*, 267-275.

[239] *Ibid.,*, 309 (stating that "[i]t is really not possible to construct any genuine contradiction between Barth's statements in his anthropology about the capacity of human nature to know God within the concrete order of revelation (in *all* its conditions) and the statements of Vatican I."). For a recent discussion of the relationship

Protestant critical realist McGrath approvingly refers to Erich Przywara's concept of the *analogia entis* as a model for the construction of natural theology.[240] If there are differences between critical realist and specifically Roman Catholic models for the interaction between theology and science, in many cases those differences may be passingly small.

These considerations suggest that a critical realist stance with an appropriately modulated understanding of the *analogia entis* could represent a robust, ecumenical way forward. Indeed, I think that is correct. Nevertheless, while the Protestant critical realist and Roman Catholic "*fides et ratio*" models present careful methodologies, they often are unclear on questions of particular application, not least in connection with areas of significant potential tension, such as the doctrines of Divine sovereignty, human uniqueness and the Fall. I seek a method that does not suggest such basic truths could be overwritten by "natural" science.

In response to these problems, in the vein of Reformed presuppositionalism and Reformed epistemology, it is tempting seek to assert the epistemological primacy of *belief*, and specifically of belief in a God possessing the attributes of classical theism. From this primary belief, other primary beliefs may follow, including belief in the reliability of special revelation in the Bible as well as belief in the more general regularity of creation, or "general revelation," tempered by belief in sinful humanity's capacities for self-deception. If such theological beliefs are primary, then apparent conflicts between "science" and "faith" might be resolved by a model that admits a degree of conflict at these difficult tension points, even as it still tries to retain some confidence in "general revelation."

The significant critique of this approach is that, while it might deliver an internally coherent world view, it cannot guarantee that any such world view actually corresponds to reality. It produces, at best, a chain of circular reasoning in which an antecedent is supposedly proven merely by showing its consistency with consequent propositions that assume the antecedent – in other words, it commits the fallacy of affirming the consequent.   Sophisticated Reformed

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between Barth and Balthasar, see D. Stephen Long, *Saving Karl Barth: Hans Urs von Balthasar's Preoccupation* (Minneapolis: Fortress Press 2014).
[240] McGrath, *The Open Secret,*, 189.

epistemologists such as Alvin Plantinga respond that they are not committing this fallacy because basic belief in God is known through revelation and faith, not through argument. The purpose of the argument is to show that there are no "defeaters," no fundamental logical inconsistencies, in holding the basic belief in God. But Plantinga also notes that in the Christian theology tradition faith is associated with a form of "certainty," and consistent with his Reformed heritage he understands that "certainty" to reside in the internal witness of the Holy Spirit and not in other kinds of proofs. Given the certain witness of the Holy Spirit, it is unclear why a Christian should be concerned about chains of reasoning that eliminate potential "defeaters." The certain testimony of the Holy Spirit should be indefeasible; if it is defeasible, it is not certain. Plantinga's response is that the apologetic exercise of removing potential defeaters is helpful to us in the human weakness and sin that can often obscure the Holy Spirit's witness.

An additional and perhaps more significant problem with Plantinga's approach is that, like naïve foundationalism, it can tend towards ontotheology. "Ontotheology," a term coined by Heidegger, is the notion that God is like any other being in the universe. [241] The problem of ontotheology is particularly acute in "theology and science" discourse precisely at the point addressed most directly by Plantinga: that of Divine action and providence. Consider, for example, a typical statement of God's action in the Psalm 135: "He makes clouds rise from the ends of the earth; he sends lightning with the rain and brings out the wind from his storehouses."[242] It is an obvious mistake to conclude the God is literally sitting at the "ends of the earth" pushing around the storm clouds with a giant God-finger. The fact that we can understand the natural processes that give rise to thunderstorms – and that even Google Earth fails to reveal God pushing them around – does not falsify Psalm 135. When Psalm 135 says God causes the thunderstorms, we know this entails a kind of causation that differs from the natural causes of thunderstorms, and that these different levels of causality are not incompatible.

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[241] Regarding ontotheology, *see* Hans Urs von Balthasar, *Theologic, Vol. 2: Truth of God* (San Francisco: Ignatius Press 2004), n. 10, 134-135; Merold Westphal, *Overcoming Ontotheology: Toward a Postmodern Christian Faith* (New York: Fordham Univ. Press 2001); D.C. Shindler, "Hans Urs von Balthasar, Metaphysics, and the Problem of Ontotheology," 1 Analecta Hermeneutica 9 (2009).
[242] Psalm 135:7 (NIV).

Aquinas spoke of these different levels of causality in Aristotelian terms as "primary" and "secondary."[243] Plantinga speaks of what he calls an "Aquinas/Calvin Model" of knowledge and warrant, but he does not seem to appreciate how Aquinas speaks of Divine action or of the ways in which Aquinas and Calvin might relate or differ on this point.[244] And when Plantinga offers the Heidelberg Catechism as a statement of what Christian theists believe about God's action in creation, he does not seem to appreciate the subtle but significant debates about God's providence in relation to creaturely freedom that wound through both the Magesterial Reformation and the Catholic divisions over Jansenism and the very different perspectives of the Eastern Church. Plantinga's lack of depth on this difficult theological question seems to leave him without resources for thinking about Divine action much beyond the flat perspectives of a kind of modern ontotheology. The same problem affects other points at which Plantinga, in some of his other work, significantly modifies the classical understanding of God's perfections that *was* (I would argue) shared by Aquinas and Calvin: that God *in esse* is simple and impassible.[245]

While Plantinga's contributions to epistemology and theology and science are helpful in demonstrating the priority of faith, then, they ironically fail to follow through with the Christian theological claim that God is the *transcendent* creator and cause of all that is, not a *part of* creation. However we try to conceive of and describe God's action in originating and sustaining the creation, or the possibility of miracles, or God's "emotional" connection to the creation, we must maintain the absolute *distinction* between God and creation, or else our project will collapse. For this reason, Plaintinga's focus on "design" arguments ultimately is misplaced.

On the question of teleology and "design," Coakley's methodology holds greater promise because it explicitly refuses onto-theology and asserts the irreducible importance of the doctrines of Trinity, creation, incarnation and resurrection. Indeed, I agree with every "hallmark" of Coakley's method. But Coakley's application of the method to "supernormal" altruism is

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[243] *See generally* Thomas Aquinas, *Summa Contra Gentiles, Book II*; "Medieval Theories of Causality" in Stanford Encyclopedia of Philosophy, available at http://plato.stanford.edu/entries/causation-medieval/; David Burrell, *Freedom and Creation in Three Traditions* (South Bend: Univ. Notre Dame Press 1993).
[244] *See Warranted Christian Belief*, Chapter 8.
[245] *See* "Self-Profile," in *Alvin Plantinga*, ed. James E. Tomberlin and Peter van Ingawen, (Dordrecht: D. Reidel 1985), p. 36; Alvin Plantinga, *God, Freedom and Evil* (Grand Rapids: Eerdmans 1977).

problematic. The most significant problem is the issue of what "normal" or "supernormal" could mean in the context of evolution. As I will explore more fully in Chapter 4.4, "normal" in evolutionary terms is only a statistical description, which changes not only over time but across fitness landscapes. The fact that there are some outliers – individuals who are extraordinarily altruistic in comparison to the mean (Mother Theresa), or extraordinarily selfish (Adolf Hitler) – is in itself neither remarkable nor particularly significant in relation to the total "n" of the sample size, which must include every human who ever has lived. But Coakley hints at what I believe is more significant: the more "normal" phenomenon of the law as an irreducibly transcendent and unique component of human "nature." As Coakley notes, there is a growing sense even among non-religious analytic philosophers that "balefully reductionistic moves in science, economics, public policy and the law" foreclose reasoned inquiry and argument, and a commitment to theoretic and ethical realism require some meaningful concept of "natural law."[246] I agree with Coakley that Aristotle and Aquinas, among others, are fruitful sources for bringing realism about natural law into conversation with evolutionary science, particularly, as Coakley suggests, in connection with neo-Aristotelian philosophy of science.[247] But my focus on "law," rather than on "supernormal" altruism, comports better with Coakley's (and Aquinas') own methodological preference for avoiding the use of theology as an outlier or afterthought. Theology best explains what is "normal," not only what is superadded to "nature."

In this regard, Milbank's approach in TST is attractive for a number of reasons. First, it deflates the presumed historic warfare between "faith" and "science" by offering a holistic account of "reason" that is already embedded in the Christian tradition. There is no possibility of "conflict" between "faith" and "science" here because those terms simply have no meaning in isolation. There is, rather, a grand narrative of God's self-giving creative love, which allows for human beings as creatures to observe and study and delight in the creation. Second, it exposes the pretentions of reductive positivistic "science" as itself a kind of a-theology, with pre-empirical theoretical commitments not derived from its own supposedly objective methods. Finally, it points toward a different form of apologetic in which the Christian narrative is offered in the

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[246] Lecture 6,, 7.
[247] *See Ibid.*, 8.

robust sense of a true *apologia* rather than as an "apology" before the bar of a totalizing modernity.[248]

A potential problem with Milbank's approach is evident in his reference to Feyerabend. Like other constructivist philosophers of science, Feyerabend was an anti-realist and a nominalist.[249] Milbank's theological project and the broader "Radical Orthodoxy," movement it spawned, of course, involves a sustained historical critique of the univocity of being, nominalism, and voluntarism.[250] While postmodern philosophers of science such as Feyerabend and Thomas Kuhn offer helpful resources concerning the social context of the natural sciences, their conclusions are finally incompatible with a realist participatory ontology grounded in the Christian doctrine of creation. It remains unclear how Milbank's "narrative" construal of the natural sciences in TST can cohere with his and Radical Orthodoxy's other broad commitments.[251]

In this regard, while outside the peculiar milieu of conservative Evangelical Protestantism and the American legal system it might be easy to dismiss YECism as a distracting sideshow, contemporary YECism presents a more subtle epistemological challenge for any Christian theologian who seeks to understand the catholic (that is, "universal" in the general sense) Christian tradition in relation to the modern natural sciences. Christian thinkers who reject YECism and accept the broad scientific consensus about the age of the universe and biological evolution usually insist that "evolution" is not the same thing as "evolution*ism*" or "scient*ism*" – that is, that the empirical truths of the natural sciences do not entail commitment to a worldview in which these empirical facts preclude the possibility of God and of some more or less traditional Christian theological claims about providence, the possibility of miracles, original sin, the

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[248] This apologetic theme is developed in Milbank's Foreword to Andrew Davidson, *Imaginative Apologetics: Theology, Philosophy, and the Catholic Tradition* (Grand Rapids: Baker 2012). Interestingly, the chapter on faith and science in that volume was written by Alister McGrath. *Ibid.*, Chapter 10.
[249] *See* Eric Oberheim, *Feyerabend's Philosophy* (Berlin: Walter de Gruyter 2006),, 74-76 (noting that "Feyerabend's nominalism is a form of anti-realism about natural kinds").
[250] *See, e.g., TST*,, 13-18; *see also* Catherine Pickstock, "Duns Scotus: His Historical and Contemporary Significance," in John Milbank and Simon Oliver, eds., *The Radical Orthodoxy Reader* (London: Routledge 2009),, 116-148.
[251] A similar criticism of Milbank's early work is made by Alister McGrath *in A Scientific Theology, Vol. 2: Reality* (Grand Rapids: Eerdmans 2002), 97-118.

inspiration of scripture, and so-on.[252]   This argument is not often well examined by its proponents, but when it is carefully examined, it focuses on epistemology. Often the question is framed in terms of whether some form of positivism is true or whether, instead, some framework of belief must be prior to empiricism. The difficult problem is that savvy YEC advocates make precisely the same move. They further argue, however, that the literal inerrancy of the Bible is a valid and indeed essential aspect of this prior framework of epistemic belief.

Thus the immensely popular YEC apologists and Creation Museum founder Ken Hamm always begins his debates (which are often offered as spectacles for consumption by church and school groups) with epistemological arguments. "How do you *know* life arose through natural processes billions of years ago?," Hamm asks his interlocutor. "Were you there?" He concludes with the coup de grâce: "I know someone who *was* there, and he wrote about it in his book, and he says it *didn't* happen that way."[253] While this is phrased with the flair of a practiced showman, it does imply an epistemology that is not too far removed seemingly more sophisticated postmodern and postliberal epistemologies. Indeed, Hamm does not hesitate to remind us that "there are no pre-theoretical facts" and that "all facts are interpreted." The essential point is that beliefs about God and revelation can and should come before, supply the parameters of, and establish the interpretive matrix for empirical observations. For Hamm, this means that the gap between "uniformitarian" science and YECism at first more of a small shift in perception than a massive rejection of modern science. "Just assume for a moment," Hamm would say, "that God exists, that He revealed Himself to us in the Bible and that the Bible really is true. Could what we observe in nature make sense given those assumptions?" "Yes," Hamm would answer this question, "and in fact our observations would make even *more* sense! Which seems more likely: that the Grand Canyon began as a tiny stream trickling over solid rock over millions and millions of years, or that

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[252] *See, e.g.*, Thomas Burnett, "What is Scientism," The BioLogos Forum, available at http://biologos.org/blog/what-is-scientism.
[253] *See* Ken Ham, "Were You There," available at https://answersingenesis.org/the-word-of-god/were-you-there/; for a somewhat chilling video of Mr. Ham teaching children this mantra, see https://www.youtube.com/watch?v=OFmiLsm3aYM. Mr. Ham's recent debate with "Bill Nye the Science Guy," in which Mr. Ham focuses on his epistemological arguments, is available online at https://www.youtube.com/watch?v=_04S0fYU7FI.

it was produced by the worldwide flood in the days of Noah, which the Bible says cracked open the very foundations of the Earth?"

We might not possess Hamm's rhetorical talents, but we might with some discomfort hear ourselves making the same kind of argument: which seems more likely, that what we have thought of for millennia as the human "mind" and "consciousness" and "will" are merely epiphenomena of a finally deterministic pattern of firing neurons, or that institutions like "the law" really represent the actions of free moral agents who are created in the image of and accountable to God? It is simply a matter of one's pre-empirical frame of reference. If we assume naturalism, then we will interpret the findings of the neurosciences as empirical confirmation of the intuition that matter is all there is. If we assume "theism," then we will minimize the findings of the neurosciences or find ways to accommodate them into a "theistic" framework. If we assume Christian orthodoxy, then we may simply explain "science" away as a narrative.

This line of thought inevitably comes back around to the question of *fides et ratio*: is the role of reason at most supportive of the inner witness of the faith prompted by the Holy Spirit, or can reason alone – "natural reason" in the language of the First Vatican Council – demonstrate the existence of the creator God? "Continental" and postliberal theologies that offer *phenomenological* perspectives on "faith and science" are helpful at this point, because such perspectives ask us what we mean by "reason." If "reason" entails the study of the whole structure of experience and consciousness, and cannot be reduced to the logic of propositional claims, then the supposed gap between the inner testimony of the Holy Spirit and other kinds of arguments may close.[254] "Faith" and "reason" then are not different ways of knowing. "Faith" always entails "reason" and "reason" always entails "faith."

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[254] Advocates of the "Continental" philosophical tradition suggest that this is precisely the benefit Continental thought offers in relation to "Analytic" or Anglo-American philosophy. *See* John McCumber*, Time and Philosophy: A History of Continental Thought* (Montreal & Kingston: McGill-Queen's University Press 2011); Simon Critchley, *Continental Philosophy: A Very Short Introduction* (Oxford: OUP 2011). It is no coincidence that the Radical Orthodoxy thinkers I discuss in this dissertation represent part of the "Continental" stream of philosophical theology, or that the "postliberal" theologians are partial to Wittgenstein, who is often seen as a sort of bridge between the Analytic and Continental traditions.

In terms of "faith and science," a phenomenological approach would not break reality down into discrete units such as "evolution" and "the Fall" and then seek to explain the apparent contradictions between those concepts through ever finer Scholastic distinctions. Such an approach would take reality as a whole, as it presents itself to us, including the reality presented to us through revelation and the Holy Spirit, and recognize that it is both multifaceted and ultimately coherent. Indeed, the claim that creation is both "good" (implying that it is intelligible, beautiful, meaningful, and so-on) and "fallen" (implying that it entails death, decay and dissolution not inherent to its created goodness) reflects our common human experience of a world that is so often heartbreaking because its loveliness is glimpsed only through great pain.

Conor Cunningham's phenomenological reading of evolutionary biology, for example, is powerful, and his use of Patristic sources to narrate the Christian vision as it is both protologically and eschatologically centered in Christ is compelling. There is some ambiguity, however, in the shape Cunningham provides that narrative at one of its most sensitive points: the question of "Adam." Cunningham does not intend to deny the reality of Adam. Nevertheless, most of Cunningham's Patristic sources of Biblical interpretation are Eastern, and most of the contemporary interpreters of those sources upon whom he draws are Eastern Orthodox.[255] Indeed, he quotes Orthodox scholar Peter Bouteneff, who argues (along with many contemporary historical-critical exegetes of all theological stripes) that "[n]either in Paul nor in the rest of the Bible is there a doctrine of original guilt, wherein all are proleptically guilty in Adam."[256] This seems a bit tendentious, as the understanding of "original sin" – and the reception of Augustine, notably in regard to "original sin" – remains one of the key sticking points between the Christian East and West.[257]

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[255] In particular, Peter Bouteneff, *Beginnings: Ancient Christian Readings of the Biblical Creation Narratives* (Grand Rapids: Baker Academic 2008); John Behr, *The Mystery of Christ: Life in Death* (Yonkers: St. Vladimir's Seminary Press 2006); David Bentley Hart, *The Beauty of the Infinite: The Aesthetics of Christian Truth* (Grand Rapids: Eerdman's 2004).

[256] *Ibid.*,, 383, quoting Bouteneff, *Beginnings*,, 41.

[257] *See* Peter Bouteneff, *Christ and Salvation*, in Mary B. Cunningham and Elizabeth Theokritoff, eds., *The Cambridge Companion to Orthodox Christian Theology* (Cambridge: CUP 2008),, 94 (noting that "the transgression and the expulsion from Paradise narrated in Genesis 3 never engendered in the Christian East a doctrine of 'original guilt' or 'guilt in Adam.' . . . Likewise the early Genesis narratives did not produce in the Orthodox East a doctrine of total depravity, which would run counter to the conviction that human nature is at root good, even

Cunningham makes an oblique reference to this difference in a footnote: "Yes, in the West, Fathers such as Augustine seem to emphasize the Fall, the advent of evil, and so on."[258] However, says Cunningham, "it is important to realize that Augustine, for example, developed his notion of original sin in a very particular context, namely, the Donatist controversy, and the Pelagian one. So it was to this degree polemical."[259] But it is unclear whether this contextualization of Augustine can do all the work Cunningham assigns to it, at least not for the Western theological tradition. As late as 1950, for example, Pope Pius XII's Encyclical Humani Generis responded to the developing science of human evolution with an insistence on a literal individual Adam, tied to an Augustinian doctrine of original sin:

> For the faithful cannot embrace that opinion which maintains that either after Adam there existed on this earth true men who did not take their origin through natural generation from him as from the first parent of all, or that Adam represents a certain number of first parents. Now it is in no way apparent how such an opinion can be reconciled with that which the sources of revealed truth and the documents of the Teaching Authority of the Church propose with regard to original sin, which proceeds from a sin actually committed by an individual Adam and which, through generation, is passed on to all and is in everyone as his own.[260]

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though distorted. The Paradise account, together with the other 'decline narratives' of Genesis 1-11, testify to the state of exile in which we currently find ourselves: at odds with God, with each other and with the created environment, and therefore in need of saving."); Kallistos Ware, *The Orthodox Way* (Yonkers: St. Vladimir's Seminary Press Rev. ed. 1995),, 62 (stating that "[o]riginal sin is not to be interpreted in juridicial or quasi-biological terms, as if it were some physical 'taint' of guilt, transmitted through sexual intercourse. This picture, which normally passes for the Augustinian view, is unacceptable to Orthodoxy. The doctrine of original sin means rather that we are born into an environment where it is easy to do evil and hard to do good; easy to hurt others, and hard to heal their wounds; easy to arouse men's suspicions, and hard to win their trust.'"). Ware nonetheless states his understanding of "original sin" in ontological terms: "human beings, made in the image of the Trinitarian God, are interdependent and coinherent. No man is an island. We are 'members of one another' (Eph. 4:25), and so any action, performed by any member of the human race, inevitably affects all the other members. Even though we are not, in the strict sense, guilty of the sins of others, yet we are somehow always *involved*."). *Ibid.*
[258] *Ibid.*,, 513, Note 38.
[259] *Ibid.*
[260] Encyclical Humani Generis of the Holy Father Pius XII, August 12, 1950, ¶37, available at http://www.vatican.va/holy_father/pius_xii/encyclicals/documents/hf_p-xii_enc_12081950_humani-generis_en.html.

Pope Pius seemed to tie this conclusion to what sounds like a fundamentalist-creationist reading of scripture:

> To return, however, to the new opinions mentioned above, a number of things are proposed or suggested by some even against the divine authorship of Sacred Scripture. For some go so far as to pervert the sense of the Vatican Council's definition that God is the author of Holy Scripture, and they put forward again the opinion, already often condemned, which asserts that immunity from error extends only to those parts of the Bible that treat of God or of moral and religious matters. They even wrongly speak of a human sense of the Scriptures, beneath which a divine sense, which they say is the only infallible meaning, lies hidden…..
>
> Further, according to their fictitious opinions, the literal sense of Holy Scripture and its explanation, carefully worked out under the Church's vigilance by so many great exegetes, should yield now to a new exegesis, which they are pleased to call symbolic or spiritual. By means of this new exegesis of the Old Testament, which today in the Church is a sealed book, would finally be thrown open to all the faithful. By this method, they say, all difficulties vanish, difficulties which hinder only those who adhere to the literal meaning of the Scriptures.[261]

To be sure, the Catholic Catechism after the Second Vatican Council seems to sound a more cautious note concerning the different senses of scripture and its interpretation.[262] Pope Benedict XVI, in a set of homilies on the Biblical creation texts, agreed with the Patristic sources cited by Cunningham that "the biblical creation narratives represent another way of speaking about reality than that with which we are familiar from physics and biology."[263] These texts, Pope Benedict said, "do not depict the process of becoming or the mathematical structure of matter; instead, they say in different ways that there is only *one* God and that the universe is not the

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[261] *Ibid.*, ¶¶22-23.
[262] *See Catechism of the Catholic Church*, ¶¶101-141.
[263] Pope Benedict XVI, *'In the Beginning:' A Catholic Understanding of the Story of Creation and the Fall* (Eerdmans 1990),, 25.

scene of a struggle among dark forces but rather the creation of his Word."[264] Concerning "original sin," Benedict took a "relational" approach to the doctrine.[265] For Benedict,

> [t]o be truly a human being means to be related in love, to be of and be for. But sin means the damaging or destruction of relationality. Sin is a rejection of relationality because it wants to make the human being a god. Sin is loss of relationship, disturbance of relationship, and therefore it is not restricted to the individual. When I destroy a relationship then this event – sin – touches the other person involved in the relationship. Consequently sin is always an offense that touches others, that alters the world and damages it. To the extent that is true, when the network of human relationships is damaged from the very beginning, then every human being enters into a world that is marked by relational damage.[266]

This approach to original sin seems a far cry from the seeming Biblical fundamentalism and Augustinian realism of *Humani Generis*. Nevertheless, the Catechism continues to affirm that the Fall and original sin have a historical referent in time: "The account of the fall in *Genesis* 3 uses figurative language, but affirms a primeval event, a deed that took place *at the beginning of the history of man*. Revelation gives us the certainty of faith that the whole of human history is marked by the original fault freely committed by our first parents."[267] The Catechism further refers to the transmission of original sin by propagation:

> the transmission of original sin is a mystery that we cannot fully understand. But we do know by Revelation that Adam had received original holiness and justice not for himself alone, but for all human nature. By yielding to the tempter, Adam and Eve committed a *personal sin*, but this sin affected the *human nature* that they would then transmit *in a fallen state*. It is a sin which will be transmitted by propagation to all mankind, that is, by the transmission of a human nature deprived of original holiness and justice. And that is why original sin is called "sin" only in an analogical sense: it is a sin "contracted" and not "committed" - a state and not an act.[268]

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[264] *Ibid.*

[265] *Ibid.,*, 73.

[266] *Ibid.,*, 73.

[267] *Catechism of the Catholic Church*, ¶390.

[268] *Ibid.,* ¶404.

This trepidation about the role of Adam is also evident in conservative evangelical and Reformed protestant thought, even outside the confines of literalistic fundamentalism. For example, in a recent book on "Adam, the Fall, and Original Sin," within a generally thoughtful collection of essays by evangelical and Reformed scholars, the author of a chapter on the science of human evolution felt compelled to publish pseudonymously, no doubt for fear of his position at an evangelical or Reformed school.[269] In a thoughtful essay in that same volume Hans Madueme lays out the problem and offers some possible solutions.[270] Like Pope Pius in relation to Catholic theology, Madueme argues that a literal Adam and a literal fall are essential to Reformed orthodoxy.[271]

Thus, it is unclear whether Cunningham's effort to employ a phenomenological method that exceeds the limits of both the ultra-Darwinists and the creationists succeeds. Perhaps it succeeds if one opts for an Eastern Orthodox account of the Fall and original sin that draws primarily on some of the Eastern Fathers, or for a neo-orthodox account that views Adam and the Fall as entirely non-historical (as does, for example, David Kelsey). But, it seems, the scientific understanding of biological stands in considerable tension with the Western-Augustinian Christian tradition, as evidenced in documents such as *Humani Generis* and the Catholic Catechism as well as in contemporary conservative Reformed theologians who continue to insist that a "literal" Adam is essential to Christian theology.[272]

Perhaps another of Cunningham's comments towards the end of the final chapter of DPI hints at a solution, or at least at a way of managing some of these tensions: "We all stand before the law; such is the lot of man."[273] As Cunningham notes, "even if we know of laws, we don't think they

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[269] *See* William Stone (a pseudonym), "Adam and Modern Science," in Hans Madueme and Michael Reeves, eds, *Adam, the Fall, and Original Sin: Theological, Biblical, and Scientific Perspectives* (Grand Rapids: Baker Academic 2014).

[270] "'The Most Vulnerable Part of the Whole Christian Account': Original Sin and Modern Science," in *Adam, the Fall, and Original Sin*.

[271] *Ibid.*

[272] *See, e.g.,* William Vandoodewaard, *The Quest for the Historical Adam: Genesis, Hermeneutics and Human Origins* (Grand Rapids: Reformed Heritage Books 2015). As the title of Vandoodewaard's book suggests, he equates debates over the historical existence of Adam with debates over the historicity of Jesus.

[273] *DPI,*, 414.

are *the Law* but are rather somewhat arbitrary – cultural products, or fruits of evolution, and therefore relative."[274] Indeed, "in the Judeo-Christian tradition there was a time before the Law of Moses, a time before the Decalogue."[275]   Yet, he continues, "from the time of Adam, there was prohibition."[276] Perhaps "the Law" is the "missing link" between Origen, Gregory of Nyssa, and Augustine, the methodological basis for narrating the true harmony of "faith" and "science." As Pope Benedict suggested, perhaps the loss of relational friendship occasioned by the Fall is precisely the loss of the Law, and perhaps Christ's fulfillment of the Law is what enables us to overcome the ban of exclusion from our humanity and recover our participation in the law of love. "Law" might be the thread by which Christian theology "out-narrates" *and* out-argues reductive naturalism in a rich tapestry of human culture that participates in God's gracious gift of creation and redemption.

Traditional Christian (and Jewish and Islamic) theology asserts that God has revealed Himself to specific individuals at unique moments in history, and that these moments of revelation can establish a new elect people and by extension a new relationship between God and humanity: the covenant with Noah, the call of Abraham, Moses at the burning bush and his receipt of the Torah, the anointing of David, the baptism of Jesus, the conversion of the Apostle Paul. There was also such a moment of revelation to "Adam:" when God disclosed to humanity the law of the two trees in the Garden. This act of God's self-disclosure, I argue, is an important part of what sets Adam apart from the broader stream of human biological evolution. Based on what we know about neural plasticity and epigenetic inheritance, we might even suggest that this encounter subtly but profoundly changed us *biologically*, even if Adam and his heirs undoubtedly remained embedded in the genetic flow among other contemporary *homo sapiens, homo neanderthalis*, and perhaps other species.[277]

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[274] *Ibid.*
[275] *Ibid.*
[276] *Ibid.*
[277] *See, e.g.,* Michael Merzenich, *Soft-Wired: How the New Science of Brain Plasticity Can Change Your Life* (San Francisco: Parnassus Publishing 2d ed. 2013); Edward Heard and Robert Martienssen, "Transgenerational Epigenetic Inheritance: Myths and Mechanisms," Cell 157:95-109 (2014).

As John Milbank notes in his most recent work, modernity tends to view "law" as Leviathan: a form of repression against our "true" animal nature.[278] Law can, of course, be repressive if it is not rooted in justice. But law as law is essential to freedom. Law sets the conditions *for* freedom. Indeed, the universe itself requires "law" as a condition of its existence. The "laws of nature" might represent the most basic potentials of being and existence.[279] We could even speak of a sort of "law" through which the most basic potentials of the being and existence of *God* can be expressed: the "law" of inner-Trinitarian relations. If each of the three persons of the Trinity is uniquely a "person," as orthodoxy holds, then there are "boundaries" to each of their personhood. Likewise, if each of the three persons of the Trinity interpenetrate each other and are of one substance, as orthodoxy also holds, then there is a "boundary" to their unity. This is, of course, an analogical use of the term "law," and we must not think of this sort of "law" as an imposition *upon* the being of God. Rather, these "laws" comprise a set of relationships that *proceed from* the being of God.[280] As such, they are an essential aspect of God's self-donation in creation, and comprise the most basic potentials of creation itself. At its heart this law is the law of ecstatic, self-giving *love*. The most basic law of "nature," and the most basic law of "politics," is the law of love.

The argument I am foreshadowing here could be considered a variant of the "moral argument" for God's existence.[281] I wish to distance myself somewhat from such arguments, however, in that they tend to argue from the phenomenon of an intuitive "moral sense" in humans to God's existence as the source of that intuition. My claim is more "Augustinian" – and, I would suggest, more fully "Thomistic" – than most contemporary versions of the moral argument. It is not so much our knowledge of objective moral truth that points toward God, but our knowledge that we are *separated* from the final, objective truth towards which our moral inclinations pull us:

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[278] John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (Wiley-Blackwell 2013).

[279] For a discussion of the "laws of nature," see Chapter 4.3.

[280] For a discussion of the procession of the Trinitarian persons and the being of God, see Balthasar, *Theo-Logic, Vol. 2*, Part III.A.2 ("Identity and Difference in God") (noting that "[t]he divine processions cannot, like those within a human mind, be accidental … since there is nothing accidental in God. They must therefore be identical with the real divine essence.").

[281] For a general discussion of such arguments, see "Moral Arguments for the Existence of God," in *Stanford Encyclopedia of Philosophy*, available at http://plato.stanford.edu/entries/moral-arguments-god/.

that is, towards God, who is love. Moreover, it is in understanding this lack that we truly begin to know *ourselves* both as *adamah* and as "in Adam."[282] One important way in which we can know our sense of lack in this regard is real comes from God's disclosure of the positive law in the Divine command and in the uniquely human practice of formulating codes of positive law. This way of framing the moral claim, I argue, is more consistent with the historic, orthodox Christian tradition than many modern formulations. Indeed, it is precisely the claim made by St. Paul in his letter to the Romans:

> Therefore, just as through one man sin entered into the world, and death through sin, and so death spread to all men, because all sinned—for until the Law sin was in the world, but sin is not imputed when there is no law. Nevertheless death reigned from Adam until Moses, even over those who had not sinned in the likeness of the offense of Adam, who is a type of Him who was to come.[283]

But if the phenomenon of "law" can be reduced to neurobiology, as some neurolaw scholars argue, this story loses all purchase. If "law" is a phenomenon of human experience that shows how humans are related to a transcendent source, I can extend Cunningham's argument about why Christian theology and biological evolution are compatible, and indeed about why evolution is *impossible* without God. If "law" is merely an epiphenomenon of neurobiology, I have no argument. The remaining chapters of this Dissertation attempt to show why "law" *cannot* be reduced to mere neurolaw, why this impossibility shows that human beings must be related to a transcendent source, and how Christian theology makes good sense of these claims. In the next Chapter, I survey various strands of traditional Christian (and Jewish) theology concerning law. In Chapter 3, I consider perspectives from paleoanthropology and neurobiology on the development of human agency and "mind" which could undermine my theological claims. I begin to argue in Chapter 3, however, that efforts by scientists working in these disciplines to eliminate the concepts of transcendent agency that underpin traditional notions of "law" are unsupported and self-defeating.

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[282] Cf. Romans 4:12.
[283] Romans 5:12-14 (NASB).

Chapter 2: Law and Christian Theology

Christian theology, with its roots in the *Torah* and the Hebrew prophetic and wisdom literature, has always been interested in the concept of law. This Chapter shows how Christian concepts of law traditionally have been tied to the doctrines of God and creation and in particular to a participatory ontology of creation. Because God is a God of order, He orders His creation, and He commands His creatures in accordance with His internal order. But God's orderliness is not an order imposed from "above" God by a power beyond Himself. Rather, God's order *is* His being, which is his life of perichoretic Triune love. The fundamental law of creation therefore is one of participation in God's Triune love. The materials in this chapter lay the groundwork for a negative critique of reductive neurolaw (Chapter 3) and for a positive articulation of a theory of natural law in light of the methodological perspective adopted in Chapter 1.

1.   The "Law" of Inner-Trinitarian Relations

It is unusual to speak of the relationship of the members of the Trinity as a form of "law." Our inclination is to think of "law" as something imposed from the outside by an authority. We cannot, of course, speak of God as though there is some such authority outside God. But "law" can also comprise an inherent property of a thing. I will argue, for example, that the moral or "natural" law and the laws of nature are inherent properties of creation. These "laws" are not imposed from above but either simply *are*, or emerge as properties from lower-level structures and interactions.

What theology says about inner-Trinitarian relations is analogous to such an inherent or emergent property of law. We must be careful here to stress the analogical nature of this claim. God is not a thing in the universe. God is not merely "an immensely wise and powerful being," not even the most wise and powerful being imaginable, for then "God" would remain a being as frogs and birds and humans are beings.[284] Nor do attributes or "properties" of God emerge over time, as process theologians suggest.[285] Rather, "God is not only the ultimate reality that the intellect and will seek but is also the primordial reality with which all of us are always engaged in

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[284] David Bentley Hart, *The Experience of God: Being, Consciousness, Bliss*, 35.
[285] For a discussion of process theology, see Chapter 1.4.

every moment of existence and consciousness, apart from which we have no experience of anything whatsoever."[286] It is as this transcendent "primordial reality" that God simply *is* the "three persons in one essence" of classical Christian theological grammar.

The Athanasian Creed is a widely used formulation of that grammar, particularly in the Western church. Its formulations are given as law-like statements:

> But the Godhead of the Father, of the Son, and of the Holy Spirit is
> all one, the glory equal, the majesty coeternal.
>
> Such as the Father is, such is the Son, and such is the Holy Spirit.
>
> ….
>
> The Father is made of none, neither created nor begotten.
>
> The Son is of the Father alone; not made nor created, but begotten.
>
> The Holy Spirit is of the Father and of the Son; neither made, nor
> created, nor begotten, but proceeding.
>
> So there is one Father, not three Fathers; one Son, not three Sons;
> one Holy Spirit, not three Holy Spirits.
>
> And in this Trinity none is afore or after another; none is greater or
> less than another.
>
> But the whole three persons are coeternal, and coequal.
>
> So that in all things, as aforesaid, the Unity in Trinity and the Trinity
> in Unity is to be worshipped.[287]

All of these statements imply corresponding negatives. The Father, Son and Holy Spirit cannot differ in Godhead, glory, majesty, greatness, eternality or equality. The Son cannot proceed from the Holy Spirit, the Holy Spirit cannot proceed from the Son alone, and the Father cannot proceed

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[286] *Ibid.* at 10.
[287] The Athanasian Creed, available at http://www.ccel.org/creeds/athanasian.creed.html

from any other.[288] To state otherwise is to worship three gods rather than one, or a god of one *prosopon* rather than the Trinity. If God were otherwise, it would not be God.

Other "laws" concerning God flow from these "laws" of the Trinity. The persons of the Trinity enjoy perfect, eternal fellowship with each other, and therefore "God *is* Love" (θεὸς ἀγάπη ἐστίν) (1 John 4:8) (emphasis added). The persons of the Trinity inhere in and are utterly transparent to each other, and therefore "God *cannot* lie" (ἀψευδὴς θεὸς – literally "unlying God") (Titus 1:2) (emphasis added).   These are not just accidental, contingent attributes of a more fundamental substance, such the way the claim "I am a Caucasian" relates to the expression of my genes in the pigmentation of my skin. To say that "God *is* love and *is* truth and *is* just and *is* holy" is finally to say the same thing, that "God *is* God," which is what God "names" Himself: "I AM WHO I AM," הְיֶה אֲשֶׁר אֶהְיֶהﬡ, *ehyeh ʾašer ʾehyeh* (Exodus 3:14).[289]

2. The Laws of Divine Command

That God issues commands in the form of "law" is clear in scripture. In the Bible's second creation narrative, God gives the man (the *adam*) four gifts, all of them embodied in trees: beauty, food, life, and freedom. The story tells us that "all kinds of trees grew out of the ground," including "trees that were pleasing to the eye and good for food," the "tree of life," and the "tree of the knowledge of good and evil".[290] These latter two trees, embodying life and freedom, were placed in the center of the garden.[291]

Another gift accompanied the "tree of the knowledge of good and evil": the gift of Law. This gift of law is the first command God gives to the man: "You are free to eat from any tree in the garden; but you must not eat from the tree of the knowledge of good and evil, for when you eat

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[288] This is of course a "Western" formulation of double procession. The "Eastern" formulation would state that both the Son and the Spirit proceed from the Father alone. Regardless of which formulation is employed, the result is a "law" of procession.

[289] As Balthasar puts it, "the Father's always already giving himself away, which thought can neither go behind nor exhaust, is the ultimate ground for God's being incomprehensibly more than any finite concept can comprehend: love, posited in its absoluteness, is absolutely groundless, and it communicates this groundlessness to everything that, qualifying its plenitude more closely, can be called a 'property' of God." *Theo-Logic, Vol. 2*, Sec. III.A.2.b.

[290] Gen. 2:8-9 (NIV).

[291] Gen. 2:9 (NIV).

from it you will certainly die."[292]   The law God gave to the man was a precious gift because it would serve all of the other gifts. In his commentary on this passage in Genesis, R.R. Reno notes that

> Human beings are the most trainable of all animals, and therefore we are the most capable of developing into highly focused, purposeful creatures. This is why the ideal of self-possession and freedom depends upon the capacity for obedience. One must be able to accept instruction from another in order to begin the process of training that leads to genuine self-command. A person in bondage to passing impulses is hardly free in any desirable sense.[293]

The man's exercise of the gift of free will to choose to eat of the "knowledge of good and evil," God warned, would lead to death – the ultimate destruction of beauty, food, life, and freedom. An intimate acquaintance with evil, the kind of "knowledge" that arises from the sexual union of a man and wife, is a bondage to the dark nothing of death. Law is the boundary God set in the Garden against nihilism. As Reno notes, "[i]n this sense, the scriptures echo Aristotle: the untrained soul is unformed and dissipated."[294]   God's Law, given in the Garden, trains us to achieve the ends for which we were created.

The same pattern is recapitulated in the Biblical flood narrative. There, God nearly destroys the entire creation because there is no other way to check human violence.[295] When the floodwaters

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[292] Gen. 2:16-17 (NIV).

[293] R.R. Reno, *Brazos Theological Commentary on the Bible: Genesis* (Ida: Brazos Press 2010),, 70.

[294] *Ibid.* at 71.

[295] Gen. 6:1-5. The Biblical flood narrative, of course, presents numerous exegetical and hermeneutical challenges, particularly for anyone seeking to understand the Biblical revelation's relationship to the overwhelming evidence from the various physical sciences for the age of the Earth, the apparent physical impossibility of a literally global flood, the geographic dispersion of species, the lack of a recent human population bottleneck, and so-on. *See, e.g.,* Davis A. Young and Ralph F. Stearley, *The Bible, Rocks and Time: Geological Evidence for the Age of the Earth* (Downers Grove: IVP 2008). As we have noted, many fundamentalists nevertheless insist on reading this narrative "literally" and construct elaborate "young earth creationist" theological and hermeneutical systems in which a recent global flood plays a foundational role. *See* Ronald Numbers, The Creationists. The same group that constructed the "Creation Museum" is now busily constructing a "Noah's Ark Park" with a full-scale replica of the Ark using the Biblical dimensions. *See* the "Ark Encounter" website, available at https://arkencounter.com/. Others are still tied to a naïve hermeneutic attempt to picture the Noahic flood as a massive but "local" event that covered most of the Ancient Near East – a scheme that also simply cannot hold water in light of the natural and physical sciences and other considerations. *See* Hugh Ross, *A Matter of Days* (Colorado Springs: NavPress 2004). In response, some Christian interpreters take the flood narrative as entirely metaphorical and suggest that it has no historical referent at all. In my opinion, a better approach is to understand these texts as an effort to make

recede and creation is restored, God establishes another covenant with humanity through Noah. It is a gift of re-creation, and that gift is accompanied by law. This includes a negative command:

> you must not eat meat that has its lifeblood still in it. And for your lifeblood I will surely demand an accounting. I will demand an accounting from every animal. And from each human being, too, I will demand an accounting for the life of another human being.
>
> "Whoever sheds human blood,
>   by humans shall their blood be shed;
> for in the image of God
>   has God made mankind.[296]

It also includes a recapitulation of the positive command given in the Garden: "As for you, be fruitful and increase in number; multiply on the earth and increase upon it."[297] Thus there was law when the waters of chaos receded after the Flood and God reaffirmed His commitment to the creation.

The pattern is again recapitulated in the giving of the Decalogue.[298] God delivered Israel from slavery in Egypt and established His people in unique covenantal relationship by giving them law. The authority of the Decalogue is rooted in God's person as He has acted in relation to Israel: "I

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sense of a pervasive cultural memory in the ancient near east. The Epic of Gilgamesh and related texts suggest that the theme of a Great Flood ran deep through the cultures that produced these Biblical texts. *See* James B. Pritchard, ed., *The Ancient Near East: An Anthology of Texts and Pictures* (Princeton: Princeton Univ. Press 2010). The Biblical flood narrative then, perhaps, represents a literary representation of a memory grounded in an act of God in time, the "scientific" or "historical" – in the modern sense – parameters of which are lost to us. For the purpose of doing theology, we take these historical-critical considerations into account in order to avoid naïve mistakes such as the Creation Museum and the Noah's Ark Park, but we nevertheless return to the text with a "second naiveté" in order to hear what God may be saying to the Church in and through the text today in the light of Christ, particularly in light of the central Christian narrative identified in the Rule of Faith and the early Creeds. *See, e.g.,* Anthony C. Thistleton, *New Horizons in Hermeneutics: The Theory and Practice of Transforming Biblical Reading* (Grand Rapids: Zondervan 1992); Nicholas Wolterstorff*, Divine Discourse: Philosophical Reflections on the Claim that God Speaks* (Cambridge: CUP 1995); Ellen F. Davis and Richard B. Hays, *The Art of Reading Scriptur*e (Grand Rapids: Eerdmans 2003). This sort of reading, in fact, seems more true to the Fathers than modernist "scientific" readings, even if the Fathers generally would have had no reason to question the "historical" basis for the literal sense of the flood narrative. *See* Bouteneff, *Beginnings: Ancient Christian Readings of the of the Biblical Creation Narratives.*
[296] Gen. 9:4-6.
[297] Gen. 9:7.
[298] *See* Exodus 20:1-17.

am the Lʘʙ˴ your God, who brought you out of Egypt, out of the land of slavery."[299] The Law as

gift was a central theme in Israel's worship:

> The law of the Lord is perfect,
> refreshing the soul.
> The statutes of the Lord are trustworthy,
> making wise the simple.
> The precepts of the Lord are right,
> giving joy to the heart.
> The commands of the Lord are radiant,
> giving light to the eyes.
> The fear of the Lord is pure,
> enduring forever.
> The decrees of the Lord are firm,
> and all of them are righteous.[300]

In the exilic and post-exilic literature, when Israel's prophets sought to explain the Nation's defeat

by Assyria and Babylon, the central reasons for this disaster were idolatry and the failure to live

by the Law's requirements for justice, conditions that were closely linked. This is the cry of the

prophet Micah:

> Hear this, you leaders of Jacob,
>   you rulers of Israel,
> who despise justice
>   and distort all that is right;
> who build Zion with bloodshed,
>   and Jerusalem with wickedness.
> Her leaders judge for a bribe,
>   her priests teach for a price,
>   and her prophets tell fortunes for money.
> Yet they look for the Lord's support and say,
>   "Is not the Lord among us?
>   No disaster will come upon us."
> Therefore because of you,
>   Zion will be plowed like a field,

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[299] Gen. 20:2. The Bible's narratives concerning Israel in Egypt and the Exodus also, of course, present intractable historical-critical problems. *See* the discussion in Note 273 above for some hermeneutical considerations.
[300] Psalm 19:7-9.

> Jerusalem will become a heap of rubble,
>> the temple hill a mound overgrown with thickets.[301]

In particular, the center of this collapse was the failure to take the law deeply to heart, as evidenced by mistreatment of the poor, the widow, and the stranger. The prophet Jeremiah offered this indictment: "Also on your skirts is found the lifeblood of the innocent poor. . . ."[302] Not merely superficial acknowledgement of the Law, but the internalization of its principles, was what God desired of the Nation:

> This is what the LORD Almighty, the God of Israel, says: Reform your ways and your actions, and I will let you live in this place. Do not trust in deceptive words and say, "This is the temple of the LORD, the temple of the LORD, the temple of the LORD!" If you really change your ways and your actions and deal with each other justly, if you do not oppress the foreigner, the fatherless or the widow and do not shed innocent blood in this place, and if you do not follow other gods to your own harm, then I will let you live in this place, in the land I gave your ancestors for ever and ever. But look, you are trusting in deceptive words that are worthless.
>
> Will you steal and murder, commit adultery and perjury, burn incense to Baal and follow other gods you have not known, and

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[301] Micah 3:9-12. The historical context of Micah's speeches is unclear. *See* David H. Master, "Micah," in John H. Walton, ed., *Zondervan Illustrated Bible Backgrounds Commentary, Vol. 5* (Grand Rapids: Zondervan 2009). Micah 1:1 states that Micah received his call "during the days of Jotham, Ahaz and Hezekiah, kings of Judah." Micah 1:1 (NASB). Some scholars suggest Micah may have lived during the last years of Jeroboam II in the north and the early years of Jotham in Judah. Master, "Micah," at 122. Others relate Micah's oracles to the Syro-Ephraimite war in 735-734 B.C., the destruction of Samaria in 722/21 B.C., or events connected with King Hezekiah in 712 or 701 B.C. *Ibid.* at 122-23. In any event, it is clear that Micah was written during a period of significant political and economic upheaval. Master suggests that "[a]s the Phoenicians began their push westward across the Mediterranean, they created enormous trading networks enhanced by increasingly efficient transportation strategies. Throughout the eight century, the Phoenecian desire for agricultural produce for trade drove famers throughout the region to adopt 'more efficient' (and likely more ruthless) methods." *Ibid.* at 123. Thus, for Master, Micah's oracles may represent a call for justice and mercy for those affected by these massive social and economic changes. *See Ibid.*

[302] Jer. 2:34 (NASB). As Steven Voth has noted, "Jeremiah was born into a world of violent changes and intense power struggles." Steven Voth, "Jeremiah," in in John H. Walton, ed., *Zondervan Illustrated Bible Backgrounds Commentary, Vol. 4* (Grand Rapids: Zondervan 2009). The context of Jeremiah is the fall of Jerusalem to the Babylonians in 586 B.C. *Ibid.* at 232. This event produced "a profound an irreversible scar in the life and identity of ancient Israel." *Ibid.* at 230. As Richard Hays has noted, the trauma of this event, along with the hope expressed by Jeremiah at the very end of his prophetic text (Jeremiah 31), echo through the texts of the Gospels: "the echo of Jeremiah 31 offers comfort, beckoning God's people to lean forward into the hope of the days that are surely coming when God – in the person of Jesus – will have *mercy*, bringing back the exiles, and write the Law on their hearts." Richard B. Hays, *Reading Backwards: Figural Christology and the Fourfold Gospel Witness* (Waco: Baylor Univ. Press 2014), 43.

then come and stand before me in this house, which bears my Name, and say, "We are safe"—safe to do all these detestable things? Has this house, which bears my Name, become a den of robbers to you? But I have been watching! declares the LORD.[303]

The consequence of this departure from God and His law was a de-creation, a return to the primal chaos, an abolition of humanity:

I looked on the earth, and behold, *it was* formless and void;
And to the heavens, and they had no light.
 I looked on the mountains, and behold, they were quaking,
And all the hills moved to and fro.
 I looked, and behold, there was no man,
And all the birds of the heavens had fled.[304]

The intertestamental literature, particularly the books of the Macabees, apocalyptic texts such as 1 and 2 Enoch and the Qumran documents, likewise testify to the enduring sense that, even as the Second Temple is built in Jerusalem, the nation remains in exile because of its failure to keep *Torah*.[305] This is the background into which Jesus of Nazareth was born and began his ministry.

Jesus, like the prophets before him, defined the true observance of the Law as an inward transformation that issues in worship of God and regard for others: "Hear, O Israel! The Lord our God is one Lord; and you shall love the Lord your God with all your heart, and with all your soul, and with all your mind, and with all your strength" and "You shall love your neighbor as yourself."[306] It is often suggested that Jesus upset the "legalism" of strictly observant Jews (including the Pharisees) by flaunting rules like the restriction on harvesting food or healing people on the Sabbath. But Jesus stood in the tradition of the Hebrew prophets and of other Second Temple Jewish reformers in emphasizing that the central focus of the *Torah* was the reformation of the heart reflected in the basis for the entire Law, the *Shemah*. This is evident

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[303] Jer. 7:3-11 (NIV).
[304] Jer. 4:23-25 (NASB). The reference to the earth as "formless and void" – ṯō·hū wā·ḇō·hū – is a quotation from Gen. 1:2. For a beautiful musical rendition of this passage, see the *accompagnato* in Part One of Handel's Messiah.
[305] *See* Shaye D. Cohen, *From the Maccabees to the Mishnah* (Westminster John Knox 2d ed. 2006); George W.E. Nicklesburg*, Jewish Literature Between the Bible and the Mishnah* (Fortress Press 2d ed. 2011).
[306] Mark 13:29-31 (NASB).

most centrally in The Sermon on the Mount, in which Jesus, as the New Moses, interprets the *Torah* through the foundational Law of Love. The Sermon on the Mount is not in any way a rejection of the Divine Command in the *Torah*. The Sermon, rather, is Jesus' restatement of the Divine Command.

As Christianity began to separate from Judaism in the first century, and particularly as more non-Jews became Christians, the early Church confronted the problem of how to interpret and apply the Torah.[307] Factions developed concerning whether Gentile Christians were required to observe the Torah's rules concerning circumcision and diet, as reflected in Acts 15. Jesus' saying Matthew 5:17-19 seems to represent the sentiments of the pro-Torah faction:

> Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfill them. For truly I tell you, until heaven and earth disappear, not the smallest letter, not the least stroke of a pen, will by any means disappear from the Law until everything is accomplished. Therefore anyone who sets aside one of the least of these commands and teaches others accordingly will be called least in the kingdom of heaven, but whoever practices and teaches these commands will be called great in the kingdom of heaven.[308]

However, as church historian John McGuckin notes, even Matthew's Gospel knocks against the legalism of the Pharisees in favor of "a new philosophy of law."[309] So the concluding line of the pericope from Matthew: "For I tell you that unless your righteousness surpasses that of the Pharisees and the teachers of the law, you will certainly not enter the kingdom of heaven."[310] In both Matthew and Mark's Gospels, McGuckin suggests, "[t]he old law of external observances is . . . contrasted with a new spirit of seeking the inner intentionality of law: access to God's will

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[307] See John A. McGuckin, *The Ascent of Christian Law: Patristic and Byzantine Formulations of a New Civilization* (St. Vladimir's Seminary Press 2012),, 17-18.

[308] Matt. 5:17-19 (NIV). See commentary on this text in *The Jewish Annotated New Testament* (Oxford: OUP 2011).

[309] McGuckin, *The Ascent of Christian Law*,, 18.

[310] Matt. 5:20. Commenting on this passage, Chyrsostom said "[n]ote how Jesus also in this passage commends the old law. He does so by comparing it with the new, a comparison that implies that is is of the same family, so to speak. More or less, it does share many family resemblances. He does not find fault with the old law but in fact makes it more strict. Had it been evil, Jesus would not have accentuated it." *Ancient Christian Commentary on Scripture*, New Testament Vol. Ia, 98 (Downers Grove: IVP 2001).

and the implementation of behavior that is acceptable."[311] Thus, says McGuckin, "the Church of the first century became a strong movement to call for a radical reconstitution of the Torah, giving primacy to the *scholia* of Jesus himself as now collected in the Gospel texts, affording him a far higher status as Law-Giver than Moses."[312]

Still, McGuckin notes, the early Church understood that the Law is not abrogated in Jesus, but rather is "radical[ly] renovated."[313] First century Christians asserted "that Jesus was the heart and center of all law … the Church elevate[d] Jesus as its Lawgiver in preference to Moses."[314] This new philosophy of law, McGuckin believes, led to the Church's separation of the "ceremonial" and "moral" law (reflected, for example, in Paul's letter to the Galatians) and its prioritization of the sayings of Jesus as the hermeneutical lens for reading Israel's scriptures – a "New Constitution" in Christ.[315] But this New Constitution was of the *living* Christ, "a living and ongoing principle, not merely a dead reference to a body of literature."[316] McGuckin discerns here "a specifically Aristotelian principle in relation to the interpretation of law: that the 'mind of the Lawgiver' must be consulted in all matters of legal interpretation and development of first principles."[317]

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[311] McGuckin, *The Ascent of Christian Law,* 18-19.

[312] *Ibid.* at 19. *See also* Robert Louis Wilken, *The Spirit of Early Christian Thought* (New Haven: Yale Univ. Press 2003). As Wilken notes, "[e]arly Christian thought . . . was as much an attempt to penetrate more deeply into the mystery of Christ, to know and understand what was believed and handed on in the churches, as it was to answer the charges of critics or explain the faith to outsiders." *Ibid.* at 3.

[313] McGuckin, *The Ascent of Christian Law*, 19. One way in which this occurred, which is not emphasized by McGuckin, was in Justin's supposed separation of the ceremonial and moral law, and in the allegorizing of the Old Testament law in relation to the witness of the Old Testament prophets. *See* Jaroslav Pelikan, *The Christian Tradition: A History of the Development of Doctrine, Vol. 1*, *The Emergence of the Catholic Tradition* (100-600) (Chicago: Univ. Chicago Press 1971), pp. 15-21. Pelikan suggests that "[a]lthough the law and the prophets belonged together in the language of Jewish theology, Christian theology identified its cause with that of the prophets against the law." *Ibid.* at 18. Nevertheless, Pelikan observes, "the most important early heresies were not Jewish, but anti-Jewish in their inspiration." *Ibid.* at 71. The early church therefore rejected Marcion's efforts to deny that the Old Testament law was part of scripture. *Ibid.* at 71-81. Marcion's followers had even attempted to amend Matt. 5:17 to read "'I have not come to fulfill the law but to abolish it.'" *Ibid.* at 76.

[314] McGuckin, *The Ascent of Christian Law*, 19*.*

[315] *Ibid.*,, 19-20. See also Pelikan, *The Emergence of the Catholic Tradition*, 71-81.

[316] *Ibid.*, 20. As Wilken notes, for the early Church, "[t]he Christian gospel was not an idea but a certain kind of story, a narrative about a person and things that had actually happened in space and time." Wilken, *The Spirit of Early Christian Thought*, 15.

[317] *Ibid.*

In its first centuries the Church did not produce any extensive written law codes. This is not surprising, given the Church's initial position as an apocalyptic movement often subject to persecution by the Roman authorities.[318] As McGuckin notes, "[t]o have told any writer of the New Testament that the icon of the Lord would be set up in the imperial palace would have drawn out merely disbelieving laughter."[319] Nevertheless, some of the early epistolary literature in the New Testament, particularly the deutero-Pauline epistles, as well as some of the very early Patristic literature, begin to establish rules for conduct in the Church that represent a sort of internal law.[320]

An interesting example of this process is the Epistle of 1 Timothy, probably composed in Paul's name within a Pauline Christian community sometime after Paul's death.[321] The introduction to 1 Timothy criticizes a group of troublemakers who have deviated from instruction based in "love that comes from a pure heart, a good conscience, and sincere faith."[322] The false teachers have "turned to meaningless talk, desiring to be teachers of the law, without understanding what they are saying or the things about which they make assertions."[323] They "occupy themselves with myths and endless genealogies that promote speculations" instead of offering "the divine training that is known by faith."[324]

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[318] *Ibid.*, 21.

[319] *Ibid.*, 21.

[320] *Ibid.*, 21-25.

[321] *See, e.g.*, Richard Hays, *The Moral Vision of the New Testament: A Contemporary Introduction to New Testament Ethics* (HarperOne 1996); Introduction to 1 Timothy, *The Jewish Annotated New Testament* (Oxford Univ. Press 2011); Luke Timothy Johnson, *The Writings of the New Testament, Third. Ed.* (Minneapolis: Fortress Press 2010), 375-375-383, 389-395. Douglas A. Campbell, *Reframing Paul: An Epistolary Biography* (Grand Rapids: Eerdmans 2014), 367-368.

[322] 1 Tim. 1:5 (NRSV). Luke Timothy Johnson suggests that the opponents of Pauline teaching addressed in 1 Timothy likely probably represent "the sort of elitist esoteric groups we so often encounter in the religiosity of the Hellenistic world," for example Gnostics. Johnson, The Writings of the New Testament, 390. Risto Saarinen similarly notes that the "myths" of the false teachers "may refer to many kinds of Hellensistic myths, for instance, pagan gods, stories of the origin of the world, esoteric and gnostic teachings in both Judaism (Titus 1:14) and other circles." Risto Saarinen, *Brazos Theological Commentary on the Bible, The Pastoral Epistles with Philemon & Jude* (Grand Rapids: Brazos Press 2008), 33.

[323] 1 Tim. 1:6-7 (NRSV).

[324] 1 Tim. 1:4. (NRSV). Saarinen suggests that "[t]he apostle's warning against myths and genealogies is directed against the intellectual and imaginative stimulation they provide: one should not believe in imagined stories, but had better trust the sound doctrine handed over ty reliable witnesses." Saarinen, Brazos Theological Commentary, 33.

The problem, the author says, is not the law, but manner in which the false teachers use the law:

> Now we know that the law is good, if one uses it legitimately. This means understanding that the law is laid down not for the innocent but for the lawless and disobedient, for the godless and sinful, for the unholy and profane, for those who kill their father or mother, for murderers, fornicators, sodomites, slave traders, liars, perjurers, and whatever else is contrary to the sound teaching that conforms to the glorious gospel of the blessed God, which he entrusted to me.[325]

Here the writer sounds like Oliver Wendell Holmes: the "law" has nothing but a negative role, although the reference here seems to be to the Torah and not to the Roman civil law in general.[326] But the author then recites principles of right order that mirror Roman household codes, including prayer for the civil authorities:

> First of all, then, I urge that supplications, prayers, intercessions and thanksgivings be made for everyone, for kings and all who are in high positions, so that we may lead a quiet and peaceable life in all godliness and dignity. This is right and is acceptable in the sight of God our Savior, who desires everyone to be saved and to come to the knowledge of the truth.[327]

The civil authorities, it seems, are thought to have some positive role in facilitating good order, although this also might consist primarily in restraining evil people. Civil order will facilitate churchly order, including modesty in dress, the subordination of women to male authority, the roles of Bishops and Deacons, respect for elders, the maintenance of a widow's list (under very specific conditions), and slaves' respect for their masters.[328]

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[325] 1 Tim. 1:8-11 (NRSV).

[326] See *The Jewish Annotated New Testament*, text note to 1 Tim. 1:7-8. Richard Hays sounds a similar note about the author of this text: "it is hard to avoid the impression that the vision of the Christian life in 1 Timothy is characterized by conformity to fixed convention of respectable, law-abiding behavior. The characteristic Pauline themes of freedom, suffering with Christ, costly love for the sake of the community, and living in the creative tension between the ages have been drastically deemphasized, if not entirely abandoned. In their place we find the modest, mundane virtues of the orderly household." Hays*, The Moral Vision of the New Testament*, 70.

[327] 1 Tim. 2:1-4.

[328] 1 Tim. 2, 3, 4, 5, 6. Hays suggests that "[p]erhaps the moral vision of the pastorals was inevitable (and even necessary) for the church at the end of the first century to achieve social cohesion and to survive external pressures." Hays, The Moral Vision of the New Testament, 71. Douglas Campbell argues that 1 Timothy's

New Testament scholars note that the deutero-Pauline 1 Timothy contrasts in some ways with the theology of law in the clearly authentic Pauline letters of Romans and Galatians. Both in Romans and Galatians, Paul pictures the Torah as a negative propaedeutic that leads to a new kind of freedom.[329]

For example, in Romans 3:19, Paul says, "[n]ow we know that whatever the law says, it speaks to those who are under the law, so that every mouth may be silenced, and the whole world may be held accountable to God."[330] Similarly, in Galatians 3:2-3, Paul poses an exasperated question to the Galatian Christians: "The only thing I want to learn from you is this: did you receive the Spirit by doing the works of the law or by believing what you heard? Are you so foolish? Having started with the Spirit, are you now ending with the flesh?"[331] In fact, Paul tells the Galatians, "all who

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emphasis on law and household order represents a response, in part, to Marcionism. Campbell, *Reframing Paul*,, 368.

[329] See Hays, *The Moral Vision of the New Testament*, 70.

[330] Romans 3:19 (NRSV). Frank Thielman notes that "Paul's use of the term *law* in the argument in Romans is perhaps the most perplexing element in a notoriously complex letter." Frank Thielman, *Paul & The Law: A Contextual Approach* (Downers Grove: IVP 1994), 165.

[331] Gal. 3:2-3 (NRSV). Martin Luther commented on this passage with characteristic starkness: "Right here we have one more difference between the Law and the Gospel. The Law does not bring on the Holy Ghost. . . . The Law and the Gospel are contrary ideas. They have contrary functions and purposes. To endow the Law with any capacity to produce righteousness is to plagiarize the Gospel. The Gospel brings donations. It pleads for open hands to take what is being offered. The Law has nothing to give. It demands, and its demands are impossible." Martin Luther, *Commentary on Galatians*, Christian Classics Ethereal Library, available at http://www.ccel.org/ccel/luther/galatians.vi.html. Augustine, in contrast, commenting on this passage, distinguished the "moral" and "ceremonial" law: "so that this question may be carefully treated and no one may be deceived by ambiguities, we must first understand that the works of the law are twofold: for they reside partly in ceremonial ordinances and partly in morals." Augustine, Commentary on the Epistle to the Galatians, in *Ancient Christian Commentary on Scripture VIII*, 35. Augustine argued that the Jewish ceremonial law had become incomprehensible and therefore brought confusion. *Ibid.* But the Christian sacraments, Augustine claimed, "when it is understood . . . produces spiritual joy and is celebrated gladly and in due season [and] is applied either to the contemplation of truth or to good morals." *Ibid.* For Augustine, "[t]he contemplation of truth is founded in the love of God alone, good morals in the love of God and the neighbor, and on these two precepts depend the whole Law and the Prophets." *Ibid.* Luther is certainly correct over Augustine in recognizing that *Torah* cannot arbitrarily be divided into "ceremonial" and "moral" components, and Augustine's claim that the Christian sacraments are somehow more accessible than the Jewish "ceremonial" law is an obvious case of special pleading. Nevertheless, Augustine's focus on the *internal* in contrast to the *external* role of *Torah* and Sacrament is on point, and permits also a more favorable reading of Luther: no one is justified by external adherence to the Law, but rather, as a person by faith is drawn into right worship of God, he or she experiences transformative grace that provides the freedom to live an authentically human life. N.T. Wright aptly frames this in a narrative key:

> Paul's overall point, throughout Galatians 3 and 4, is *narratival* . . . . Once you understand how the story works, the great covenant story from Abraham to the messiah, you can see (a) that the Torah was a necessary, God-given thing, with it is own proper role within that story, and (b) that the God-given role of Torah has now come to a proper and honourable end – not that there was anything 'wrong' with it, but that it was never designed to be permanent. The latter is what Paul

rely on the works of the law are under a curse."[332] The law "was added because of transgressions, until the offspring would come to whom the promise had been made…."[333]

But, Paul continues in Romans, the law is not abolished, but is fulfilled by the "law of faith."[334] "Do we then overthrow the law by this faith?," Paul asks, to which he responds "By no means (μὴ γένοιτο)! On the contrary, we uphold the law."[335] Likewise, in Galatians, Paul says "Is the law then opposed to the promises of God? Certainly not (μὴ γένοιτο)!" The law was a

specially needs to stress, but the former point is vital (despite the long and loud chorus of dualistic readers) to avoid any slide towards Marcionism. . . . Galatians 3 is not, then, an argument hinging on the theological contrast between 'grace' and 'law', or even the psychological contrast between the struggle to please a legalistic God and the delight of basking in the undeserved pleasure of a gracious one. Those contrasts are indeed present as resonances, and later theologians were not wrong to draw out such implications. But the point at which those extra meanings took over and became central, displacing the actual argument Paul was mounting, was the point at which the exegetes ceased to listen to him and began to listen instead to the echo of their own voices bouncing off the text.

N.T. Wright, *Paul and the Faithfulness of God, Book II* (Minneapolis: Fortress Press 2013), 863.

[332] Gal. 3:10. Thielman states that "when Paul says that those who rely on works of the law are under a curse, he is not saying anything particularly controversial for a Jew." Thielman, *Paul & The Law*, 127. At least some contemporary Jewish interpreters disagree. The Jewish Annotated New Testament, for example, states that "Paul's negative assessment of the Torah and those who follow it is striking: he insists that the Torah does not come from God (3:19-20); no longer has a salvific role, and perhaps never did (3:21-22); and its observance is akin to the worship of the Greek gods (4:9-10)." *Jewish Annotated New Testament*, 332. Johnson, however, consistent with many contemporary interpreters of Paul, notes that Paul's focus is not on faith in Christ in contrast to observance of Torah, but on the adequacy of Christ as the faithful one who fulfilled Torah. Johnson, *The Writings of the New Testament*, 296. Johnson says that, for Paul in Galatians, Torah "is both *annulled* and *fulfilled* by the Messiah. It is annulled as an absolute norm for God's activity and human righteousness. If the only measure of righteousness is Torah, then Jesus cannot be the source of God's life. This is because Jesus is unrighteous according to that norm: He is a 'sinner,' one who is 'cursed by God' because he 'hangs on a tree' (Deut. 21:23)." *Ibid.* at 296. But, Johnson continues, "[b]ecause it was always more than law – being God's revelation and wisdom – Torah is also fulfilled in the Messiah. Paul cannot even speak of righteousness without using Torah's narratives and prophecies. . . . God did something new in Jesus' death: he revealed righteousness outside the norm of Torah. This calls for a new response of faith, which shows that Torah as the bearer of promise is also fulfilled." *Ibid.*

[333] Gal. 3:19.

[334] Romans 3:27. In his Commentary on Romans, Karl Barth characterized Paul's teaching in this chapter as a dialectic that drives us away from any sort of self-reliance. Karl Barth, *The Epistle to the Romans* (London: OUP, Trans. from 6th ed., 1968), 110. As Barth notes, "The man who boasts that he possesses something which justifies him before God and man, even if that something be his own insecurity and brokenness, still retains confidence in human self-justification." *Ibid.* N.T. Wright, perhaps influenced by Barth's later work on the doctrine of election, suggests that Paul's theology, particularly as expressed in Romans 3:27 to 4:25, centers on "the redefinition, in and around Jesus the Messiah, of the Jewish doctrine of election, rooted in the covenant theology of Genesis and Deuteronomy and worked out through Jesus' saving death and resurrection." Wright, *Paul and the Faithfulness of God*, Vol. II, 846.

[335] Romans 3:31. N.T. Wright suggests that Paul's "covenantal perspective on election, and its redefinition through Jesus the Messiah, provides the larger category within which 'juridicial' and 'participationist' categories can be held together in proper Pauline relation." Wright, *Paul and the Faithfulness of God, Vol. II*, 846.

"disciplinarian (παιδαγωγός) until Christ came, so that we may be justified by faith."[336] The Greek term παιδαγωγὸς refers to a pedagogue, a tutor hired by the head of a household to instruct young boys in life and morals.[337] But now, Paul tells the Galatians, we are no longer young boys in the household, who are "no better than slaves."[338] "As many of you as were baptized into Christ," he says, "have clothed yourselves with Christ," and thus "[t]here is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for you are all one in Christ Jesus."[339]

Yet Paul does not advocate antinomian freedom. "What should we say? That the law is sin?," he asks rhetorically, to which he offers his familiar refrain: "By no means (μὴ γένοιτο)!" The law demonstrated to Paul the depth of his sin, but his sin was his own, within himself, and not inherent in the law.[340] In response to this dilemma, Paul offers his great *cri do coeur*:

> So I find it to be a law that when I want to do what is good, evil lies close at hand. For I delight in the law of God in my inmost self, but I see in my members another law at war with the law of my mind, making me captive to the law of sin that dwells in my members. Wretched man that I am! Who will rescue me to from this body of death? Thanks be to God through Jesus Christ our Lord! So then, with my mind I am a slave to the law of God, but with my flesh I am a slave to the law of sin.[341]

In fact, then, there is no conflict in Paul's theology of law between "law" and "freedom."[342] The pedagogue of the law moves him to understand his own sin, his own inner rejection of the

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[336] Gal. 3:24.
[337] See *Strong's Concordance*, 3807.
[338] Gal. 4:1.
[339] Gal. 4:28. N.T. Wright notes that Paul's theology concerning the relation of Jews and Gentiles and the role of *Torah* is rooted in monotheism. "Paul returns," Wright says, "to the most foundational confession of the Jewish faith, the *Shema*: since God is one, he is God of Gentiles as well as Jews. Monotheism undergirds not only election, but also the christologically redefined election: this God will justify circumcision on the basis of *pistis* [faith], and uncircumcision through *pistis*." Wright, *Paul and the Faithfulness of God, Vol. II*, 848.
[340] Romans 7:13-25.
[341] Rom. 7:21-25.
[342] As the notes above on Paul's discussion of *Torah* suggest, I am broadly sympathetic to the "New Perspective" reading of Paul that centers on God's election of a people for participation in His mission of redemption – the Jews, first, through *Torah*, and the Gentiles as well, through Christ's faithful fulfillment of *Torah*. *See generally* N.T. Wright, Paul and the Faithfulness of God, Vol. II, 846-48. My appreciation for the "New Perspective," however,

fundamental law of love, which paradoxically frees him to take on the nature of the only one who was able to fulfill the law: Christ. And in Christ Paul is finally free to love.

Thus, Paul says to the Galatians, "do not use your freedom as an opportunity for self-indulgence, but through love become slaves to one another. For the whole law is summed up in a single commandment: 'You shall love your neighbor as yourself.'"[343] A person who is "led by the Spirit" is "not subject to the law" but displays the "fruit of the Spirit": "love, joy, peace, patience, kindness, generosity, faithfulness, gentleness, and self-control."[344] "There is no law against such things," Paul says.[345] Yet, a person who does the "works of the flesh," which Paul says are "obvious" – "fornication, impurity, licentiousness, idolatry, sorcery, enmities, strife, jealousy, anger, quarrels, dissensions, factions, envy, drunkenness, carousing and things like these" – "will not inherit the kingdom of God."[346]

The notion of "law" in the Gospels and in Paul obviously is complex. In contrast to the hard distinctions found in some later Christian theologies, particularly in the Lutheran strand of the Reformation, however, contemporary Biblical scholarship generally recognizes that both Jesus and Paul were thoroughly Jewish and that neither of them rejected Torah.[347] Jesus' "fulfillment" of Torah in the Sermon on the Mount, says Jonathan Klawans, represents rabbinic tradition that sought the meaning of Torah beyond its plain literal sense.[348] And Paul, Mark Nanos tells us, "saw himself wholly within Judaism, as one who was assigned a special role in the restoration of Israel and the nations."[349] Paul "was a reformer," Nanos says, "one who sought to redress what

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supplements, rather than supplants, more "existential" readings of Paul, in particular by Barth but also by Augustine and, to a degree, Calvin and Luther.

[343] Gal. 5:13-14.

[344] Gal. 5:22-23.

[345] Gal. 5:23.

[346] Gal. 5:19-21. Augustine noted the tension in this section of Galatians between law and human freedom, which is a central theme of this Dissertation. As Augustine noted, "People think that the apostle here denies that we possess free will. They do not perceive what he is saying to them: If they refuse to hold fast to the grace they have received, through which alone they are able to walk in the Spirit and avoid fulfilling the desires of the flesh, they will not be able to do as they wish. . . . It is love that 'fulfills the law.'" But 'the wisdom of the flesh' by following temporal goods opposes spiritual love. How can it be made subject to the law of God (that is, freely and obediently fulfill righteousness and not be opposed to it) when even as it tries it must be vanquished?" Augustine, Comentary on the Epistle to the Galatians, in *Ancient Christian Commentary on Scripture VIII*, 81.

[347] See, e.g., The *Jewish Annotated New Testament*, Essays, "The Law" and "Paul and Judaism."

[348] *Ibid.*, 516.

[349] *Ibid.* at 552.

he believed to be an oversight….; he was not the founder of a new religion, even if things turned out otherwise."[350]   Early Christianity and rabbinic Judaism after the destruction of Herod's Temple began to part ways over the universality of this claim for Gentiles who did not observe all the requirements of Torah, and this is evident in the Acts and the Pauline and Petrine epistles as the wrestle with the problem of table fellowship.[351]   Nevertheless, both Jesus and Paul advocated a theology of Torah that was shared by other pious Jews: the Torah should not be understood as a set of arbitrary rules, but rather as a teacher, a pedagogue, that facilitates inner transformation and a culture of *shalom.*[352]

3.   Law, the Soul and the Christian Tradition: Tertullian

It was not until the growing Christian movement had to respond to persecution from the Roman state that Christian thinkers begin to articulate a more comprehensive theory of both internal (synodical) and secular (civil) law.   A great early thinker here is Tertullian.   In his defense of Christians against the charges of atheism, cannibalism, incest and the dissolution of the bonds of the Roman empire, the *Apoligeticus*, Tertullian called the Roman judicial system to task for not affording Christians and Christianity a fair hearing.[353]   Tertullian's concept of justice emphasized fair and neutral procedures regardless of the nature of the charge or the accused:

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[350] *Ibid.*

[351] See *The Jewish Annotated New Testament*, Essay, "Food and Table Fellowship"; McGuckin, The Ascent of Christian Law,, 17-18.

[352] In light of current scholarship about Jesus, Paul, and Judaism, I would not draw such sharp distinctions as McGuckin regarding first century Christian understandings of Torah. McGuckin agrees that "[i]t is not an abrogation of the law that is actually taking place here," but he thinks the early Christians undertook "a radical renovation of the Law by those who felt empowered to compose a new constitutional arrangement of it." McGuckin, *The Ascent of Christian Law*,, 19. Although McGuckin is correct to note that Christians were unique in placing Jesus at the center of the Torah's fulfillment, the notion that Torah was not about the code itself so much as the inner transformation wrought by the code was a thoroughly rabbinic one. McGuckin suggests that part of the subtle shift concerning law and order between the authentic Pauline epistles of Romans and Galatians and the deutero-Pauline epistle of 1 Timothy reflects the growing influence of Roman ideals on the late First and Early second century Church as it became further distinguished from rabbinic Judaism. *Ibid.* at 65. The household codes so emphasized in 1 Timothy and other deutero-Pauline epistles reflect the Roman jurisprudential idea of *auctoritas*: a legal principle bears moral authority "by virtue of its own logic, by virtue of its inherent rightness, and by virtue of the high standing of the person who voiced the argument." *Ibid.* at 66. *Auctoritas*, McGuckin notes, was distinct in Roman legal theory from *potestas*, the "power to be able compel others to one's will." *Ibid.* True law as grounded in *auctoritas* and not merely in *potestas*. The same broadly held true, McGuckin shows, in the development of Christian synodical and conciliar practices through the fourth century. *Ibid.* at 62-94.

[353] *See* public domain translation available at http://www.tertullian.org/articles/mayor_apologeticum/mayor_apologeticum_07translation.htm.

supposing it to be true that we are criminals of deepest dye, why are we treated differently by you from our fellows, I mean all other criminals, since the same guilt ought to meet with the same treatment? When others are called by whatever name is applied to us, they employ both their own voices and the services of a paid pleader to set forth their innocence. They have every opportunity of answering and cross-questioning, since it is not even legal that persons should be condemned entirely undefended and unheard. But the Christians alone are not permitted to say anything to clear themselves of the charge, to uphold the truth, to prevent injustice in the judge.[354]

These procedural omissions, Tertullian argued, were tied to a substantive failure. The Roman authorities were not interested in whether the charges against Christians were true. Rather, "[t]he one thing looked for is that which is demanded by the popular hatred, the confession of the name, not the weighing of a charge."[355]   The Roman magistrates never determined "how many slaughtered babes each had already tasted, how many times he had committed incest in the dark, what cooks, what dogs had been present (on the occasion)."[356]   Instead, the corrupt system pressed for a confession or denial of "the name" of Christ, often through torture, and that confession or denial determined the entire case. His appeal therefore was to a higher concept of justice and what today we call "freedom of religion," rooted in fairness and truth, that transcended the raw power of the Roman state. Of course, Tertullian went on in the *Apologeticus* to refute these slanderous claims against the Christians, although it is unlikely his theoretical framework appealed to many Patrician Romans for whom the Empire's success was indissolubly

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[354] *Ibid.,* Chap. II. In some ways consonant with contemporary missional theologies, such as that of N.T. Wright mentioned in the previous notes, Tertullian emphasized that Christian communities should be tolerated by the state because "God gave Christians as his gift to the world. . . ." Eric Osborn, *Tertullian, First Theologian of the West* (Cambridge: CUP 2003), 65. In Terutllian's economy, Christians' "innocence has tempered injustice in the world and their prayers have prevailed upon God for good." *Ibid.*

[355] *Apologeticus*, Chap. II.

[356] *Ibid.* Osborn argues that "Tertullian's central idea is that the universe is made of opposites which must be harmonized and held together by reason. The persecution of Christians destroys this harmony and is therefore fundamentally wrong and due to demonic perversion. The balance of ethical opposites is necessary and anticipates God's final justice which will restore all things. The persecution of Christians undermines the moral fabric of the world. Tertullian's claim is strengthened by an insistence that the justice of the world is always proleptic and imperfect, whereas the final justice of God initiates the eschaton now." *Ibid.* at 67.

tied to the ancient pagan traditions (even if, for many of that class, the content of the pagan rituals were held as little more than superstition).

Tertullian did not directly connect this concept of transcendent law to the soul, but he writes extensively about the soul in his *Treatise on the Soul*.[357] This is one of Tertullian's post-Montanist treatises, and it reflects his characteristic contrast between Christian faith and Greek reason:

> For by whom has truth ever been discovered without God?   By whom has God ever been found without Christ? By who has Christ ever been explored without the Holy Spirit? By whom has the Holy Spirit ever been attained without the mysterious gift of faith? Socrates, as none can doubt, was actuated by a different spirit. For they say the at demon clave to him from his boyhood….[358]

Tertullian argued that the soul is created at birth, that it has a corporeal nature, and that the term "spirit" is not a separate element of the person but merely describes the operation of the soul.[359] In some of these arguments he sounds like a modern biologist, albeit transposing "soul" for "genes." For example, he favorably cited the Stoic philosopher Cleanthes: "Cleanthes too, will have it that family likeness passes from parents to their children not merely in bodily features, but in characteristics of the soul; as if it were out of a mirror of (a man's) manners, and faculties, and affections, that bodily likeness and unlikeness are caught and reflected in the soul also."[360] Tertullian further asserted that the soul is the ruling power of the person and that it resides physically in the heart.[361] Perhaps we could transpose "heart" for "brain" and render Tertullian as a proto-neurobiologist!

But Tertullian was no materialist. The soul, he asserted, is "rational" by nature, because rationality is "impressed upon it from its very creation by its Author, who is Himself essentially

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[357] Tertullian, *A Treatise on the Soul*, available at http://www.newadvent.org/fathers/0310.htm.
[358] *Ibid.*, Chapter 1.
[359] *Ibid.*, Chapters 4, 6, 11.
[360] *Ibid.*, Chapter 5.
[361] *Ibid.,* Chapter 15. Osborn notes that Tertullian's sense of tension or antithesis in human nature between good and evil is reflects Tertullian's background in Stoicism. Osborn, *Tertullian, First Theologian of the West*, 163 (stating that "Platonists like Clement could doubt the ultimate reality of evil. Heraclitean Stoics like Tertullian could only face reality when evil and sin were taken seriously.").

rational."[362]   Human beings, of course, are not always rational, which Tertullian ascribed to the

influence on the soul of Adam's transgression, "which thenceforward became inherent in the

soul, and grew with its growth, assuming the manner by this time of a natural development,

happening as it did immediately at the beginning of nature."[363]   The irrationality of the human

soul as presently observed is not attributable to God: "[a]ll sin," Tertullian said, "is irrational:

therefore the irrational proceeds from the devil, from whom sin proceeds; and it is extraneous

to God, to whom also the irrational is an alien principle."[364]   Tertullian further linked the senses

to the soul and argued that the senses therefore cannot deceive, unless they are disordered or

imposed upon from the outside.[365]   Again, consistent with his debt to Stoicism, Tertullian sounds

something like a modern empiricist.

Yet, because the soul is by nature rational, for Tertullian it is nothing like our modern concepts

of "selfish genes" or neurobiological fiat.   The soul's rationality is also the human being's

freedom.   The soul, and thus the person, may function in accordance with its natural capacities

and thereby the person may be governed by reason, or the soul may (dis)function in accordance

with the irrationality of sin:

> The soul, then, we define to be sprung from the breath of God,
> immortal, possessing body, having form, simple in its substance,
> intelligent in its own nature, developing its power in various ways,
> free in its determinations, subject to be changes of accident, in its
> faculties mutable, rational, supreme, endued with an instinct of
> presentiment, evolved out of one (archetypal soul).[366]

This suggests a connection between Tertullian's *Apologeticus* on law and religious freedom and

his understanding of the soul.   Human beings are capable of exercising the higher law of reason,

informed particularly by their (in Tertullian's view) generally reliable senses, all of which vest in

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[362] Tertullian, A Treatise on the Soul*.,* Chapter 16.

[363] *Ibid.*, Chapter 16. Osborn suggests that Tertullian "made the first moves toward a doctrine of original sin. . . ."
Osborn, Tertullian, First Theologian of the West, 163.

[364] *Ibid.* Tertullian does not here explain, however, the origin of the Devil!

[365] *Ibid.*, Chapter 17.

[366] *Id*, Chapter 22. As Osborn notes, Tertullian's emphasis on human freedom underpins Tertullian's "defence of
the creator against Marcion." Osborn, *Tertullian, First Theologian of the West*, 168. We have previously noted
how the challenge of Marcionism shaped the church's views about the goodness of Divine law.

the soul. For Tertullian, this, and not the irrationality of mere prejudice that refuses to examine the facts of the case, should form the basis of civil law.

4. Law, the Soul and the Christian Tradition: Lactantius

Lactantius was a second great early exponent of a Christian vision of law and justice. He had been an official in Diocletian's court and wrote his *Divine Institutes*, and particularly the section *On Justice*, in response to the great persecution under Diocletian.[367]

Lactantius' primary concern in *On Justice* was to demonstrate that the Christians, in fact, are the "true" Romans.[368] The Roman ideal was grounded in a sense of justice. As Lactantius noted, justice "is either by itself the greatest virtue, or by itself the fountain of virtue, which not only philosophers sought, but poets also, who were much earlier, and were esteemed as wise before the origin of the name of philosophy."[369] Without virtue, justice gives way to mere authority and power.

Lactantius recited portions of Aratus' poem *Phaenomena* – the same poem reference by the Apostle Paul in Athens – which conjures a golden age of justice and virtue.[370] The golden age was lost, however, when people began to lust after power and possessions. When lust replaced virtue, law became separated from justice.[371] Now the governing authorities prevailed "as much by authority as by strength, or resources, or malice."[372] Having lost all traces of humanity, equity

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[367] McGuckin*, The Ascent of Christian Law*,, 110-112.

[368] *Ibid.*

[369] Lactantius, *On Justice*, available at http://www.sacred-texts.com/chr/ecf/007/0070131.htm, Chapter 5.

[370] *Ibid.* (quoting Aratus, *Phaeonomena,* available at http://www.theoi.com/Text/AratusPhaenomena.html). The full paragraph from Aratus is compelling:

> Her men called Justice; but she assembling the elders, it might be in the market-place or in the wide-wayed streets, uttered her voice, ever urging on them judgments kinder to the people. Not yet in that age had men knowledge of hateful strife, or carping contention, or din of battle, but a simple life they lived. Far from them was the cruel sea and not yet from afar did ships bring their livelihood, but the oxen and the plough and Justice herself, queen of the peoples, giver of things just, abundantly supplied their every need.

Aratus, *Phaeonomena*, lines 101-107. As Elizabeth DePalma Digeser notes, "Although Hellenistic political theory had long put forward the idea that the just state was a reflection of the cosmos and that the monarch could somehow be the source of living law, Lactantius was among the first Christians to develop these notions within a Christian cosmology." Elizabeth DePalma Digeser, *The Making of a Christian Empire: Lactantius & Rome* (Ithica: Cornell Univ. Press 2000), 56-57.

[371] Lactantius, On Justice, Chapter 6.

[372] *Ibid.*

and pity – which Lactantius identified as the "offices" of justice – the rulers instead "began to rejoice in a proud and swollen inequality, and made themselves higher than other men, by a retinue of attendants, and by the sword, and by the brilliancy of their garments."[373] But Christ, Lactantius argues, restored justice, and in the Christians the fruits of virtue that support the flourishing of the *civitas*, can be realized.[374]

Lactantius' appeal on behalf of the Christians was thus in part pragmatic: if the Empire is to return to its golden age, Christians should be protected and not persecuted. But he also reached for a transcendent feature of justice: equality. "Although justice embraces all the virtues together," he says, "yet there are two, the chief of all, which cannot be torn asunder and separated from it – piety and equity."[375] Equity is inherent to human nature: "[f]or God, who produces and gives birth to men, willed that all should be equal, that is, equally matched. He has imposed on all the same condition of living; He has produced to all wisdom; He has promised immortality to all; no one is cut off from His heavenly benefits."[376] This means that social distinctions are erased: "[i]n His sight no one is a slave, no one a master; for if all have the same Father, by an equal right we are all children."[377] Lactantius admitted that such social distinctions persist even among Christians but, he says, "we measure all human things not by the body, but by the spirit," so that "although the condition of bodies is different, yet we have no servants, but we both regard and speak of them as brothers in spirit, in religion as fellow-servants."[378]

Justice, then, for Lactantius, was closely connected to inward desire. A just man, he said, "is neither at enmity with any human being, nor desires anything at all which is the property of another."[379] Mere animals cannot be "just" because they cannot discipline their desires. In animals, Lactantius argued, "[b]ecause they are destitute of wisdom, nature is the provider of

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[373] *Ibid.*
[374] *Ibid.*, Chapter 7. DePalma Digeser suggests that "[i]n asserting that piety and equity – as he defined them – were the first two principles of divine law, Lactantius expresses in Roman terms the two commandments on which the whole Christian Law is based . . . (Matt. 22:36-40)." DePalam Digeser, *The Making of a Christian Empire: Lactantius & Rome*, 56.
[375] Lactantius, *On Justice*, Chapter 14.
[376] *Ibid.*
[377] *Ibid.*
[378] *Ibid.*, Chapter 16.
[379] *Ibid.,* Chapter 18.

supplies for itself. Therefore they injure others that they may profit themselves, for they do not understand that committing an injury is evil."[380] A man, however, "who has the knowledge of good and evil, abstains from committing an injury even to his own damage, which an animal without reason is unable to do; and on this account innocence is reckoned among the chief virtues of man."[381]

Lactantius' emphasis on piety and equity as the keys to justice undergirded his argument for religious freedom. If piety and virtue should be encouraged, and if all people are equal under the law, Lactantius asked, "who is so arrogant, who so lifted up, as to forbid me to raise my eyes to heaven? Who can impose upon me the necessity either of worshipping that which I am unwilling to worship, or of abstaining from the worship of that which I wish to worship?"[382] This, Lactantius claimed, is another way in which the Christians are the true harbingers of justice, the true Romans: "we, on the contrary, do not require that any one should be compelled, whether his is willing or unwilling, to worship our God, who is the God of all men; nor are we angry if any one does not worship him."[383]

5. Law, the Soul and the Christian Tradition: Augustine

Augustine's political theology, as expressed in his City of God and elsewhere, of course became a central pillar of Western Christendom.[384] Augustine, like Lactantius and Tertullian, understood that there is a spiritual or natural law, built into the creation by God, which is the true source of righteousness. For example, he noted in the Confessions that, when he was a Manichean, he

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[380] *Ibid.*

[381] *Ibid.*

[382] *Ibid.*, Chapter 14.

[383] *Ibid.*, Chapter 21. As DePalma Digeser suggests, Lactantius' political theology eschewed any notion that the state should be subject to different standards than the church: "Lactantius intended his understanding of divine law to apply not merely to individuals but to the Roman state as a whole. . . . So long as evil existed (that is, until the second coming), there would be a need for the state, but the only legitimate government would be one that acknowledged the One God and treated its citizens with equity (*aequitas*). These arguments responded to the juridicial philosophy that had developed since Ulpian, in which Roman law was seen as a reflection not only of natural law but also of Roman Religion. No other Christian author before Lactantius had drawn so heavily on Cicero to attempt such a thoroughgoing discussion of justice or so clearly postulated a Christian empire whose foundation was based on a new understanding of natural law." DePalam Digeser, *The Making of a Christian Empire: Lactantius & Rome*, 58-59.

[384] *See, e.g.,* McGuckin, *The Ascent of Christian Law*, Chapter 6; Paul Weithman, "Augustine's Political Philosophy," in *The Cambridge Companion to Augustine*, ed. Eleanore Stump and Norman Kretzmann (Cambridge: CUP 2006).

did not know either that true inward righteousness takes as its criterion not custom but the most righteous law of almighty God, by which the morality of countries and times was formed as appropriate to those countries and times, while God's law itself has remained unchanged everywhere and always, not one thing in one place and something different elsewhere.[385]

If God's eternal law is unchanging, Augustine wondered, why are there obvious differences among the laws of various cultures throughout history? Is justice "fickle and changeable?"[386] No, Augustine answered, "but the epochs over which she rules do not all unfold in the same way, precisely because times change."[387] At various times and places, some particular applications of the eternal law might become more or less apparent and feasible.[388] Moreover, God's eternal law stands above the laws of any temporal king.[389] If God's law conflicts with the law of a human king, the human law should change. "As in the hierarchy of human society a more powerful official is placed above one of lesser rank and is to be obeyed," Augustine said, "so God stands above all."[390] To obey God's eternal law even if it conflicts with civil law "does not undermine the community," but rather ultimately strengthens the community in its proper relation to God.[391]

At times God's law might seem opaque or confusing.[392] Yet God's law, for Augustine, was not merely an arbitrary decree. A breach of God's law does not harm God Himself. "But how can our vices touch you, who are incorruptible?," Augustine asked rhetorically; "[w]hat crimes can

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[385] Augustine, *Confessions*, 7, 13.
[386] *Ibid.*
[387] *Ibid.*
[388] *Ibid.* As Augustine notes:
> Human beings live on earth for a brief span only, and they lack the discernment to bring the conditions of earlier ages, of which they have no experience, into the same frame of reference with those they know well; but they can easily perceive in one body or one day or one house what is appropriate for each limb, each period of time and all persons and places. Thus while they may be scandalized by the one, they readily submit to the other.

Ibid.
[389] *Ibid.*, 8, 15.
[390] *Ibid.*
[391] *Ibid.*
[392] *Ibid.*

be committed against you, who are immune from harm?"[393]   His answer was that since the eternal law is part of God's good ordering of creation, breaches of that law destroy the human soul:

> For even when people sin against you, they are maliciously damaging their own souls. Iniquity plays itself false when it corrupts and perverts its own nature, to which you gave life and order, or when it makes intemperate use of lawful things, or again when it burns with desire for other things not permitted, lusting to enjoy them in a way contrary to nature.[394]

The eternal law, built into the soul, therefore helps order human desires towards their proper end.

But if the rational soul inclines human beings to God, why do we end up with sin and violence? We think we have made ourselves free of the law, masters over it. But our quest for freedom binds us to slavery. This is why Augustine connects the need for a King – human law – to sin. Without sin, man would live by the divine law and would not become subject to other men. Because of sin, Augustine argued, men need the scourge of human law:

> And beyond question it is a happier thing to be the slave of a man than of a lust; for even this very lust of ruling, to mention no others, lays waste men's hearts with the most ruthless dominion. . . . And therefore the apostle admonishes slaves to be subject to their masters, and to serve them heartily and with good-will, so that, if they cannot be freed by their masters, they may themselves make their slavery in some sort free, by serving not in crafty fear, but in faithful love, until all unrighteousness pass away, and all principality and every human power be brought to nothing, and God be all in all.[395]

Human principalities, powers and laws, for Augustine, were temporary restraints.[396] There is one path to freedom from this cycle of enslavement: love. For Augustine, the fulfillment of love,

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[393] *Ibid.*, 8, 16.
[394] *Ibid.*
[395] COG, Ch. 15.
[396] Paul Wiethman notes that Augustine's view about the temporary nature of governance relates to his understanding of political authority as inherently coercive: "for Augustine, the most salient feature of political authority is just that feature an authority would have to have in order to govern a society of people all of whom

when God is all in all, marks the end of positive law. Love does not impose. Positive law, in contrast, is a relation of imposing power.

Nevertheless, for Augustine, at times, the law must be coercive, since human desires are prone to distortion. If in our "curiosity" we twist our desires towards evil, the law operates to thwart those twisted desires and reign in such "curiosity":

> It is evident that the free play of curiosity is a more powerful spur
> to learning . . . than is fear-ridden coercion; yet in accordance with
> your laws, O God, coercion checks the free play of curiosity. By
> your laws it constrains us, from the beatings meted out by our
> teachers to the ordeals of the martyrs, for in accord with those laws
> it prescribes for us bitter draughts of salutary discipline to recall us
> from the venomous pleasure which led us away from you.[397]

But here the sense of "law" employed by Augustine is largely internal: it is God's law that constrains us internally and the scourge of persecution that purifies us. We will see in a later section the problematic way in which Augustine applied his concept of positive law to religious dissent against the Donatists.

6. Law, the Soul, and the Christian Tradition: Aquinas

A final stop on this brief tour of classical Christian concepts of law is with one of the most important figures for "natural law" theorists: Thomas Aquinas. Aquinas devoted a portion of the *Summa* to a "*Treatise on Law*," demonstrating how important the concept of law had become to Western Christian society.   Aquinas most fully developed the link between "law" to the capacity for reason. Law, for Thomas, is a means by which God instructs rational human creatures.[398]

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are constitutionally prone to conflict: the authority to coerce them. This authority is common to those in positions of politicapower and the masters of slaves. Augustine also insists that subjection to political authority, like the subjection to a slave-master, is morally improving because both foster humility, particularly when the good are subjected to the bad. Thus political authority and the mastery of slaves both rely on coercion, and both teach humility to sinfully proud human beings." Wiethmann, Augustine's Political Theology, 240.

[397] Confessions, 14, 23. On the theme of Augustine and "curiosity," see Joseph Torchia OP, *Restless Mind: Curiositas and the Scope of Inquire in St. Augustine's Psychology* (Milwaukee: Marquette Univ. Press 2013); Paul Griffiths, *Intellectual Appetite: A Theological Grammar* (Washington D.C.: The Catholic University Press of America 2009).

[398] *ST*, I-II, 90, "On the Essence of Law." Thomas contrasts "Law" to "Grace" in that "Law" is God's means of instruction and "Grace" is God's means of assistance. *Ibid.* But in Thomas' system, "Law" and "Grace" are not antithetical concepts, as they are in some Lutheran and Reformed theologies. Rather, for Thomas, "Law" and "Grace" are like two sides of the same coin. The literature on Aquinas and natural law theory is vast. For some

Thomas defined "Law" as "a rule and measure of acts, whereby man is induced to act or restrained from acting."[399] The essential rule and measure for human action – the "law" of human action – for Thomas, is reason, "since it belongs to the reason to direct to the end, which is the first principle in all matters of action. . . ."[400]

At times, Thomas sounds like a modern positivist. Thomas agreed that positive law generally is unnecessary for virtuous people who seek to follow the light of reason, but that the bad person requires further discipline: "[m]en who are ill disposed are led willingly to virtue by being admonished better than by coercion; but men who are evilly disposed are not led to virtue unless they are compelled."[401] Yet Thomas clearly tied law to a transcendent end, which is embodied in statutes that are broadly applicable to the entire community.[402] In contrast, for Holmes, the purpose of law is to engineer the result *the judge* desires by establishing rules and procedures that will change the bad man's behavior. There is no transcendent justice in this system, nor is there love. There are only outcomes that the enforcer of the law – the judge – desires, and technocratic means towards reaching those ends.

For Thomas, then, all true "law" is a participatory relation. "Law," he says, "is in all those things that are inclined to something by reason of some law: so that any inclination arising from a law, may be called a law, not essentially but by participation as it were."[403] This is true not only of the "natural law" that is built into the creation, but also of positive law enacted at the command of a human sovereign. Thomas argued that

> In order that the volition of what is commanded may have the
> nature of law, it needs to be in accord with some rule of reason.
> And in this sense is to be understood the saying that the will of the

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good sources see Matthew Levering, *Biblical Natural Law: A Theocentric and Teleological Approach* (Oxford: OUP 2012); Jean Porter, *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids: Eerdmans 1999); Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids: Eerdmans 2004); Russel Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World* (ISI Books 2002); Paul E. Sigmund, "Law and Politics," in *The Cambridge Companion to Aquinas*, ed. Norman Kretzmann and Eleonore Stump (Cambridge: CUP 1993).

[399] *ST* I-II, 90, Art. 1.
[400] *Ibid.* Thomas here cites "the Philosopher," Aristotle.
[401] *ST* I-II, 95, Art. 1, ad 1.
[402] *See ST* I-II, 95, Art., 1, ad 2 (explaining why law governed by statute is superior to law enacted only by judges).
[403] *ST* I-II, 90, Art. 1, ad 1.

sovereign has the force of law; otherwise the sovereign's will would
savour of lawlessness rather than of law.[404]

The rule of reason, Thomas insisted, demonstrates that good or just laws must be directed towards the proper end of reason: the "common good," which is "universal happiness."[405] A putative law that is not directed towards the common good is "devoid of the nature of a law."[406]

The "common good" in the broadest sense – "the whole community of the universe" – in Thomas' thought, is governed by God.[407] Although God promulgates particular laws, "the end of the Divine government is God Himself, and His law is not distinct from Himself."[408] Moreover, all created things "partake somewhat of the eternal law," which is "imprinted on them" and which provides them with "their respective inclinations to their proper acts and ends."[409] Thomas notes that "[e]ven irrational animals partake in their own way of the Eternal Reason," but that only rational creatures participate in the Eternal Reason "in an intellectual and rational manner."[410] Therefore, Thomas said, "the participation of the eternal law in the rational creature is properly called a law, since a law is something pertaining to reason…."[411] Human law participates in Divine law, in the life of God Himself, to the extent that human practical reason concerning specific cases comports with speculative reason concerning the natural law imprinted on us as creatures.[412] The construction of positive law is a form of participation in God whereby the general principles of eternal law are applied to contingent cases through the exercise of practical reason.[413]

This brief survey of Biblical and classical Christian sources shows that, in the Christian tradition, humanity is *Homo Juridicus*.[414] We are creatures of law. As Legal historian Harold Berman notes,

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[404] *ST* I-II, 90, Art. 1, ad 2.
[405] *ST* I-II, 90, Art. 2. Here Thomas cites Aristotle's *Nichomachean Ethics*.
[406] *Ibid.*
[407] *ST* I-II, 91, Art. 1.
[408] *ST* I-II, 91, Art. 1, ad 3.
[409] *ST* I-II, 91, Art. 2.
[410] *ST* I-II, 91, Art.2, ad 3.
[411] *Ibid.*
[412] *ST* I-II, 91, Art.3 , ad 1, 2, 3.
[413] *ST* I-II, 91, Art. 3, ad 3.
[414] In recent years, following on the formative work of Harold Berman, there has been an outpouring of scholarship on historical and contemporary Christian perspectives on the nature and purposes of positive law, which demonstrates, through diverse strands of the Christian tradition, similar themes to the survey of classical sources I outline in this Chapter. *See, e.g.,* Harold Berman*, Law and Revolution: The Formation of the Western Legal*

in his magisterial study "Law and Revolution," early European Christian law was a means of reconciliation.[415]   Law, he says, "was conceived primarily as a mediating process, a mode of communication, rather than primarily as a process of rulemaking and decisionmaking. . . . Christianity treated even a king as a human being, subject like every other human being to punishment by God for his sins and only able to be saved by God's grace."[416] In contrast, the familiar refrain of the Biblical Book of Judges highlights what happens when law's legitimacy is eroded: "In those days Israel had no king; everyone did as he saw fit." (Judges 21:25). Modern people are inclined to affirm this as good, but as the story of the Levite and his concubine in Judges 19 makes clear, the fruits of this circumstance are betrayal, rape, oppression and violence.[417]

Chapter 3: Paleo-Law: Have We Always Been Human?

As Chapter 2 argues, Christian theologies of law are rooted in peace. Law derives from the order of God's being, which is an order of love. When creatures participate in God's love, they live according to God's law, and there is justice and peace. When creatures (particularly humans) deviate from God's law, there is dissolution and violence.

But legal philosophy has long been vexed by the problem of violence. If "law" is merely the imposition of one person or group's will upon another person or group, then "law" is an empty

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Tradition (Cambridge: Harvard Univ. Press 1983); Harold Berman: *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Belknap Press 2006); Michael W. McConnell, Robert F. Cochrane Jr., and Angela C. Carmella, eds., *Christian Perspectives on Legal Thought* (New Have: Yale Univ. Press 2001); John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Atlanta: Emory Univ. Press 2006); Oliver O'Donovan and Joan Lockwood O'Donovan, eds*., From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Grand Rapids: Eerdmans 1999); John Witte Jr. and Frank S. Alexander, eds*., The Teachings of Modern Christianity on Law, Politics and Human Nature* (New York: Columbia Univ. Press 2006); John Witte Jr. and Frank S. Alexander, eds., *The Teachings of Modern Roman Catholicism on Law, Politics, and Human Nature* (New York: Columbia Univ. Press 2007); John Witte Jr. and Frank S. Alexander, eds., *The Teachings of Modern Orthodox Christianity on Law, Politics and Human Nature* (New York: Columbia Univ. Press 2007); John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: CUP 2008); John Witte Jr. and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge: CUP 2008); Robert F. Cochrane Jr. and David Van Drunen, eds*., Law and the Bible: Justice, Mercy and Legal Instituti*ons (Downer's Grove: IVP Academic 2013).
[415] *The Religious Foundations of Western Law*, p. 49-50
[416] *Ibid.*
[417] *See* Stephen R.L. Clark, *Biology & Christian Ethics* (Cambridge: CUP 2000),, 183-184.

term that merely signifies a kind of power maintained by violence. The classical response to this problem, which is the response of traditional Christian theology discussed in Chapter 2, is to refer to a concept of "natural" law rooted in a Divine source. The debate about whether or not there is any sort of "natural" law – including whether the concept of "natural" law makes any difference or merely relocates the problem of violence from other humans to "nature" or "God" – is ancient and predates Christian sources. But it is only in the past hundred years or so that the modern natural sciences have begun to illuminate the even deeper antiquity and diversity of human evolution. If we wish to address the problem of "natural" law today, we must ask whether human evolutionary history undermines the kinds of founding myths (the Garden of Eden, the Athrasis Epic, the Timaeus, and so-on) that supported claims about "natural" law made by many pre-modern writers. What can paleoanthropology and evolutionary neurobiology tell us about human "law?" Is "law" just an artifact of evolution's bloody flow? This chapter reviews and reviews and critiques the narrative of human cultural evolution as told by some of its best known narrators. It is important to understand this background narrative because it provides the "creation myth" for modern sociobiological and neurobiological ethical programs, including neurolaw.

1. The Evolution of "Human" Culture: The First and Last Human

Paleoanthropologists differ sharply about the nature and cause of the differences between *homo sapiens sapiens* – us – and the many human / hominid species that also form the human evolutionary tree.[418] Indeed, the ambiguity extends even to the use of the word "human."

The fascinating and beautifully produced book *The Last Human*, for example, offers photographs of forensic reconstructions based on fossil samples of twenty-two species of hominids dating back to over seven million years, as well as narratives of the possible lifeways of these creatures.[419] As the narratives proceed through the twenty-two species, the language subtly changes from "man-ape" to "apeman" to "man."

For the earliest species profiled, *Sahelanthropus tchadensis*, *Orrorin tugenensis*, and *Ardipithecus ramidus* and *kadabba*, the lifeway narrative evokes the "man-ape":

> On reaching the crown of a yellow-wood tree the man-ape began bending back branches. He softly hooted to himself for there were no other man-apes in sight. Just when he felt the nest was right, he laid in it belly-up watching the sky darken, and waiting for the night. As the sun disappeared into the horizon, a small gust of wind licked up from the east. The light drizzle that began shortly after the wind died prompted the man-ape to break back small branches with leaves and cover his body. Feeling comfortable with his new blanket, he quickly fell asleep.[420]

A photo of the "man-ape" *Sahelanthropus tchadensis* suggests that the subject "contemplatively surveys the African landscape some seven million years ago."[421]

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[418] For a good overview of the evidence for human evolution from a paleoanthropological perspective, see Ian Tattersall, *The Fossil Trail: How We Know What We Think We Know About Human Evolution* (Oxford: OUP 1995). For a discussion of the genetic evidence for human evolution, see Steve Jones, Robert Martin, and David Pilbeam, eds., *The Cambridge Encyclopedia of Human Evolution* (Cambridge: CUP 1994), Part Seven: "Genetic Clues of Relatedness."

[419] G.J. Sawyer and Viktor Deak, *The Last Human: A Guide to Twenty Two Species of Extinct Humans* (New Haven: Yale Univ. Press 2007).

[420] *Ibid.*, p. 27.

[421] *Ibid., p. 32.*

The Last Human, p. 32

The lifeway narratives shift to the term "man-ape" with *Australopithecus anamensis, Kenyanthropus platyops, Australopithecus afarensis,* which lived in the African Great Rift Valley about four million years ago.[422] So, for example,

> Standing in the crook of a tree, a female man-ape reached up for unripe figs. Leaf monkeys jumped back and forth in the smaller branches of the tree crown dropping partly eaten figs on the man-ape below. One leaf monkey descended down to the man-ape's eye-level. Facing the man-ape, it chattered and squealed at her relentlessly. Harassed by the noise and debris, the man-ape descended the tree first. Remaining on two legs, she leisurely walked to another tree and picked the fruit from the lower branches.[423]

One of the species mentioned here *Australopithecus afarensis*, is that of "Lucy," a famous and important specimen that exhibits the smaller braincase of an ape with a bipedal upright walking posture – a transitional form. A photograph of a reconstructed Lucy shows her, as the caption states, as she "searches desperately through the savannah for her missing three year old daughter."

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[422] *Ibid.*, pp. 46-47.
[423] *Ibid.*, p. 63.
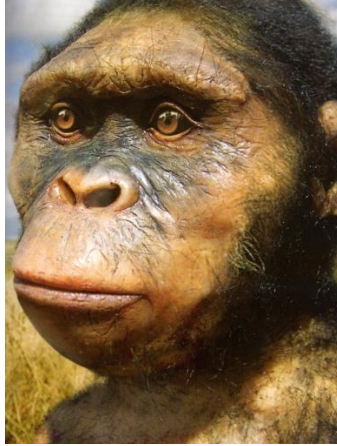
The Last Human, p. 69

With two other Great Rift Valley species, *Paranthropus aethiopicus,* and *Australopithecus garhi*, both of which lived about two million years ago, the descriptor shifts to from "man-ape" to "apemen." Thus:

> With the evening quickly approaching, the apemen constructed nests from shrubs and herbs growing on the shaded woodland floor. Some of the youngsters made their nests in small trees above where the adults slept.
>
> Sitting up in her nest with the stick still in her hand, the apemen stared suspiciously at a small sapling within arm's reach. Cocking the stick with her right and bending the sapling with her left, she carefully inspected the foliage for snakes. When none were found, she put the stick down and stripped the sapling's bark. Getting at the underlying pith, she enjoyed a final bite before turning in for the night.[424]

A photograph of a reconstructed *Paranthropus aethiopicus* shows him looking contentedly in the direction of the camera, with what appears to be the hint of a smile. The caption tells us that, "[a]mused by the playfulness of his children, an adult *Paranthropus aethiopicus* watches protectively and lovingly."[425]

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[424] *Ibid.*, 78.
[425] *Ibid.*, 82.

The Last Human, p. 83

With the introduction of the *Homo* genus the lifeway narratives drop the "ape" and use the terms "man" and "pygmy."[426] The narrative preceding *Homo rudolfensis* describes a wary encounter between men and baboons:

> A man, knee-high in water, was standing on two legs pulling plants out by the roots and tossing them only land. Five other men sat immobile below a patch of bush-willow trees, watching and trying to avoid the rain. A troop of baboons watched the men at a safe distance.[427]

A close-up of *Homo rudolfensis*, which lived near Lake Turkana about 1.9 million years ago, allows us to peer deep behind his eyes – dare we say into his soul?: "Thoughts of tomorrow," the caption says, "underlie the intelligent gaze of *Homo rudolfensis*."[428]
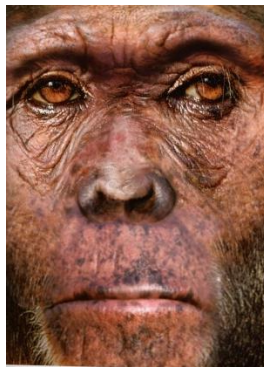
The Last Human, p. 121

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[426] *Ibid.* at 113.
[427] *Ibid.* at 115.
[428] *Ibid.* at 120.

For *Homo habilis*, the terminology shifts to "pygmy," reflecting the problems paleoanthropologists have faced in classifying this species.[429] The narrative evokes a pygmy searching for food along the shore of a "grey blue" lake "lined by the pink hues of hundreds of flamingoes": "Not discouraged by failure, the pygmy walked along the shore looking for other opportunities. Not finding any, he thought about all the food in the highland forest. It was early in the morning and the forest was close enough to make it there and back in a single day."[430] A photo reconstructing *Homo habilis*, which lived about 1.5 to 1.8 million years ago, suggests that "A brilliant African sky offers a visual wonder for a curious female *homo habilis*."[431]

The Last Human, p. 127

The title of "human" is first given with the introduction of *Paranthropus bosisei*, a stout species found in various African sites dating to 1.4 to 2.3 million years ago, and *Homo Ergaster, Homo georgicus, Homo erectus, Homo pekinensis, and Homo floresiensis*, with dates ranging from over 1 million years ago (*H. Ergaster*) to only hundreds or tens of thousands of years ago.[432] So:

> A group of apemen, a gelada baboon troop, and two humans fed together on herbs and grasses along the shore, keeping a safe distance from the ramp-like hippo trails descending into the lake. With many of the grasses mature and turned to seed, the apemen concentrated on these, using their front teeth to strip the seeds from the tall tufts. Willing to brave their proximity to the hippo

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[429] *See Ibid.,*, 129.
[430] *Ibid.,*, 122.
[431] *Ibid.,*, 127.
[432] *Ibid.,*, 135.

trail, the humans fed on the rootstocks of a small patch of sedges exposed by the receding shoreline. When an apeman came to feed next to them, the two humans became visibly uneasy, increasing their eye movements and averting a fixed gaze.[433]

And:

A shrill, squeaking cry caught the attention of two young men walking into the high veldt. They stopped, turned and looked around, but they saw nothing. Glancing at each other with quizzical looks they continued on their way.[434]

And yet more evocatively:

She didn't remember why, but at the time she was crying. Maybe she was sick or just hungry. The old woman held her in her arms, rocked her back and forth, and hummed. She placed some cherries in her hand. Eating them made here stop crying, and she felt better. Those were the earliest memories she had.[435]

The photographic reconstructions also become even more compelling. The caption explains, "After being separated from his group for several days, a young *Homo ergaster*, Nariokotome Boy, rejoices at seeing the familiar faces of his family."[436]

The Last Human, p. 147

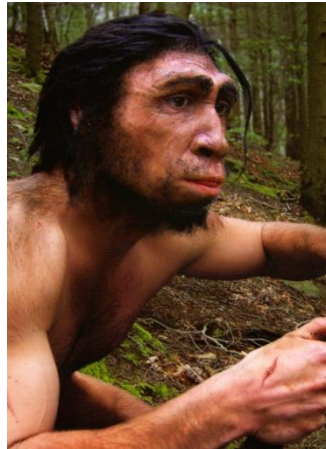[433] *Ibid.,*, 131-132. One cannot help but notice the cadence of an old joke form: "A group of apemen, a gelada baboon troop, and two humans walk into a bar…."
[434] *Ibid.,*, 139.
[435] *Ibid.,*, 149.
[436] *Ibid.*, 147.

And here Peking Man (*H. pekinensis*), which lived from 250,000 to 600,000 years ago, is pictured "Stalking his prey."[437]

The Last Human, p. 172

The broad outlines of the story told in *The Last Human* reflect the clear pattern of the evidence contained in fossils and genes: over millions of years, a variety of hominid forms flowered on the human evolutionary tree (or bush), many of which were evolutionary dead ends; moving forward in time towards the present, the morphology of some of these now-extinct species often appears closer to that of anatomically modern humans; and finally there remains one branch now occupied by only one species – us.

But where the narratives in *The Last Human* fill in cultural and mental landscapes of these creatures, which cannot be inferred so directly from bones, an emphasis on conscious awareness, agency, aesthetics, and values emerges that seems hard to justify. Note the adverbial phrases and richly anthropomorphic descriptions: "Feeling comfortable with his new blanket"; "contemplatively surveys"; "leisurely walked"; "searches desperately"; "enjoyed a final bite before turning in for the night"; "[a]mused by the playfulness of his children"; "watches protectively and lovingly"; "not discouraged by failure"; "curious"; "quizzical"; "thoughts of tomorrow"; "intelligent"; "earliest memories"; "rejoices." From these narratives, it seems that

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[437] *Ibid.*,, 173.

everything – every *one* – from *Sahelanthropus tchadensis* seven million years ago on – was capable of intentions, plans, memories, and even virtues such as courage, joy and love.

In fact, no paleoanthropologist thinks our hominid forebears possessed these characteristics in the way we *homo sapiens sapiens* possess them. We may assume, with good reason, that things *like* what we now identify as "human" intentions, plans, memories and virtues were present in varying degrees in our ancestors, if nothing else in virtue of the fact that they are ancestral to us. And we can observe in the archeological record the technologies employed by some of these ancestors, in the form of different kinds of stone toolkits. Yet there is no evidence that any of our distant hominid ancestors, or even our more recent early human forebears, possessed anything near the flower of what we now call "human culture." While the recovery of hominid / early human stone toolkits dating back millions of years is endlessly fascinating, modern chimps have been observed sharpened sticks and stone anvils as tools. Tool use itself therefore is not a distinguishing feature of humanity. The technology inherent in the Oldowan toolkit, dating back at least 2.6 million years, surpasses anything known to be used today by chimpanzees, but by upper paleolithic standards it was simple: a hammerstone was used to strike a stone core, which produced sharp flakes.[438]

The Acheulean toolkit, which appears in the archeological record about 1.76 million years ago, employed a two-stage technology, in which larger flakes stricken from the core were further refined by striking smaller flakes from their edges.[439] The resulting took is called a "handaxe," which misleadingly conjures to mind something a notched and grooved head attached to a wooden handle. In fact, the Acheulean handaxe is simply a large flaked stone that can be held in the hand, as shown below:[440]

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[438] Smithsonian Institute, "Early Stone Age Tools," available at
http://humanorigins.si.edu/evidence/behavior/tools/early-tools (last visited August 30, 2012).
[439] *Ibid.*
[440] *Ibid.*

250,000 year old Acheulean handaxe

Photo Source: Smithsonian Institute

The Acheulean toolkit remained unchanged for well over *one million years*, without being supplemented by other technologies.[441]

By about 400,000 to 200,000 years ago, the "prepared core technique" was developed, whereby a variety of flakes could be produced from a core with one strike.[442] This more precise technique facilitated the production of "points," which were attached to shafts in order to make spears, such as this point from Ethiopia dating from just over 100,000 years ago: [443]

Photo Source: Smithsonian Institute

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[441] *Ibid.*

[442] Smithsonian Institute, "Middle Stone Age Tools," available at
http://humanorigins.si.edu/evidence/behavior/tools/middle-tools (last visited August 30, 2012).

[443] *Ibid.*

The toolkits also diversified to include scrapers and awls for working hides and wood.[444] Still, the range of tools remained limited and there is no evidence of rapid innovation.

By the Upper Paleolithic (Europe) or Late Stone Age (Africa), however, there is evidence of far greater diversity and innovation. As the Smithsonian Institute's web resource notes,

> These toolkits are very diverse and reflect stronger cultural diversity than in earlier times. The pace of innovations rose. Groups of *Homo sapiens* experimented with diverse raw materials (bone, ivory, and antler, as well as stone), the level of craftsmanship increased, and different groups sought their own distinct cultural identity and adopted their own ways of making things.[445]

At the same time, we begin observe in the archeological record the first substantial evidence of symbolic art and spiritual / religious practices.

2. Language, Mind, and the Cultural Explosion

It seems, then, that most of the creatures profiled in *The Last Human*, for the vast majority of the millions of years over which those different species lived and died out, were capable, at best, of little more technology than modern chimpanzees, and were incapable of creating symbolic art or spiritual / religious artifacts. In evolutionary time, aside from some simple tools, what we call "human culture" appears suddenly and with little warning.

Indeed, most paleoanthropologists broadly agree that a "cultural explosion," a "big bang of human culture," occurred around 60,000 to 30,000 years ago.[446] As archeologist Steven Mithen notes, "with no apparent change in brain size, shape or anatomy in general – the cultural explosion occurred."[447] Similarly, paleoanthropologist Ian Tattersall, who curated the American Museum of History's Hall of Human Origins, argues that modern humans "are an altogether

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[444] *Ibid.*

[445] Smithsonian Institute, "Later Stone Age Tools," available at http://humanorigins.si.edu/evidence/behavior/tools/late-tools (last visited August 30, 2012).

[446] *See* Steven Mithen, *The Prehistory of the Mind: The Cognitive Origins of Art and Science* (London: Thames and Hudson 1996),, 151. As with all things in paleoanthropology, there are dissenters even from this widely held view. For a discussion of various views, see Ofer Bar-Yosef, "The Upper Paleolithic Revolution," Annu. Rev. Anthropol.. 2002, 31:363-93.

[447] *Ibid.* at 15.

unprecedented presence on our planet."[448] Further, Tattersall says, the notion that "the long human story" represents "an extended and gradual struggle from primitiveness toward perfection" is simply false.[449] "The acquisition of the uniquely modern sensibility" reflected in the cultural explosion, Tattersall says, "was instead an abrupt and recent event."[450]

Tattersall believes that our hominid predecessors generally did not possess the capacity for symbolic thought and had no robust sense of "self." For example, Tattersall describes *Homo heidelbergensis*, which lived between 600 and 200 thousand years ago, as follows:

> These were hardy, resourceful folk, who occupied and exploited a huge range of habitats throughout the Old World through the deployment of an amazing technological and cultural ingenuity. They were adroit hunters who pursued large game using sophisticated techniques, built shelters, controlled fire, understood the environments they inhabited with unprecedented subtlety, and produced admirable stone tools that at least occasionally they mounted into composite implements. Altogether, they lived more complex lives than any hominids had ever done before them.[451]

And yet, Tattersall observes, "throughout the period of *Homo heidelbergensis's* tenure no hominid produced anything, anywhere, that we can be sure was a symbolic object."[452] He therefore concludes that,

> [i]f I had to wager a guess, it would be that the intelligence of these hominids, formidable as it may have been, was purely intuitive and non-declarative. They neither thought symbolically as we do, nor did they have language. As a result, we can't usefully think of them as a version of ourselves, certainly cognitively speaking.[453]

Although most paleoanthropologists agree that the fact of a "cultural explosion" is well documented, they disagree on what caused it. Tattersall suggests there are two leading theories:

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[448] Ian Tattersall, *Masters of the Planet: The Search for Our Human Origins* (New York: Palgave MacMillan 2012),, X.
[449] *Ibid.*, XI.
[450] *Ibid.*
[451] *Ibid.*,, 142.
[452] *Ibid.*
[453] *Ibid.*,, 142-43.

the theory of "mind" and the theory of "language." Tattersall himself falls into the "language" camp.

Tattersall acknowledges that "[t]he changeover of *Homo sapiens* form a nonsymbolic, nonlinguistic species to a symbolic, linguistic one is the most mind-boggling cognitive transformation that has ever happened to any organism."[454] He finds the theory of language compelling because language seems to bridge the "symbolic" and "intuitive" aspects of observed human nature and because language is a "communal possession."[455] He takes these two aspects of human nature – symbolic and intuitive – to correspond to reason and emotion.[456]

Tattersall suggests that language first developed "in a small community of biologically prepared early *Homo sapiens* somewhere in Africa," perhaps first among children stretching their minds through play, though he acknowledges that "[t]he details of this transition will probably forever evade us…."[457] Part of this "biological preparation," according to Tattersall, might have involved the brain's ability to make connections between higher areas – the cortex – "without passing through the older emotional centers below."[458] One of the first linguistic functions this might have facilitated, he suggests, was the ability to name objects. Another possibility he finds plausible is a significant increase in the brain's capacity for working memory, which facilitates executive functions such as "decision-making, goal forming, planning, and so-on."[459] In any event, he concludes, "it seems likely that a random modification of the already exapted brain, plus some children at play, led to the literal emergence of a phenomenon that changed the world."[460]

Steven Mithen, in contrast, is a prominent proponent of the "mind" school. Mithen argues that the cultural explosion "resulted in such a fundamental change in lifestyles that there can be little doubt that it derived from a major change in the nature of the mind."[461] Mithen draws on

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[454] *Ibid.* at 220.
[455] *Ibid.* at 220-221.
[456] *Ibid.* at 220.
[457] *Ibid.*
[458] *Ibid.* at 222-223.
[459] *Ibid.* at 224.
[460] *Ibid.* at 225.
[461] *Ibid.*

evolutionary psychologists who think of the "mind" not as a unified command center, but rather as a set of specialized modules that gradually developed in response to different environmental pressures. Instead of the common metaphor of a "computer" for the mind, Mithen employs the metaphor of a "Swiss army knife."[462] The key breakthrough for the cultural explosion, Mithen argues, must have been a new way of connecting the diverse modules of the early human mind so that they could communicate and coordinate with each other in new ways. Here he employs a different metaphor: the human mind became a "cathedral," with different "rooms" that can function seamlessly together. Like a visitor to a cathedral who might walk from the nave to the chapel to the altar, cognition could then flow across domains and make unified connections.

An early paleolithic person might have known "rock" in one domain that included making flake tools, "animal" in another domain that included scavenging carcasses for food, and "female" in yet another domain that included sex and reproduction – but these different cognitive modules might not have communicated with each other. An upper paleolithic person, in contrast, might have been able to make connections between "rock," "animal," and "female" in ways that gave rise to the symbolic "Venus" figurines found in the archeological record starting about 35,000 years ago, or the exquisite lion/man from Hohlenstein Cave in Germany, dating to about 30,000 years ago, both shown below.

35,000 year old Venus figurine

Photo Source: Wikimedia Commons

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[462] For a discussion of this metaphor as used by contemporary neuropsychologists, see Conor Cunningham, *DPI*, 197-201.

30,000 year old Lion / Man Statue

Photo Source: Wikimedia Commons

Both Mithen and Tattersall, however, seem to recoil from the implications of their observations for any concept of transcendence, even as they exult in the transcendent beauty of something like the Lion Man Statue. At the conclusion of *The Prehistory of the Mind*, Mithen declares that "[t]he human mind is a product of human evolution, not supernatural creation. I have laid bare the evidence. I have specified the 'whats,' the 'whens' and the 'whys' for the evolution of the mind."[463] Mithen believes his explanations are complete and airtight. He seems to have no room for a concept of "why" beyond the biological, never mind a concept of causation that could encompass "evolution" as part of an act of "creation."

Similarly, in a strange coda to his *Masters of the Planet*, Tattersall reflects on universals and the bell curve.[464] He observes that,

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[463] *The Prehistory of the Mind*, 215.
[464] *Masters of the Planet*, "Coda."

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Yes, you can indeed find regularities in human behaviors, every one of them doubtless limited by basic commonalities in the structure of our controlling organs. But all such regularities are in reality statistical abstractions, and people are absolutely uniform in none of them. As a result, if any statistical phenomenon could be said to govern the human condition, it would be the 'normal distribution' or the 'bell curve'…. In any human characteristic you might care to specify, physical or behavioral, you will find a bell curve…. For every saint, there is a sinner; for every philanthropist, a thief; for every genius, an idiot.[465]

These variations, he suggests mean there are no universals, but only variations along a curve.[466] Indeed, he claims, "apart from that basic ability we all share to re-create the world in the mind, perhaps the only other true 'human universal' we all show is cognitive dissonance."[467] This is quite a jarring "Coda" given Tattersall's exuberant claim in the previous chapter that human language, born in the play of children, represents a "communal possession" of humanity. It seems that Tattersall must toss aside his prior 220 pages of argument and resign himself to the fact that human existence can have no common meaning or purpose.

3. The Emergence and Reduction of Transcendence and "Law"

If Mithen and Tattersall's reservations about transcendence are correct, there can be no "law," or at least no possibility of the "rule of law." There may be cognitive connections that facilitate language and the production of cultural artifacts, but such signs must signify nothing beyond themselves. If there is nothing signified, there may be cultural and linguistic structures that encourage and enforce behaviors, but there cannot be "law."

Yet Tattersall strikes a hopeful note at the end of his Coda. Although humans have polluted the planet – a fact about which Tattersall does not hesitate to offer a negative value judgment rather than a placid observation about the normal distribution – there is hope, because "our rational abilities and our extravagant neophilia nonetheless remain beyond remarkable."[468] "From the

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[465] *Ibid.*,, 228-229.
[466] *Ibid.*
[467] *Ibid.*
[468] *Ibid.* at 232.

very first stirrings of the human symbolic spirit," Tattersall assures us, "the technological and creative histories of humankind have revolved around an energetic exploration of the innovative potential released by our new way of processing information about the world."[469] Thus, "while the auguries appear indeed to be for no significant biological change in our species, culturally, the future is infinite."[470]

How does Tattersall move from the confines of the normal distribution into an infinite future in the course of a few paragraphs? How does he move from rejecting all universals to "*our* rational abilities," "*our* extravagant neophilia," "*the* human symbolic spirit," the "technological and creative histories of human*kind*" and "*our* new way of processing information about the world?"[471] He does not explain.

It seems that Mithen and Tattersall as archeologists and anthropologists cannot accept the implications of their own evidence against reductive scientism. Mithen and Tattersall agree that something extraordinary happened around the cultural explosion. For all the language of intentionality, self-consciousness, symbolism and memory that a book like *The Last Human* ascribes to our hominid forebears, Mithen and Tattersall argue that there has never been *anything* like these capacities as they present themselves in modern humans among any other creature known to have inhabited the Earth. Purpose, meaning, and even beauty, joy and hope keep bubbling up from the primordial ooze.

4. Law and Writing

The timeline for the species profiled in The Last Human concludes well before the cultural explosion. Even the cultural explosion is pre-historical, in the sense that there were no elaborate systems of writing or written records developed immediately during that time. The notion of

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[469] *Ibid.*
[470] *Ibid.*
[471] *Ibid.* (emphasis added).

positive law, however, by definition, entails a record.[472] We must look substantially later in human history, to the time of the first cities, to find such records.

The oldest law code discovered by archeologists is that of Ur-Nammu, ruler of the city of Ur during its third dynasty, which began in about 2050 B.C.[473] The tablet containing Ur-Nammu's laws dates to about three hundred years before Hammurabi created the code that was inscribed on a famous stele now on display in the Louvre.[474]

One side of the tablet containing Ur-Nammu's law code locates the origin of the laws in a creation myth. [475] The chief gods An and Enlil appointed the moon-god Nanna to rule over Ur, and Nanna in turn selected Ur-Nammu as their human representative.[476] Ur-Nammu removed the "chislers" and "grabbers," people who stole the citizen's oxen, sheep and donkeys, from the city.[477] He established a system of weights and measures and ensured equity for the poor and dispossessed.[478] By his rule he ensured that "the orphan did not fall a prey to the wealthy," "the widow did not fall a prey to the powerful," and "the man of one shekel did not fall a prey to the man of one mina (sixty shekels)."[479]

The other side of the tablet lists Ur-Nammu's laws. The tablet is badly damaged and only five of the laws are readily discernible.[480] These show that the *lex talonis* already had been mitigated through a system of monetary payments. Thus, if a man cut off another man's foot with some sort of instrument (the text is unclear about what kind of instrument), he was liable for damages of 10 silver shekels; a severed nose required damages of 2/3 of a silver mina (40 silver shekels).[481]

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[472] *See* James Bernard Murphy, *The Philosophy of Positive Law: Foundations of Jurisprudence* (New Haven: Yale Univ. Press 2005), 1-3 (discussing sources of positive law).

[473] Samuel Noah Kramer, *History Begins at Sumer: Thirty-Nine Firsts in Recorded History* (Philadelphia: Univ. of Pennsylvania Press 3d ed. 1981).

[474] *Ibid.* For a photograph and discussion of the Hammurabi stele, see the Louvre Museum website, available at http://www.louvre.fr/en/oeuvre-notices/law-code-hammurabi-king-babylon.

[475] *Ibid.*

[476] Kramer, *supra* Note 199.

[477] *Ibid.*

[478] *Ibid.*

[479] Kramer, *History Begins at Sumer,*, 54.

[480] *Ibid.*

[481] *Ibid.,*, 55.

Ur-Nammu certainly was not the first law-giver. Indeed, there are references dating about three hundred years before the Ur-Nammu law tablet to the legal reforms of Urukagina, ruler of this city of Lagash.[482]   According to an inscription memorializing Urukagina, he "freed the inhabitants of Lagash from usury, burdensome controls, hunger, theft, murder, and seizure (of their property and persons). He established freedom (of a type). The widow and orphan were no longer at the mercy of the powerful: it was for them that Urukagina made his covenant with Ningirsu."[483] All of these references show that concepts of justice, the rule of law, and written law codes date at least to the foundations of the earliest Mesopotamian cities. Perhaps the inscribing of positive law is as old as writing itself.[484]

We know nothing of "law" prior to recorded history. But if Stephen Mithen's theory of mind is correct, the cognitive connections that facilitated art, science and religion also would have facilitated concepts of "law" -- and the lack of such connections would have meant that for early hominids / humans, there was no "law." And if Tattersall is correct, the acquisition of language would also have facilitated the concept of law, particularly positive law with its concrete expression in language.

The earliest small bands of hunter-gatherer hominid / humans, of course, would have operated according to sets of social "rules."[485] Social rules are not a uniquely human trait. Indeed, social ordering is a pervasive feature of the animal kingdom. Even insects, such as honey bees, can show intricate social ordering.[486] "Dumb" farm animals, such as the chickens I've begun raising in my backyard, are socially strict creatures – hence the term "pecking order."[487] Other higher mammals, such as whales, dolphins, and elephants, display detailed social ordering with local

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[482] *Ibid.*

[483] http://history-world.org/reforms_of_urukagina.htm

[484] The earliest written documents are Sumerian clay tablets that date to about 3400 B.C. See John Haywood, *Historical Atlas of the Ancient World* (New York: MetroBooks 1998), §1.07;

[485] For a discussion of the game theoretic analysis of social traits in evolutionary biology, see Zachary Ernst, "Game Theory in Evolutionary Biology," in *The Cambridge Companion to the Philosophy of Biology* (Cambridge: CUP 2007), 304.

[486] *See* Nature Web Focus: Honey Bees, available at http://www.nature.com/nature/focus/honeybee/ (noting that "Honeybees have fascinating social structure and advanced societies despite having brains that are five orders of magnitude smaller than humans.")

[487] *See* Pam Percy, *The Field Guide to Chickens* (New York: Voyageur Press 2006), 39; Jerome D. Belanger, *The Complete Idiot's Guide to Raising Chickens* (London: Penguin 2010), 74.

cultural variations.[488] Modern chimpanzee bands possess elaborate cultural norms that regulate access to food, access to sex, access to affection, and even what we might anthropomorphically call "war" with other tribes.[489] Observations of chimpanzee and bonobo social ordering provide the raw material for many game-theoretic studies of human evolutionary psychology.[490]

But it seems clear that even the most socially "advanced" of the higher mammals do not possess concepts of social order closely akin to what we call "law." A dominant animal in the pack might perform a sort of "judicial" function by forcibly ending disputes, but there is nothing like a well-defined set of juridical procedures or principles. Most significantly, even these highest of social mammals appear to have no concept of binding abstract principles that would support a "rule of law." The "law" for them finally is, literally, the "law of the jungle" – chemistry, instinct, material and reproductive advantage, and force.

If we humans know a concept of "law" that refers the "legitimate" rule of law to abstract principles – indeed if we know even a concept of "legitimacy" – this requires a sort of cognitive capacity that only we humans, of all the creatures on Earth, seem to possess. Could it be that the same cognitive breakthroughs that facilitated the creative explosion in language art, technology and religion also were necessary to the development of "law?" Indeed, could it be that an essential part of what marks us out as "human" is just this sense of transcendent "law?"

Such a notion resonates with the Bible's second creation narrative in Genesis 2. To be clear, we are not suggesting some kind of "concordist" reading in which Genesis 2 must in the literal sense conform to the upper paleolithic cultural explosion, much less to Mithen's intriguing but debatable views about the prehistory of the mind. The literal sense seems to be rooted in ancient near eastern mythological forms that cannot be correlated to any precise "historical" record. Yet all the senses of this text together do convey that God's institution of the "law of the Garden" – "do not eat of it" – represents something significant about the creation of the "human," the

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[488] *See* Edward O. Wilson, *Sociobiology: The New Synthesis, 75th Anniv. Ed.* (Cambridge: Harvard U. Press 2000), Part III.
[489] *See* Frans de Waal, *Chimpanzee Politics* (Baltimore: JHU Press 2007); Christophe Boesch, *The Real Chimpanzee: Sex Strategies in the Forest* (Cambridge: CUP 2009), 102-104.
[490] *See Ibid.*

adam. To the *adam* and not to Sahelanthropus tchadensis or any of the other extinct species detailed in The Last Human, so it seems, God said "do not eat of it." Perhaps only the *adam* was cognitively prepared to hear this command. Indeed it seems that no species of hominid / human prior to the cultural explosion, at least, would have been prepared to hear

5. Reductive Sociobiology

Reductive sociobiological and neurobiological orthodoxy demurs even from the modest claims of paleoanthropologists such as Mithen and Tattersall. David Sloan Wilson, Distinguished Professor of Biological Sciences and Anthropology at Binghamton University, argues that Darwinian evolution fully explains everything, including every aspect of human nature.[491] Anyone who thinks otherwise, even an "intellectual" who is not religious, is a kind of fundamentalist, an "'academic creationist.'"[492]

Sloan Wilson is clear in his evangelistic program for his version of evolutionism. "First," he says, "we must abandon the notion that some special quality was breathed into us by a higher power."[493] He claims that this does not demand an outright rejection of religious faith because, he says, – "*many* people manage to combine a vibrant religious faith with a fully naturalistic conception of the world."[494] But whatever he means here by "religious faith," there is no room in that faith for anything but the physical world. Sloan Wilson's epistemology is uncompromising: "[w]hat goes for knowledge of the physical world also goes for knowledge about ourselves. If something is wrong with your body, your mind, or society, it has a naturalistic explanation, just like [a] problem with your car. Believing that we have special God-given abilities is like praying to your car on the side of the road."[495]

Sloan Wilson is not content merely to reduce "religious faith" to nature. He must include "culture" as well. "A common claim," even among non-religious people, he notes, "is that

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[491] David Sloan Wilson, *Evolution for Everyone: How Darwin's Theory Can Change the Way We Think About Ourselves* (New York: Delacorte Press 2007).
[492] *Ibid.* at 3 (quoting The Nation, "The New Creationism: Biology Under Attack," 1997). We may note in passing the irony of dismissing as "fundamentalist" everyone who disagrees with Sloan Wilson's Darwinian fundamentalism.
[493] *Ibid.*,, 68.
[494] *Ibid.*
[495] *Ibid.*

'biology' sets broad limits to our behavior, such as eating and procreation, but that 'culture' determines what we do within the broad limits, such as making art rather than babies."[496] This high concept of "culture," he correctly observes, suggests that notwithstanding our evolutionary past we are free to choose our future destiny. To this claim that "culture" exerts some kind of downward causality Sloan Wilson cries "Hubris, all hubris!"[497] Since whatever attributes make humans unique are merely "like an addition on to a vast multiroom mansion" over deep evolutionary time, "[i]t is sheer hubris to think that we can ignore all but the newest room."[498] Indeed, Sloan Wilson thinks claims that humans are "uniquely intelligent, moral, flexible, and capable of aesthetic appreciation" are mostly "self-congratulatory and suspect as factual claims."[499] He thinks it empirically established that "other species far surpass our intelligence for specific tasks and that traits associated with goodness can evolve in any species, given the right environmental conditions."[500]

Nevertheless, Sloan Wilson admits that humans possess a unique capacity to construct their own social environments, and indeed "evolutionary social constructivism" is the core of his moral and political philosophy.[501] The essential problem for morality, religion, and politics, in Sloan Wilson's scheme, is that "[s]ome individuals are driven to benefit themselves at the expense of others or their society as a whole."[502] To illustrate this problem, he surveys various game-theoretic models of altruism.

In a chapter titled "Love Thy Neighbor Microbe," for example, he describes a bacterial species, *Pseudomonas flourescens*, which creates a polymer mat that sticks the bacteria together in a colony.[503] The mat is biologically expensive to create, and eventually some mutant bacteria instead devote energy to reproduction. When the mutants begin to thrive, the mat collapses, and the colony disintegrates. "Thus," Sloan Wilson observes, "is the glue of civilization dissolved

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[496] *Ibid.,, 69.*
[497] *Ibid.*
[498] *Ibid.,, 70.*
[499] *Ibid.* at 71.
[500] *Ibid.*
[501] *Ibid.*
[502] *Ibid.* at 13.
[503] *Ibid.,, 128-129.*

by sloth!" And such "examples of good and evil among microbes can be repeated without end because they are based on inescapable facts of social life."[504] All of this maps directly onto human behavior and human folk concepts of "good" and "evil." But, Sloan Wilson concludes, "[i]f the traits that we associate with goodness can evolve, then we can make them more common by providing the right environmental conditions. Far from denying the potential for change, evolutionary theory can provide a detailed recipe for change."[505]

Of course, the behavior of these bacteria has nothing to do with what most Christian theologians and philosophers traditionally have called "good" and "evil" because those categories relate to intentional states and transcendentals.[506] If the Platonic and Aristotelian philosophy and the Christian, Islamic and Jewish traditions have anything to say about it, a microbe is neither "good" nor "evil" because microbes have no capacity for intentional participation in a "good" that is beyond themselves, nor can microbes intentionally deny "the good" and thereby abandon themselves to "evil." Microbes indeed do not have intentional "selves," or in the grammar of Christian theology, "souls." Even the Eastern / Buddhist traditions to which Sloan Wilson seems drawn – he seems to think the Dali Lama would approve of his naturalist reductionism – locate "reality" in a transcendent realm, although finally in a very different way than in the West. But Sloan Wilson has already made his *a priori* commitment to absolute naturalism, so he has dismissed several thousand years of historical reflection on "good" and "evil" *tout court*. Here we must remark on Sloan-Wilson's cry of "Hubris, all hubris!" (Yet what is "hubris" in a naturalistic game-theoretic world without transcendent virtues?)

Similarly, Michael Graziano, Professor at Princeton University's Neuroscience Institute, denies any sense of the transcendent:

> When we say we are conscious, aware, self-aware, in conscious control of our actions, have a stream-of-consciousness understanding of ourselves, what we really mean, apparently, is this: there is a system in the brain whose job is to construct models of intentionality of other people or of ourselves; and right or

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[504] *Ibid.,*, 129.
[505] *Ibid.,*, 32.
[506] This is discussed more fully in Chapter Three.

wrong, confabulated or not, the self-model, continuously updated, continuously refined, supplies the contents of our conscious mind.[507]

Since the author of this phenomenon is merely a system in the brain, Graziano says, "this sense of consciousness – a soul on a trajectory through waking life – is a perceptual illusion. It is a perceptual model that is at best a simplification and sometimes plain wrong."[508] All intentionality is reducible, for Graziano, to individual neurons.[509] And what seems like the product of self-reflexivity, awareness, and language – the sorts of cultural things Mithen and Tattersall argue radically distinguish modern humans from all other creatures – are merely "memes" that cause certain neurons to fire.[510] Graziano is particularly keen to apply his notion of neurobiology and memeology to religion: "[b]elief after belief," he proclaims, "each component of a religion is ultimately present for one historical reason; the religion was better able to spread and survive because of it. Darwinian evolution selected for those traits."[511]

Notwithstanding Graziano's confidence in memeology, the concept is highly problematic.[512] Nevertheless, there is something insightful about memeology: it at least recognizes the phenomenon of "culture" as something that exists and exerts causality. The neurobiologist Graziano's memeology does not mix well with the anthropologist Tattersall's rejection of universals (half-hearted though it turns out to be), nor can it be squared with evolutionary biologist Sloan Wilson's absolutist constructivism. If cultural units replicate and spread akin to genes, then they have the capacity to become universals. A common cultural substrate might become as universal as a common biological substrate, and just as some common biological

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[507] Michael Graziano, *God Soul Mind Brain: A Scientist's Reflections on the Spirit World* (Fredonia: Leapfrog Press 2010).

[508] *Ibid.,*, 65.

[509] *Ibid.,,* 97-101.

[510] *Ibid.,,* 150-158.

[511] *Ibid.,* 160.

[512] For a good critique of memeology, see Alister McGrath, *Dawkins God: Genes, Memes, and the Meaning of Life* (London: Wiley-Blackwell 2004). No one has ever observed a "meme," nor by definition can "memes" ever discretely be observed because they are cultural phenomena and not encoded in biology like genes. Moreover, if memes can explain "belief after belief" in religion, they can do the same in science. This would mean there can be no "science" of archeology or paleontology that might offer insights into the development of human consciousness, awareness, language, or culture because the idea of something like "archeology" or "paleontology" is just a meme, as are any ideas of human consciousness, awareness, language and culture. Memeology itself must be merely a meme, as must the supposed explanatory power of Darwinian evolution.

features demarcate a species, so might some common cultural features. Indeed, memologists commonly point to religion, belief in the "self" and in other "selves," and the "illusion" of free will as essentially universal units of human culture, notwithstanding their efforts to spread new and contrary memes to those notions.

This reference to the "illusion" of free will, however, highlights another problem for memeology. If materialism is true, how can we speak of "culture," the "will" or the "mind" at all? There could not be any such entity as a cultural replicator, because "culture" must be more than the sum of the material that produces "culture." If Van Gough's *Starry Night* is finally only described in terms of the matter that makes up the pigments and canvas arranged in patterns forced by the neurochemicals in Van Gough's brain – neurochemicals that in their production, distribution, transmission, or reception apparently fell outside the normal distribution for *homo sapiens sapiens*, judging by Van Gouhg's obvious mental illness – then there is nothing about *Stary Night* that could comprise "culture."   "Culture," "pigments," "canvas," "patterns," "brain," "Van Gough," "Starry Night," and so-on, would be signs without signifying anything *real*.   In metaphysical terms, if materialism is true, neither memeology nor any other theory of "culture" can be true. And since "law" is a persistent feature of human culture, if materialism is true, then there can be no metaphysical realism in the concept of "law." The next Chapter describes how some scholars have used neuroscience to reach precisely that conclusion.

Chapter 4: Neuro-Law and the End of Persons

The previous chapter surveyed human evolution in relation to the development of human "culture" and law. We have seen that paleoanthropologists speak of a "cultural explosion" that dramatically sets our species apart from anything that preceded it. The capacities that facilitated this unprecedented shift may relate to language, brain structure, or some combination of such factors. It is reasonable to include "law" as one of the fruits, if not one of the defining features, of this phase in which human beings dramatically became distinct from all other creatures on the Earth.

But we have also seen that paleoanthropologists shrink from the conclusion that the "cultural explosion" reflects any sort of emergence or irruption of transcendence. Even more so do neurobiologists and sociobiologists reject any notion of transcendence. For them, self-awareness and transcendence must be illusions of the brain, and "culture" must, at most, reflect the spread of "memes."

Legal theorists have not missed the implications of the new reductive sociobiology and neuroscience for "folk" concepts of the rule of law. Many legal scholars have become interested in the emerging field of "Law and Neuroscience," or "Neurolaw."[513] This chapter reviews and critiques neurolaw discourse. This discussion prepares the way for a positive theological account of "law" in Chapter 4.

1. The Emergence of NeuroLaw

Popular science writers and scholars alike often suggest that the "mind" is the last unopened black box in the universe.[514] Modern neuroscience promises to crack open this box by unlocking

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[513] See, e.g., The MacArthur Foundation Research Network on Law and Neuroscience website, available at http://www.lawneuro.org/resources.php.

[514] *See, e.g.,* Güven Güzeldere *"*Introduction: The Many Faces of Consciousness," in Ned Joel Block, Owen J. Ianagan, and Güven Güzeldere, eds. *The Nature of Consciousness: Philosophical Debates* (Boston: MIT Press 1997) (stating "[t]here is perhaps no other phenomenon besides consciousness that is so familiar to each of us and yet has been so elusive to any systematic study, philosophical or scientific … are we facing a phenomenon the understanding of which lies forever beyond our intellectual capacities?"); Big Think, "The Ghost in the Machine: Unraveling the Mystery of Consciousness," July 15, 2012 (asking, "[i]f physicists can find the 'God particle' with a Hadron collider, then why, given their sophisticated tools, have neuroscientists failed to unlock the black box of consciousness?"), available at http://bigthink.com/think-tank/the-ghost-in-the-machine-unraveling-the-mystery-of-consciousness.

and demystifying human consciousness, conscience, and will.   It seems that each day reveals a new discovery, from the identification of brain regions associated with specific emotions, perceptions and memories to the translation of human visual impulses onto computer screens.[515] Such research offers the hope of new treatments for debilitating neurological diseases such as Epilepsy and Parkinson's, better therapies for depression, anxiety, sleep disorders, and other maladies, more effective reconstructive techniques and prosthetic devices for disabilities caused by stroke, brain damage and other traumatic injuries, and deeper insights into cognition, mental performance, and learning, among other benefits.   The rapid progress of brain and neuroscientific research therefore is rightly cause for celebration.

There are, however, dangers lurking within this framework of progress. Modern neuroscience operates under a presumption of scientific naturalism. In part, this reflects the methodological presupposition of all modern natural science: a "scientific" explanation is one that makes reference only to "natural" phenomena.[516]   In significant part it is also a metaphysical assumption about what is real, or at least what is possible. The "mind" or "will," many neuroscientists argue, is simply an epiphenomenal product of lower level processes that are hidden from what we (mistakenly) call "consciousness." Human beings do not have any real "freedom." We are entirely creatures of "law" – the laws of nature.[517]

This connection between neuroscience and the laws of nature has informed the emerging discourse in "neurolaw."[518] In the relevant literature, "neurolaw" encompasses as wide variety of research programs and perspectives. Many neurolaw scholars are exploring how the new insights drawn from brain scans and other neuroscientific findings might be used as evidence in

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[515] *See* Nishimoto, Vu, Naselaris, Benjamini, Yu and Gallant, "Reconstructing Visual Experiences from Brain Activity Evoked by Natural Movies," Current Biology 21:19, 1641-1646 (September 2011), available at http://www.cell.com/current-biology/abstract/S0960-9822%2811%2900937-7.
[516] *See, e.g.,* Merriam-Webster Dictionary, "Science" (defining "science" as "knowledge about or study of the natural world based on facts learned through experiments and observation"), available at http://www.merriam-webster.com/dictionary/science.
[517] *See* Chapter 3.5.
[518] *See* Chapter 3.

a courtroom, for example, to establish diminished mental capacity to commit a crime.[519] These generally are salutary efforts consistent with traditional scholarship and practice on the use of scientific evidence in the courtroom. Neurolaw scholars are seeking to better understand, for example, how diagnostic tools such as functional magnetic resonance imaging (fMRI) might or might not be useful as evidence in the courtroom.[520] Such evidence might help determine the presence of brain injury in a negligence case, assess mental capacity in a competency hearing, or define "brain death" for purposes of interpreting a medical advance directive.[521]   More controversially, fMRI evidence could bear on the *mens rea* requirement in criminal law when the defendant suffers from some mental defect, or on whether a witness is telling the truth.[522] Such uses of the best available empirical science to help clarify the application of legal rules represents the way in which the law's general principles become instantiated in particular situated contexts.

But "neurolaw" also refers to efforts to explain and reform the legal system based on neuroscience. If the human "mind" or "will" is reducible to the laws of nature, then the cultural artifacts of the human mind that that affect the will – in particular, positive law – likewise are reducible to the laws of nature. If positive law is reducible to the laws of nature, then Ockham's Razor suggests that the unnecessary term should be elided and we should acknowledge that jurisprudence is really only the study of human behavior from the bottom up. That is, what we call "positive law" is in fact epiphenomenal, and what are "real"are only the brute facts of nature. "Jurisprudence" is actually just "sociology," or more accurately, "jurisprudence" is actually just "sociobiology."

Some of the more candid neurolaw scholars acknowledge and celebrate this reductionistic program.   Neurolaw, for them, represents an opportunity to erase the final traces of jurisprudential moralism that seem irrepressible in common-sense "folk" conceptions of positive law. Mainstream modern academic legal scholarship has long been suspicious of connections

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[519] *See* Owen D. Jones, Jeffrey D. Schall & Francis X. Shen, *Law and Neuroscience* (Sandy: Aspen 2014); The MacArthur Foundation Research Network on Law and Neuroscience Website, available at http://www.lawneuro.org/.
[520] See, e.g., Neal Feigenson, "Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI," in Michael Freeman and Oliver R. Goodenough, *Law, Mind and Brain* (Franham: Ashgate 2009).
[521] *Ibid.* at 25.
[522] *Ibid.*

between "law" and "morality."   In particular, since the nineteenth century, American legal scholarship has been deeply influenced by "legal realism" (not to be confused with metaphysical realism), which holds that positive law is produced "from below," in the concrete realms of sociology, economics, and evolutionary psychology, and not "from above," in the ethereal realm of transcendent ethics. The Kantian separation between facts and values has thoroughly invaded modern American jurisprudence.   Neurolaw presents an opportunity to cement this gap empirically with the hard data of brain scans.

2.   The Path of the Law: Reductive NeuroLaw

Reductive neurolaw scholars argue that neuroscience completely rewrites the concept of "law" because it destroys any meaningful concept of intentionality. They want to replace any notion of autonomous general legal principles with neurobiology. Law, like everything else, could be fully explained by science.

For these reductive neurolaw scholars, neuroscience suggests that "the brain is a physical entity governed by the principles and rules of the physical world,"and that "brain determines mind."[523] Contemporary neuroscience thereby claims to elide the soul and the mind – what many neuroscientists call "the ghost in the machine."[524]   All of the faculties attributed in Medieval Christian theology to the "sensitive soul" ("locomotion, appetite, sensation, and emotion"), as well as the intellectual faculties attributed to the human "rational soul," these scientists suggest, can or will be accounted for by brain functions.[525]   As Martha Farah of the University of Pennsylvania's Center for Neuroscience & Society puts it, "as neuroscience begins to reveal the mechanisms of personality, character, and even sense of spirituality dualism becomes strained. If these are all features of the machine, why have a ghost at all? By raising questions like this, it seems likely that neuroscience will pose a far more fundamental challenge to religion than

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[523] Brent Garland, ed., *Neuroscience and the Law: Brain, Mind and the Scales of Justice* (New York: Dana Press 2004).

[524] *See Ibid.* For the origin of the term "ghost in the machine," see Gilbert Ryle, *The Concept of Mind* (Chicago: Univ. of Chicago Press 1949).

[525] *See* Nancey Murphy, *Bodies and Souls, or Spirited Bodies* (Cambridge: CUP 2006), 55-69.

evolutionary biology."[526]   Not just religion, but law as well, can be reduced to neuroscience. Farah notes with some understatement that "[t]he idea that behaviour is determined by physical causes is hard to reconcile with the intuitive notions of free will and moral agency on which our legal systems are based."[527]

Indeed, "free will" is an illusion, many neurolaw scholars argue. Among their most compelling bits of evidence for this claim are studies, based on the pioneering work of Benjamin Libet, suggesting that the brain signals the body to engage in actions before we become consciously aware of the action we will take.[528] This "precognition" suggests that our actions are automatic responses to stimuli and that our conscious "decisions" are really merely *ex post* determinations not to "veto" what the brain has already signaled its readiness to do. We have, at best, "free won't" rather than "free will."[529] Therefore, "according to neuroscience, no one person is more or less responsible than any other for actions. We are all part of a deterministic system that someday, in theory, we will completely understand."[530] The notion of "responsibility" is only a "social construct," law is an instrumentalist tool useful for engineering of the society we are constructing, and the society we are constructing ultimately is reducible to the evolutionary history embedded in our brains.

David Eagleman, Director of the Initiative for Neuroscience and the Law at the Baylor College of Medicine, is a leading proponent of this view.[531] Eagleman states the issue for neurolaw as follows: "the crux of the question is whether all of your actions are fundamentally on autopilot or whether there is some little bit that is 'free' to choose, independent of the rules of biology."[532]

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[526] University of Pennsylvania Center for Neuroscience & Society website, available at http://neuroethics.upenn.edu/index.php/section-blog/28-articles/72-science-and-the-soul (last visited March 10, 2010).

[527]Martha Farah, *"Responsibility and Brain Function,"* available at http://neuroethics.upenn.edu/index.php/penn-neuroethics-briefing/responsibility-a-brain-function

[528] Garland, *Neuroscience and the Law*, *supra* Note 48, 56.

[529] *Ibid.*

[530] *Ibid.* at 68.

[531] See http://www.nuelaw.org (last visited October 28, 2011).

[532] Daivd Eagleman, *Incognito: The Secret Life of the Brain* (New York: Pantheon 2011), 166.

Eagleman offers a seemingly mundane example: the every-day activity of driving home from work and opening the front door of one's home.[533] Most of us will realize, if we reflect on these actions once we are comfortably seated on the couch after a long day, that we drove home on mental auto-pilot and that we opened the door without thinking about the location of the doorknob. If our route had been changed because of road construction, or if our significant other had installed a new door with a different type of opener, things would have been different: these new facts would have required greater attentiveness. For Eagleman, this means that the conscious aspect of returning home from work is only a "little bit" of the story. Once we become habituated to the routine, it becomes automatic.[534] The same is true, he argues, for all of our actions, including what we mistakenly attribute to intentionality.

In a recent interview, Eagleman acknowledged that his view of neurobiology undermines libertarian notions of personal autonomy and free will.[535] Asked, whether neuroscience completely erodes or at least challenges the notion of individual autonomy, he replied, "I'm afraid it does," "you are your biology," and "what I'm pretty certain about now is that to whatever extent we have free will it is only a bit player in what actually happens in people's lives."[536]

Eagleman asserts that "[t]he unique patterns of neurobiology inside each of our heads cannot qualify as *choices*; these are the cards we're dealt."[537] He suggests that "it is difficult to find the gap into which to slip free will – the uncaused causer – because there seems to be no part of the machinery that does not follow in a causal relationship from the other parts."[538] He argues that concepts of "blame" should be replaced with "science" and that "[b]lameworthiness should be removed from the legal argot."[539] Blameworthiness is merely a "backward-looking concept that

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[533] *Ibid.*

[534] *Ibid.*

[535] See http://www.youtube.com/watch?v=wSQY7zHk5y8 (last visited October 28, 2011).

[536] *Ibid.* Of course, he did not explain how his views about biological determinism are consistent with his description of first-person phenomenological qualia ("I'm afraid…" "I'm pretty certain…"). And just moments before offering that grim response, he suggested that bio-feedback treatments for criminals would provide them with a "libertarian" way to "help themselves." *Ibid.*

[537] David Eagleman, "The Brain on Trial," The Atlantic, July/August 2011.

[538] *Ibid.*

[539] *Ibid.*

demands the impossible task of untangling the hopelessly complex web of genetics and environment that constructs the trajectory of a human life."[540]

Eagleman's near-mechanistic view of human nature is reflected in his bold and ultimately frightening vision of the legal system. Since people do not really possess moral agency, the question for the law is not whether the accused is to *blame* for his or her conduct, but rather whether there is something "different" about the person's neurobiology that led the person to act in a certain way.[541] We should think about criminal conduct "[i]n the same way we think about any other physical process, such as diabetes or lung disease."[542]

Eagleman admits that, at present, only in relatively rare cases can we assert with confidence that a person's anti-social conduct was caused by an identifiable brain condition, such as a tumor, but this, he claims, is merely a problem of technology.[543] In principle, he suggests, science will one day be able to measure biological states with a degree of comprehensiveness and granularity that will permit a full diagnosis of criminal conduct. Culpability, he argues, should not "be determined by the limits of current technology."[544] In place of traditional legal concepts of fault and blame, Eagleman proposes a "forward-looking" system in which criminals would receive bio-feedback treatments designed to retrain their brains towards "pro-social behavior."[545]

How does Eagleman define what "pro-social" should mean in a world of neurobiological determinism? He speaks of "social contracts," "society's needs," and what we can "hope for" as "a society that respects individual rights and freedom of thought."[546] All of these concepts, of course, presuppose the very "folk" concepts of freedom, autonomy, and intentionality that Eagleman's neuroscience supposedly deconstructs. Yet for Eagleman, these concepts are merely artifacts of evolution. "A meaningful theory of human biology," he argues

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[540] *Ibid.*
[541] *See Ibid.* at 174-177.
[542] *Ibid.* at 170.
[543] *Ibid.* at 175-176.
[544] *Ibid.* at 176.
[545] *Ibid.*
[546] *Ibid.*

Cannot be reduced to chemistry and physics, but instead must be understood in its own vocabulary of evolution, competition, reward, desire, reputation, avarice, friendship, trust, hunger, and so on – in the same way that traffic flow will be understood not in the vocabulary of screws and spark plugs, but instead in terms of speed limits, rush hours, road rage, and people wanting to get home to their families as soon as possible when their workday is over.[547]

Instead of assuming people ordinarily possess a degree of agency that allows them to choose whether to abide by the law, Eagleman argues that "criminals should always be treated as incapable of having acted otherwise."[548]

The role the legal system would then shift from assigning blame based on agency to changing the law-breaker's brain state in order to produce more desirable behavior. This would be accomplished by a "prefrontal workout," consisting of cognitive biofeedback.[549] A person's sentence – their prescribed prefrontal workout regimen – would depend on the degree to which the person's biology is "modifiable," based on some as-yet-undiscovered measure of neuroplasticity.[550] The concept of variable neuroplasticity is important, Eagleman observes, because contrary to the ideals of developed democracies, all people are *not* created equal: "[w]hile admirable, the notion [of human equality] is simply not true."[551] People vary widely both in nature and in nurture.[552] With this truth in hand, we could "tailor sentencing and rehabilitation" to the individual's specific neurobiological make-up.[553]

If neurolaw is truly to fulfill its promise, why *doesn't* an ardent believer such as David Eagleman go all-in for lobotomies, chemical castrations, and other more direct biological interventions? "The ethical problem," Eagleman suggests, "pivots on how much a state should be able to change its citizens."[554] This is a "landmark problem" in neuroscience: "as we come to understand the

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[547] *Ibid.* at 218-19.

[548] *Ibid.* 177.

[549] *Ibid.* at 182-186.

[550] *Ibid.* at 188-189.

[551] *Ibid.*

[552] *Ibid.* at 187.

[553] *Ibid.* at 188.

[554] *Ibid.* at 182.

brain, how can we keep governments from meddling with it?"[555] One of Eagleman's concerns is that legal advances of recent years, such as civil rights legislation, should not be compromised: "[o]ur social policies work to cement into place the most enlightened ideas of humanity and to surmount the basest facets of human nature."[556]

3. NeuroLaw and the Camp

Reductive NeuroLaw advocates such as David Eagleman never explain what terms like "should" or "meddling" or "enlightened" or "surmount" or "basest facets" might mean in his neuro-world. Nor does he venture any suggestion about why some behaviors should qualify for a prefrontal workout while others ought to be left unchecked, or encouraged. In a world without transcendence, why *should* one organism's immanent frame be preferred over another's? Eagleman recites notorious examples of pedophiles and mass murderers whose conduct clearly was influenced by significant brain traumas or invasive tumors. What makes their brain states or their conduct *abnormal* and therefore subject to correction? Why ought "governments" not possess the power to meddle with citizens' brain states? In an evolving sociobiological matrix, there are no "neuro-rights" (a term Eagleman inexplicably introduces and then drops); there are only game-theoretic solutions for passing along genes.

To move from extreme examples such as pedophiles and mass murderers, consider a society in which people who hold undesirable ideas and engage in other anti-social practices – say, rallies and demonstrations for political or religious causes opposed by the majority of the populace – are sent to re-education camps for prefrontal workouts. To refine the example, let us admit that people are not in fact created equal, and that the task of determining which rallies and demonstrations are anti-social is taken on by an elite class specially bred for this task. To risk the *reductio ad Hitlerum*, Visions of Aryan supremacy, Communist China during the Cultural Revolution, contemporary North Korea, and Orwell's "1984" are not far off.[557] These are not new ideas, dressed up though they may be in the trendy lingo of neuroscience.

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[555] *Ibid.*
[556] *Ibid.* at 186.
[557] *See* Wikipedia, "Reductio ad Hitlerum," available at https://en.wikipedia.org/wiki/Reductio_ad_Hitlerum.

Eagleman, to be fair, is not advocating a neuroscientific totalitarian state, but there appears to be no reason why not. There simply is no basis in neuroscience for his expressed preference of liberal democratic values or for any other notion of human dignity inscribed in the law. Having given up on a meaningful notion of persons and agency, he destroys the basis for understanding "human equality" as something that transcends differences in mental capacity.[558]

Indeed, Eagleman at times seems uncomfortable with his own logic. In an effort to critique any concept of an immaterial soul – which he refers to as "the extrabiological soul" – he rehearses various examples of how brain states, chemical alterations (such as cocaine) and brain injuries can affect behavior, and concludes that "invisibly small molecules we call narcotics, neurotransmitters, hormones, viruses, and genes can place their little hands on the steering wheel of our behavior."[559] Quoting neuroethicist Martha Farah, he asks

> if an antidepressant pill can help us take everyday problems in stride, and if a stimulant can help us meet our deadlines and keep our commitments at work, then must not unflabbable [sic] temperaments and conscientious characters also be features of people's bodies? And if so, is there anything about people that is *not* a feature of their bodies?[560]

"If there is something like a soul," Eagleman says, "it is at minimum tangled irreversibly with the microscopic details."[561] "From this point of view," he notes, "you can see why biological reductionism has a strong foothold in modern brain science."[562]

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[558] Cf. Stephen R.L. Clark, *Biology & Christian Ethics*,,264 (noting that "[i]f our bodies and minds have been constructed from chance innovations by evolutionary selection, without any regard to Beauty or the Good, it may be true that most minor deviations will be less 'fit'. . . . But their fitness is of no serious concern to any disillusioned eye. Why should we not rearrange things to secure whatever it is we still find we want? . . . . If we retain a residual, 'superstitious' belief that *pain* (not just my pain) is 'bad' we might even reckon it better to extinguish living creatures and their pain altogether.").
[559] *Ibid.* at 209.
[560] *Ibid.* (quoting Farah, M.J., "Neuroethics: The Practical and the Philosphical," Trends in Cognitive Sciences 9: 34-40 (2005)).
[561] Eagleman, 209.
[562] *Ibid.*

But then, remarkably, Eagleman undermines his entire thesis with a critique of reductionism based on emergence.[563] Reductionism, he says, "isn't the whole story."[564] He critiques the sort of genetic reductionism that drove the Human Genome Project and concludes that "successive levels of reduction are doomed to tell us very little about the questions important to humans."[565] He nods towards systems biology by noting that "the contributions from the genome can really be understood only in the context of interaction with the environment" and argues that "knowledge of the genes alone is not sufficient to tell you much about behavior."[566] He offers the example of reducing an airplane to a hunk of metal, and concludes that "[t]he concept of emergent properties means that something new can be introduced that is not inherent in any of the parts."[567]

So much for the way Eagleman initially framed the "crux of the question" concerning law and responsibility: he apparently agrees that there can be a meaningful concept of will and responsibility that need not propose a mind "independent of biology." Indeed, he agrees that will and responsibility need not even emerge from the brain alone: "[w]ithout a doubt," he says, "minds and biology are connected – but not in a manner that we'll have any hope of understanding with a purely reductionist approach."[568] And later he concludes:

> When we talk about 'the brain' and behavior, this is a shorthand
> label for something that includes contributes from a much broader
> sociobiological system. The brain is not so much the seat of the
> mind as the hub of the mind.[569]

After this statement, it is hard to comprehend what all the fuss is about. It seems, then, that Eagleman wants it both ways: he wants neuroscience to replace notions of agency and culpability, but at the same time he wants to speak holistically of things like "desire," "friendship," "trust," "people," and "families."

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[563] *Ibid.* at 209-224.
[564] *Ibid.*
[565] *Ibid.* at 210.
[566] *Ibid.* at 211-212.
[567] *Ibid.* at 217.
[568] *Ibid.* at 216.
[569] *Ibid.* at 219.

In fact, Eagleman's approach is question-begging on multiple fronts. First, Eagleman assumes that any part of the brain that is "free" to choose must comprise a "little bit." But what is meant by "little?" Throughout his book, Eagleman gives examples that suggest the brain is comprised of multiple independent control systems that operate below conscious awareness. He argues that what we call "consciousness" is a sort of executive control module that becomes active when circumstances require mediation between the sub-conscious control systems – a situation that, in quantitative terms, represents a small portion of our overall brain function. It appears, then, that Eagleman's term "little bit" is quantitative: only a small portion of our waking brain activity may be dedicated to conscious decision-making. This may be true, but Eagleman simply begs the question whether the *qualitative* aspects of the activity he assigns to conscious decision-making are a "big bit" of what we mean by "consciousness" and "responsibility."[570]

4. NeuroLaw and the Normal Distribution

In an evolving universe, taken solely on its own terms, there is no normative force to the term "normal." There are populations, which always exhibit some degree of genetic diversity, and there is change over time. There is no sense in which organisms should conform to any "norm" external to survival in the context of the selective pressures on the organism. Perhaps a rough analogy to a "norm" would be a species' fitness landscape – that is, the parameters of the environment the species inhabits.[571] The notion is that natural selection will direct a population toward the mean fitness level as determined by the organisms' environment.[572]

Let us return to Ian Tattersall's reference to the normal distribution. We could imagine a statistical normal distribution in which the mean fitness level represents what Eagleman means by "normal" behavior. This is a great leap of imagination given the complexity of human behavioral interactions (can "*a* behavior" even be isolated from other behaviors?), but

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[570] A truly committed and consistent materialist will reply that, indeed, Eagleman has missed the point: at the end of the day, there are only quantum probabilities, and nothing else. This seems to be, for example, David Sloan Wilson's view.

[571] For a discussion of this concept, *see* Mark Ridley, *Evolution* (London: Blackwell 3d ed. 2004), 216-29.

[572] *See Ibid.*

nevertheless we shall simplify for the sake of discussion. In a normal distribution, more than 25% of the set falls between one and two standard deviations from the mean, as illustrated below:[573]
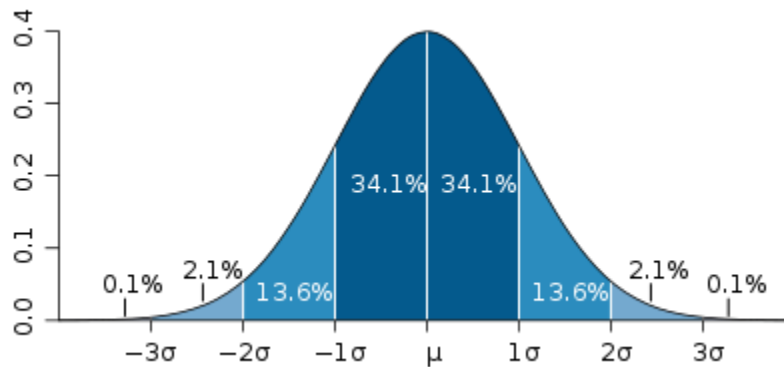
Would Eagleman propose that 25% of the population be assigned to reeducation camps for prefrontal workouts? In the United States, this would encompass about 780 million people. According to the U.S. Census Bureau, over 1.6 million people were incarcerated in State and Federal prisons in the U.S. as of 2009.[574] Extending Eagleman's cognitive workout program to people beyond one standard deviation of the mean therefore would represent a massive expansion of the criminal justice system, without precedent in world history. Or, perhaps, Eagleman would require cognitive workouts for only the roughly 2% who fall on the tails outside two standard deviations of the mean? This would cover about 6.8 million people in the U.S. – about six times the number now incarcerated. Who would decide where to draw this line? Do the 68% within one standard deviation of the mean get to decide, or the 95% within two standard deviations?

A significant problem here – which is also a problem with Tattersall's reference to the normal distribution – is that, in strictly evolutionary terms, particularly in terms of the concept of fitness landscapes, it is doubtful whether there *is* any such thing as a homogenous normal

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[573] Illustration from Wikimedia Commons, available at
http://en.wikipedia.org/wiki/File:Standard_deviation_diagram.svg.
[574] U.S. Census Compendia, Table 347, "Prisoners Under Jurisdiction of State or Federal Correctional Authorities –
Summary by State 1990-2009, available at http://www.census.gov/compendia/statab/2012/tables/12s0347.pdf

distribution.[575] Biologists who favor the idea of fitness landscapes distinguish between "global" and "local" landscapes, and argue that segments of a broader population can move toward a fitness mean dictated by local niche conditions, which might represent a different mean that that of the aggregate population. The resulting picture is more like a set of hills and valleys rather than a single normal distribution:[576]
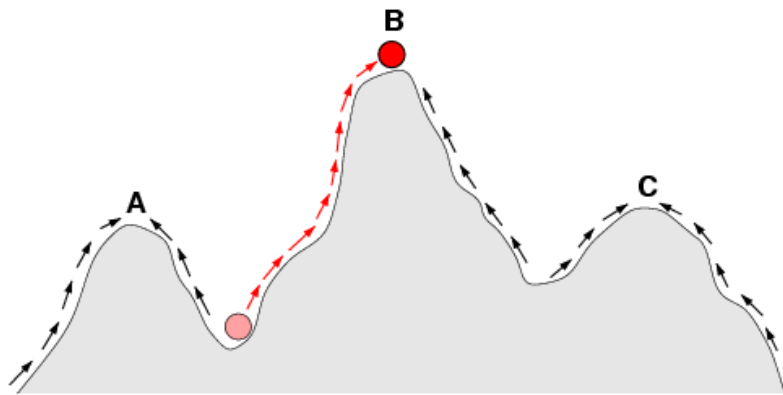
So what might the fitness landscape look like for human social behaviors? Would there be local populations in which optimal behaviors include things like forced marriage of young girls, slavery and spousal abuse? It seems there would be, or else such behaviors would not recur so often throughout human history. Within such populations, presumably there would be no need for cognitive workouts to correct such behavior. If anything, people who fall a standard deviation or two outside this local mean (such as, perhaps, some brave young woman who desired independence and an education) would be candidates for reeducation. Curiously, this might indeed describe the socialization process for young girls in some contemporary societies that blend tribalism with radical Islamism (the Taliban). [577]

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[575] For a brief discussion of the debate within evolutionary biology about the idea of local fitness landscapes, see Ridley,, 217-18.

[576] Image source: Wikimedia Commons, available at http://en.wikipedia.org/wiki/File:Fitness-landscape-cartoon.png. Points A and C in this diagram are local optimal fitness peaks.

[577] *See* William S. Abruzzi, "Ecological Theory and the Evolution of Complex Human Communities," Advances in Human Ecology 5:111-156 (1996) (noting that "Considerable controversy surrounds the application of ecological concepts in anthropological human ecology."); Maria Pankhyo and Stacy McGrath, "Ecological Anthropology," in *Anthropological Theories: A Guide Prepared for Students*, available at http://anthropology.ua.edu/cultures/cultures.php?culture=Ecological%20Anthropology;   In fact, the applicability of fitness landscapes and other ecological concepts to human cultural change is a contested question in the

Biologist and new atheist popularizer Sam Harris tackled precisely the problem of the treatment of women in radical Islamist societies in an audacious TED talk, entitled "Science Can Answer Moral Questions."[578]   Early in his talk, consistent with Eagleman, Harris claims that "a suicide bomber's personality … is a product of his brain."[579] Yet, later, he flashes a picture of a woman wearing a Burqa, and claims that everyone in his audience knows it is unhealthy and bad for this woman to be forced to wear a Burqa "involuntarily."[580] But isn't the woman's choice to wear the Burqa, or her compliance with the social norm that impels her to wear the Burqa, a product of *her* brain? And doesn't the tradition of Burqa-wearing reflect something about social strategies in the fitness landscape of Islamic societies, with deep historical roots in the cultural dress practices of the ancient near east?   Why should Harris' historically recent Western liberal democratic values trump the survival strategies of the near eastern societies in which the Burqa is valued?

5. Law and Science

The drive to make the law "scientific" is not in the first instance the result of any empirical observations of evolutionary biology or neuroscience.   Rather, it is rooted in the broader intellectual movement towards legal positivism and instrumentalism.   In his insightful book *Law as a Means to an End*, Brian Tamanaha describes the shift in Anglo-American law towards legal instrumentalism starting in the nineteenth century.[581] Tamanaha traces how "law" in the West became unmoored from any transcendent source and began to occupy the place of a "science." He explains that

> Science is oriented toward uncovering causal relations, effects and functions, formulated in terms of principles or laws.   Non-instrumental views portrayed law *as* an immanent ordering (of the universe or of the community).   Under a scientific view, law would

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discipline of anthropology. *See* Pankhyo and McGrath, "Leading Figures." Not surprisingly, early pioneers of what has become the school of ecological anthropology include Thomas Malthus and Charles Darwin.

[578] Sam Harris, "Science Can Answer Moral Questions," available at http://www.ted.com/talks/lang/en/sam_harris_science_can_show_what_s_right.html. TED stands for "Technology, Entertainment, Design." *See* http://www.ted.com/pages/about. Videos of "TED Talks" feature are freely available on the Internet and have become a cultural phenomenon. *See http://www.ted.com/talks.*

[579] Harris, "Science Can Answer Moral Questions."

[580] *Ibid.*

[581] Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: CUP 2006).

come instead to be seen as the *source* of social order -- to produce social order is the function or purpose or end of law. In turn, this new perspective, over time, would open up questions about the efficiency and utility of law in carrying out its functions. The subtle but fundamental difference can be put thus: law *is* order, versus law *maintains* order."[582]

Tamanaha notes that in the Anglo-American legal tradition, historically, "law was not seen as an empty vessel that could be filled in with whatever content might be desired by law makers to serve whatever end was desired."[583] There were various theories of legal legitimacy, including "natural law, principle and reason, or customs from time immemorial," all of which finally located law in some transcendent source.[584] But, according to Tamanaha, a variety of intellectual currents, including Spenserian social Darwinism, laisez faire economics, and Benthamite utilitarianism, contributed to the rise of "legal positivism" throughout the nineteenth century.[585] Legal positivism is a form of "command" theory of law, in which the law is simply whatever the authority with the power to enforce it says it is.[586] Legal positivism is readily twinned with legal instrumentalism, which understands the law as a tool for achieving ends that are essentially infinitely malleable.[587] Thus the law becomes severed from any transcendent source beyond the chosen instrumental ends instantiated in the will of whoever has the power to enforce the law.

This notion that law is reducible to power and will is reflected in Justice Oliver Wendell Holmes, Jr.'s influential essay *The Path of the Law*, delivered at the opening of Boston University Law School and published in the Harvard Law Review in 1897.[588] Holmes' essay is so important that it occupies the opening slot in David Kennedy and William Fishers' compilation of *The Canon of American Legal Thought*.[589]

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[582] P. 21
[583] *Ibid.* at 35.
[584] *Ibid.*
[585] *Ibid.* at 35-41.
[586] *Ibid.* at 43.
[587] *Ibid.*
[588] Oliver Wendell Holmes, "The Path of the Law," 10 Harv. L. Rev. 457 (1897).
[589] David Kennedy and William W. Fisher III, *The Canon of American Legal Thought* (Princeton Univ. Press 2006).

Holmes opens his essay with the claim that "[w]hen we study law we are not studying a mystery but a well-known profession."[590] From the study of precedent – the "oracles of the law" – Holmes argued, the law student can discern the nature of legal duties.[591] A legal duty is not a moral idea, but rather "is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court."[592] The law exists to deter the "bad man," for "[a] man who cares nothing for an ethical rule which is believed and practiced by his neighbor is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."[593] Therefore, Holmes told the newly matriculated Boston University law students, "[i]f you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[594]

The law *in esse*, for Holmes, had nothing to do with morality. Indeed, only "confusion of thought" could result from any equation of law and morality.[595]   Instead, Holmes wondered aloud "whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law."[596] If this were possible, Holmes mused, judges might better understand their role as social engineers.[597] Indeed, Holmes looked "forward to a time when the part played by history in the explanation of [legal] dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."[598]

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[590] Holmes, "The Path of the Law," 10 Harv. L. Rev. at 457.
[591] *Ibid.*
[592] *Ibid.*
[593] *Ibid.*
[594] *Ibid.*
[595] *Ibid.,,* 31.
[596] *Ibid.*
[597] *Ibid.,,* 35 (stating "I think that the judges have failed adequately to recognize their duty of weighing the considerations of social advantage.").
[598] *Ibid.,,* 40.

A key "step towards that ideal" for Holmes was "that every lawyer ought to seek an understanding of economics."[599] Holmes concluded his germinal essay with a nod to the form of practical reason that underwrote his philosophy: "Read the works of the great German jurists," Holmes advised, "and see how much more the world is governed to-day by Kant than by Bonaparte."[600] There were no choices for Holmes other than the seemingly opposite poles of rational freedom and dictatorial tyranny.

There is a profound irony here that seems to escape neurolaw scholars such as David Eagleman: Justice Holmes wrote the infamous U.S. Supreme Court opinion in *Buck v. Bell,* a 1927 case that upheld the forced sterilization of mentally retarded persons.[601] In that case, Holmes wrote that

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[602]

The climactic line of Holmes' opinion in *Buck v. Bell* is widely regarded as one of the most embarrassing in the history of U.S. Supreme Court Jurisprudence: "Three generations of imbeciles are enough."[603]

6. From the Bad Man to Homo Economicus to Homo Irrationaliblis

In the contemporary history of American legal thought, this conjoining of legal positivism and legal instrumentalism has tended to break into two sometimes contradictory streams: the law

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[599] *Ibid.*
[600] *Ibid.*
[601] Buck v. Bell, 274 U.S. 200 (1927).
[602] *Ibid.*
[603] *Ibid.* at 207.

and economics movement, and critical legal studies ("CLS").[604] Law and economics seeks to explain legal rules in terms of microeconomic principles. CLS seeks to explain legal rules by deconstructing the power relations behind the rules. CLS can be critical, indeed hostile, to law and economics, but in some ways they are natural bedfellows. It is law and economics, after all, that supplies the notion of "capture," which shows how most regulatory requirements result from the influence of power industries that influence ("capture") the regulators.

But law and economics, following Holme's Kantian bent, purports to offer a "scientific" analysis of legal rules that can supply an objective basis for policymaking.[605] Perhaps for this reason, over the past twenty five years or so, law and economics has been a reigning paradigm for legal scholarship, while CLS has declined except among pockets of diehard adherents (often among dispossessed groups such as racial minorities, women, and the LGBT community). To be sure, there are other very important paradigms in the legal academy that eschew the positivism behind both law and economics and CLS, notably deontological approaches informed in one way or another by John Rawls.[606] Nevertheless, law and economics continues to represent a default "scientific" posture for many legal scholars.[607]

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[604] *See* Kennedy, *The Canon of American Legal Thought*, 7. *See also* Peter Fitzpatrick and Alan Hunt, "Introduction to Critical Legal Studies," 14 J. Law & Soc. 1 (1987).

[605] See James R. Hackney, Jr., *Under Cover of Science: American Legal-Economic theory and the Quest for Objectivity* (Durham: Duke Univ. Press 2006).

[606] See John Rawls, *A Theory of Justice* (Cambridge: Harvard Univ. Press 3d ed. 1999). It is beyond the scope of this Dissertation to offer a critique of Rawlsian legal theory. In short, critics argue that Rawlsians cannot articulate a reason why anyone *ought* to honor the original position and the veil of ignorance, if cutting the veil and betraying the original position would make an individual actor better off. A defender of Rawls might argue that the original position ought to be honored because it protects the rights of all citizens and thereby promotes the aggregate well-being of everyone. This sounds, however, like a utilitarian argument and not a deontological one. Utilitarian arguments fail for the same reason: why *ought* any individual actor care about aggregate social welfare? Who says maximizing aggregate social welfare is "good" if reaching that goal decreases individual welfare for some? The question of what comprises "the good" is begged. For a general introduction to the "original position" in Rawls' thought, see Stanford Encyclopedia of Philosophy, "Original Position," available at http://plato.stanford.edu/entries/original-position/. For a classic critique of Rawls, see Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books 1977).

[607] Kennedy and Fisher divide American legal thought into eight schools: "Legal Realism, Legal Process, Law and Economics, Law and Society, Critical Legal Studies, Modern Liberalism, Feminist Legal Thought, and Critical Race Theory." *The Canon of American Legal Thought*,, 7.   Law and Economics and Law and Society, however, are in fact both branches of Legal Realism, with Law and Society representing sociology and other social sciences apart from economics. *See* Tamanaha, *Law as a Means to an End*,, 123-126. Likewise, Feminist Legal Thought and Critical Race Theory are branches of Critical Legal Studies. *Ibid.*, 120-123. Legal Process and Modern Liberalism represent the pragmatist and Rawlsian influences.

In recent years, however, the law and economics movement has witnessed a significant shift occasioned by the rise of behavioral economics.[608] Classical microeconomics assumes rational utility-maximizing actors who act on perfect information, a model which even neoclassical economists admit almost never obtains in the real world.[609] Behavioral economics, in contrast, assumes that people do things for reasons that are often irrational or sub-rational.[610] This assumption is informed by empirical behavioral psychology studies.[611] And behavioral economics has spawned a robust new sub-discipline of behavioral law and economics.[612]

Behavioral law and economics scholarship can offer useful and interesting insights concerning the limitations of rational choice theory for legal analysis.[613] Critics have argued, however, that the experiments upon which behavioral economics is based are not transposable to real-world market situations.[614] Here reductive neurolaw enters the stage. The supposedly harder science of neurobiology – "harder" precisely because it is a *natural* science rather than a *social* science – might confirm the behavioral economists' insight that human beings are finally not rational beings. NeuroLaw thereby promises the fulfillment of Holmes' Kantian dream.

7. Cautionary Tales

Contrary to Eagleman and Harris, some neurolaw scholars recognize the need for caution when reframing concepts of positive law, particularly in light of the expansive possibilities seemingly

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[608] *See, e.g.,* Christine Jolls, Cass R. Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics," 50 Stan. L. Rev. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*,*" 88 Calif. L. Rev. 1051 (2000); Russell Korobkin, "What Comes After Victory for Behavioral Law and Economics?," 2011 U. Ill. L. Rev. 1653 (2011) (stating that "[t]he battle to separate the economic analysis of legal rules and institutions from the straightjacket of strict rational choice assumptions has been won by the proponents of "behavioral law and economics.")

[609] *See* Jolls, et al., "A Behavioral Approach to Law and Economics," *supra* Note 50; Korobkin and Ulen, "Law and Behavioral Science," *supra* Note 50.

[610] *See* Jolls, et al., "A Behavioral Approach to Law and Economics," *supra* Note 50 (stating that "Economic analysis of law usually proceeds under the assumptions of neoclassical economics. But empirical evidence gives much reason to doubt these assumptions; people exhibit bounded rationality, bounded self-interest, and bounded willpower.").

[611] *See Ibid.; see also* Joshua Wright and Douglas H. Ginsburg*,* "Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty," 106 N.W. L. Rev. 1033 (2012) (noting that "[e]merging close on the heels of behavioral economics over the past thirty years has been the 'behavioral law and economics' movement, which explores the legal and policy implications of cognitive biases.").

[612] *See supra* Note 50.

[613] *See* Wright and Ginsburg, *supra* Note 53.

[614] *Ibid.*, 1044-52.

opened up by neuroscience. Stephen J. Morse, a law professor and Associate Director of the

Center of Neuroscience & Society at the University of Pennsylvania, asks "why so many

enthusiasts seem to have extravagant expectations about the contributions of neuroscience to

law, especially criminal law."[615] Morse suggests that

> Many people intensely dislike the concept and practice of
> retributive justice, thinking that they are prescientific and harsh.
> Their hope is that the new neuroscience will convince the law at
> last that determinism is true, no offender is genuinely responsible,
> and the only logical conclusion is that the law should adopt a
> consequentially based prediction / prevention system of social
> control guided by the knowledge of the neuroscientist-kings who
> will finally have supplanted the platonic philosopher-kings.[616]

Careful neurolaw scholars recognize some of the problems with reductionism. As Morse notes,

"the arguments and evidence that [reductive neurolaw scholars] use to convince others

presuppose the folk-psychological view of the person. Brains do not convince each other, people

do. Folk psychology presupposes only that human action will at least be rationalizable by mental

state explanations or will be response to reasons – including incentives – under the right

conditions."[617]

Morse notes that "the legal view of the person does not hold that people must always reason or

consistently behave rationally according to some preordained, normative notion of

rationality."[618] Instead, he argues, the law requires only that people be *capable* of "minimal

rationality according to predominantly conventional, socially constructed standards."[619] Such a

notion of minimal rationality is important because law governs people, not machines:

> Machines may cause harm, but they cannot do wrong, and they
> cannot violate expectations about how people ought to live
> together. Machines do not deserve praise, blame, reward,
> punishment, concern, or respect because they exist or because of

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[615] Stephen J. Morse, "The Status of NeuroLaw: A Plea for Current Modesty and Future Cautious Optimism," 39 J. Psych. & Law. 595, 598 (2012).
[616] *Ibid.*
[617] *Ibid.* at 599.
[618] *Ibid.* at 600.
[619] *Ibid.*

the results they may cause. Only people, intentional agents with the potential to act, can do wrong and violate expectations of what they owe each other.[620]

"If human beings were not rational creatures who could understand the good reasons for action and were not capable of conforming to legal requirements through intentional action or forbearance," Morse reminds us, "the law could not adequately guide action and would not be just."[621]

Nevertheless, Morse argues that, even if neuroscience destroys any concept of human free will, this would not matter one bit for legal doctrine.[622] Morse argues that "[c]riminal law doctrines are fully consistent with the truth of determinism or universal causation that allegedly undermines the foundations of responsibility. Even if determinism is true, some people act and some do not."[623]

In one sense, Morse is correct. A society could continue to employ legal doctrines that govern *behaviors* even if those behaviors are unfree. And even where legal doctrines govern *mental states* – such as the *mens rea* requirement in criminal law – the law could define those states with reference to the absence of certain kinds of constraints on action, such as unusual behavioral states defined as "insanity." But what Morse does not admit is that this would represent a *radically* different concept of "law" than what has historically obtained in Western culture. In particular, this conception would sever the notion of "law" from the notion of "justice." Why *ought* a society to enact laws that discourage some behaviors and encourage others? That is a question of justice. Without some concept of human freedom, there is no concept of justice, at least not in any sense familiar to our sense of "law."

Later in the same article, Morse seems to recognize this conundrum. He notes that "[d]espite our lack of understanding of the mind-brain-action relation, some scientists and philosophers question whether mental states have any causal effect, thus treating mental states as psychic

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[620] *Ibid.*

[621] *Ibid.* at 601.

[622] *Ibid.*,, 605.

[623] *Ibid.*

appendixes that evolution has created but that have no genuine function."[624] This claim, he

admits, is made by "serious, thoughtful people," and, if true, "would create a complete and

revolutionary paradigm shift in the law of criminal responsibility and competence (and more

widely)."[625] Nevertheless, Morse suggests, "given our current state of knowledge, there is little

scientific or conceptual reason to accept" this broader critique.[626] It seems that Morse thinks

some concept of supervenience might preserve a notion of intentionality that would underwrite

some idea of rationality and justice in the law. And yet, Morse suggests that "[m]ost informed

people are not dualists concerning the relation between the mind and the brain. That is, they no

longer think our minds—or souls—are independent of our brains and bodies more generally and

can somehow exert a causal influence over our bodies."[627]

8. NeuroLaw and neo-Aristotelianism

A few bold philosophers and legal scholars have gone further than Morse and have more directly

taken neurolaw to task for its reductionism of "mind" to "brain."[628] Michal Pardo and Dennis

Patterson, in their article *Philosophical Foundations of Law and Neuroscience*, observe that "[i]f

anything unites the various problems and projects of neurolegalists, it is the belief that the mind

and the brain are one. This belief has spread far beyond neurolegalists, for it is a pervasive feature

of much of the current literature and research in neuroscience as well as more popular

writings."[629]   Yet, Pardo and Patterson ask, "does it make sense to attribute to the brain

psychological attributes normally attributed to persons? Can we intelligibly say that the brain

thinks, perceives, feels pain, and decides? If we cannot, what are the implications for

neuroscience and law?"[630]

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[624] *Ibid.* at 610.
[625] *Ibid.*
[626] *Ibid.*
[627] *Ibid.,*, 609.
[628] *See* Thomas Nagel, *Mind & Cosmos: Why the Materialist Neo-Darwinian Conception of Nature is Almost Certainly False* (Oxford: OUP 2012); Charles Landesman*, Liebniz's Mill: A Challenge to Materialsim* (South Bend: Univ. Notre Dame Press 2011); Keith Ward, *More Than Matter: Is There More to Life than Molecules* (Grand Rapids: Eerdman's 2011); Michael Pardo and Dennis Patterson, "Philosophical Foundations of Law and Neuroscience," 2010 U. Ill. L. Rev. 1211, 1225 (2010).
[629] Pardo and Patterson, "Philosophical Foundations of Law and Neuroscience," 2010 U. Ill. L. Rev. at 1225.
[630] *Ibid.*

Pardo and Patterson believe that the reduction of "mind" to "brain" is a category mistake. Nevertheless, they reject what they describe as the "Cartesian dualism" that posits the "mind" as a separate "substance" or "entity."[631] Instead, they opt for a phenomenological distinction between "behavior, reactions and responses of the living human being in the stream of life" and the "brain functions and activities" that relate to these behaviors, reactions and responses. "This is the key," they claim, "to the mereological fallacy and the undoing of the reductive impulses of neurolegalists":

> Behavior is something only a human being (or other animal) can engage in. Brain functions and activities are not behaviors (and persons are not their brains). Yes, it is necessary that one have a brain in order to engage in behavior. But the reduction of a psychological attribute to a cortical attribute is a fallacious move from whole to part.[632]

A key aspect of Pardo and Patterson's critique is the interpretation of the relation between empirical observations of brain states and specific behaviors. For example, Pardo and Patterson criticize a "neuroeconomics" study of activity in different brain regions triggered by monetary offers in a ultimatum game.[633] The authors of the study concluded that different brain regions fire when the offer is perceived to be "unfair," and suggested that legal rules (presumably regarding information disclosures) could be tweaked to mitigate bad economic choices. Pardo and Patterson conclude that

> The evidence does not support their interpretations. First, it makes no sense to say that the brain "decides," "reasons," or "adjudicates" anything. Second, all that the neuroscientific evidence shows with regard to the ultimatum game is what subjects' brains were doing while they (the subjects) were deciding whether to accept or reject the offer. Consider the following analogy. Suppose one's face turned red whenever he was angry. Now, suppose when faced with an unfair offer in the ultimatum game, his face turned red right before he rejected the offer. Surely we would not say that the person's face rejected the offer--why,

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[631] *Ibid.* at 1216.
[632] *Ibid.* at 1226.
[633] *Ibid.*

then, conclude that his insula cortex did so because it too turned colors on an fMRI machine?[634]

But if Pardo and Patterson reject what they consider the Cartesian-dualist and reductionist accounts of the mind-brain relation, what do they offer instead? They propose that "[t]he mind is not an entity or substance at all (whether non-physical or physical). To have a mind is to possess a certain array of rational powers exhibited in thought, feeling, and action."[635] This concept, they suggest, is rooted in Aristotle. As they interpret Aristotle,

> the mind is not a part of the person that causally interacts with the person's body. It is just the mental powers, abilities, and capacities possessed by humans. Likewise, the ability to see is not a part of the eye that interacts with other parts of the physical eye. Under this conception, the question of the mind's location in the body makes no sense just as the location of eyesight within the eye makes no sense.[636]

They argue that this Aristotelian concept is "materialist/physicalist" in the sense that to lose the brain is also to lose the mind, but that it is nonreductive because "the mind is not identical with the brain."[637]   And this means that, although neuroscience can contribute to law, it cannot overtake law.[638]

Pardo and Patterson have done a great service in debunking some of the grander claims of neurolaw and in introducing Aristotle back into the mix. But Pardo and Patterson are careful to steer away from Aristotelian notions of causation. They invoke Aristotle as a sort of paradigmatic example of holism in the mind-body relation, but without offering the context for Aristotle's hylomorphism, which finally only makes sense within a thicker metaphysical matrix than that to which Pardo and Patterson are prepared to commit. The next Chapter explores such a thicker matrix.

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[634] *Ibid.* at 1238.
[635] *Ibid.* at 1249.
[636] *Ibid.* at 1249-50.
[637] *Ibid.* at 1250.
[638] *Ibid.*

Chapter 5: Mind, Law, Soul

Our discussion of method in theology and science in Chapter 1 raised basic questions about the relationship between "faith" and "reason," particularly in connection with Christian theology's claims about God, creation, and the human person. In Chapter 2, we began to relate these concerns to discourse in paleoanthropology and evolutionary neurobiology concerning human uniqueness, agency, and the human mind. In Chapters 3 and 4, we saw how the paleoanthropological and neurobiological discourse has been extended into the "science" of jurisprudence, we began to critique some reductive concepts of neurolaw, and we suggested that at least some contemporary analytic philosophers are looking towards a new Aristotelianism in order to preserve some meaningful concept of "law." In this Chapter, we will examine other contemporary philosophical and theological responses to neuroscientific reductionism, both in the general philosophy of mind and in ethics, and we will begin to build a case for the continued importance and rationality of "orthodoxy" – that is, of an essentially Nicene Trinitarian faith and an essentially Chalcedonian Christology – in response to reductive neurolaw. In the process of this argument, we will return to one of our basic motivating questions: who was, and who is, "Adam?"

1. The Cartesian Mind and Mental Causation

Neurobiological and sociobiological reductionists often speak as though there is no reasonable debate among serious thinkers about the elision of "mind" or "soul" in contemporary accounts of the person. The common foil here is the sort of dualism attributed to René Descartes.[639] In this account, Descartes proposed that "a person is a wholly immaterial substance possessing mental but no physical characteristics," and that this inner "person" somehow causes events in the physical body (for Descartes, famously, through the pineal gland).[640] Descartes was motivated towards such an extreme form of dualism because he accepted the prevailing

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[639] *See* E.J. Lowe, *An Introduction to the Philosophy of Mind* (Cambridge Univ. Press 2000),, 9-11; Jaegwon Kim, *Philosophy of Mind* (Boulder: Westview Press 3d ed. 2010), Chapter 2.

[640] *See Ibid.* As Lowe observes, Descartes did not always consistently argue for such an extreme version of dualism, but it is nonetheless what is meant in contemporary discourse by "Cartesian dualism." Lowe, *An Introduction to Philosophy of Mind*, 11.

Newtonian view of physical determinism and did not think it possible for mechanistic processes to produce intelligent or apparently intelligent activities such as thought and speech.[641]

Descartes' effort to explain the mind developed in the disenchanted cosmos of early modernity.[642] The cosmic order of Ideas, in which "reason" involved a teleological participation in the good that draws the soul *towards* being and gives the universe intelligibility, was replaced by a cosmic order of mechanism, in which reason or rationality was located entirely in the internal representation of an external world of physical causes.[643] Contemporary physicalists understand the ways in which quantum mechanics changed Newtonian mechanism, but they agree with Descartes' most basic metaphysical assumption: that the participatory ontology of the Platonic / Aristotelian / Scholastic world has no purchase on reality. The Cartesian notion of mind, for them, is a sort of vestigial appendage that does no real work.

If that were the sum of the equation, the physicalists surely would be right. The various arguments Descartes mounted in support of the disembodied mind or soul lack traction. His "conceivability" argument – that if it is possible to conceive of one's self as existing apart from a body, then this is in fact so – fails because it is possible to imagine all sorts of things that are not real states of affairs.[644] Descartes' "divisibility" argument – that the self is a simple and whole substance while the physical body is composed of parts and divisible – is question begging.[645] Perhaps, as today's physicalists argue, the self is neither simple nor a substance, and there really is no such thing as a unified, persistent "self."[646] Further, Descartes' interactionist account of mental causation upon the physical violates empirical conservation laws.[647] The non-physical force of the Cartesian mind cannot alter the momentum of the physical vital spirits Descartes

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[641] *Ibid.,,* 10-11.
[642] *See* Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge: Harvard Univ. Press 1989),, 143-146.
[643] *Ibid.*
[644] *See* Lowe,, 11-13. Contemporary discussions of conceivability in relation to physicalism and consciousness often center of Frank Jackson's famous "There's Something About Mary" thought experiment. See Peter Ludlow, Ujin Nagasawa and Daniel Stojar, eds., *There's Something About Mary: Essays on Phenomenal Consciousness and Frank Jackson's Knowledge Argument* (Cambridge: MIT Press 2004).
[645] *See* Lowe *An Introduction to the Philosophy of Mind.,,* 13-15.
[646] *Ibid.*
[647] *Ibid.,,* 25.

imagined were connected with bodily motion because to alter momentum requires the addition of physical energy.[648] Nonreductive physicalists argue that their approach does not involve any of these problems because downward mental causation emerges from lower physical levels; there is no need to invoke new infusions of energy that would violate conservation laws.[649]

It is certainly not the case, however, that a very narrow form of Cartesian interactionist dualism is the only sort of dualism on offer in the current philosophical debate over the "mind-body" problem.[650] As E.J Lowe notes in his *Introduction to the Philosophy of Mind*, "most of the current 'isms' in the philosophy of mind are generated by the need felt by their advocates to propound and justify a broadly *physicalist* account of the mind and its capacities."[651] Nevertheless, other philosophers, including Lowe, opt for non-Cartesian dualist or idealist approaches to the mind-body problem.[652]

Lowe notes that good philosophers must "inform themselves as well as they can about a domain of empirical scientific inquiry before presuming to offer philosophical reflections about it."[653] But as science (by which Lowe means natural and physical science) "only aims to establish what *does* in fact exist, given the empirical evidence available to us," these sciences cannot in themselves "tell us what *could* or *could not* exist, much less what *must* exist, for these are matters which go beyond the scope of any empirical evidence."[654] Physicalism may or may not be true, but science alone cannot reach this determination. There is no *a priori* reason, then, to restrict the philosophical investigation of the mind-body problem to physicalist alternatives.[655]

For Lowe, the issue turns on whether we are realists about mental states – that is, whether one "considers that states of thinking and feeling really do exist."[656] The reality of mental states, for

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[648] *Ibid.* at 24-26.
[649] *Ibid.,,* 27-31.
[650] *See Ibid.*, *Preface*, which highlights some common physicalist alternatives. "Interactionist" dualism is the notion that the mind is separate from but interacts with and causes effects within the body. *Ibid.,,* 21.
[651] *Ibid.,,* xi.
[652] *See generally Ibid.* For a brief overview of approaches to mind-body dualism, see the entry for "Dualism" in the *Stanford Encyclopedia of Philosophy*, *available at* http://plato.stanford.edu/entries/dualism/.
[653] *Ibid.,* p 3.
[654] *Ibid.,,* 5.
[655] Lowe,, 22-24.
[656] *Ibid.,,* 39.

Lowe as well as for other dualists and even non-reductive physicalists, seems to be the principal driver of all contemporary non-reductive accounts of the mind. If mental states are not real, then there seems to be no possibility of reflecting on propositions such as the reality of mental states.[657]

Even *reductive* physicalists, Lowe notes, retain some notion of the reality of mental states. Lowe distinguishes reductive physicalists from eliminative materialists in that "[r]eductive physicalists do not, in general, want to deny the very existence of many of the types of mental state talked about by functionalists, such as beliefs, desires and intentions."[658] Instead, reductive physicalists simply believe that "mental states of these types just *are* – that is, are identical with – certain types of brain states: just as science has revealed, say, that the temperature of a heated body of gas is in fact identical with the mean kinetic energy of its constituent molecules. . . ."[659] But this, as Lowe noted previously, is a fundamentally metaphysical claim that cannot be resolved by empirical science alone.

In the extreme anti-realist view of eliminative materialism, in contrast, "states of belief, desire and intention *simply do not exist*, and hence *a fortiori* . . . such states are not identical with physical sates of any sort."[660] But this would mean, as Lowe argues, "to abandon also the very notions of truth and falsehood and therewith, it seems, the very notion of rational argument which lies at the heart of the scientific understanding of the world."[661] "It would be ironic indeed," Lowe notes, "if the eliminative materialist, in his pursuit of a scientific theory of human behavior, could be convicted of undermining the very enterprise of science itself."[662]

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[657] As the *Stanford Encyclopedia of Philosophy* puts it, "it is hard to convince oneself that, as one, for example, reflectively discusses philosophy and struggles to follow what is being said, that it is not the semantic content that is driving one's responses." *See http://plato.stanford.edu/entries/dualism/.*

[658] Lowe,, 63.

[659] *Ibid.*

[660] Lowe,, 63.

[661] *Ibid.,,* 65.

[662] *Ibid.* As Keith Ward puts it, "[t]he extreme materialist view that consciousness is an illusion can only be consistently held by philosophers who are not conscious." Keith Ward, *More than Matter: What Humans Really Are* (Oxford: Lion Hudson 2010).

The fact that even the practice of meaningful empirical science seems to require some sort of realist account of mental states, Lowe concludes, provides a powerful argument for the reality of mental states. The concepts of belief, desire and intention that eliminative materialists dismiss as "folk psychology," Lowe concludes, should not "be viewed as a proto-scientific theory of human behavior but, rather, as part of what it is to be a human being capable of engaging meaningfully with other human beings. They are not dispensable intellectual artifacts, but partially constitutive of our very humanity."[663]

Lowe argues that the problems with strong forms of Cartesian dualism can potentially be overcome by other ways of conceiving the causal interaction between mental and physical states.[664] Lowe states the common causal closure argument in favor of reductive physicalism as follows:

(1) At every time at which a physical state has a cause, it has a fully sufficient physical cause. (*Call this the principle of the causal closure of the physical*.)

(2) Some physical states have mental states amongst their causes. (Call this premise *the principle of psychophysical causation*.)

(3) When a physical state has a mental state amongst its causes, it is rarely if ever causally overdetermined by that mental state and some other physical state. (Call this premise *the principle of causal non-overdetermination*.)[665]

The principle of causal non-overdetermination "rules out the possibility that, whenever a mental state *M* is a cause of a physical state *P*, there is another physical state *Q* such that (a) *Q* is a cause of *P* and yet (b) even if one of the two states *M* and *Q* had not existed, the other would still have

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[663] Lowe,, 66. A similar argument was made against psychological behaviorism, prior to the advent of contemporary neurobiology, by Charles Taylor in *The Explanation of Behaviour* (London: Routledge 1964) (noting that the "premise, that a purpose or set of purposes which are intrinsically human can be identified, underlies all philosophical and other reflexion concerning the 'meaning' of human existence, and this, too, would collapse if the mechanistic thesis were shown to hold."). Conor Cunningham makes a similar point: "Rather than the humanities being a proto-science, and therefore guilty of folk psychology (in a pejorative sense), science is a proto-art; for all science is thought by people, we happen to call them scientists, and therein lies science's beauty, its truth, and even its goodness." Conor Cunningham, "Is There Life Before Death," in John Behr and Conor Cunningham, eds. *The Role of Death in Life* (Eugene: Wipf and Stock 2015), 139.
[664] *Ibid.*,, 26.
[665] *Ibid.*,, 27.

sufficed, in the circumstances, to cause *P* to exist."[666] The example Lowe refers to here is a common one in the law of Torts and in criminal law: a victim is shot simultaneously by two assailants, and the bullet from either gun would have been sufficient to cause death.[667] In such a case, there are independently sufficient causes for the victim's death, and both shooters are legally culpable. Premise (3) in the argument above, however, rules out the possibility of such independently sufficient causes with respect to mental states that are causes of physical states.[668] A mental state, according this argument, cannot comprise an independently sufficient cause of any physical state.

From these premises, physicalists reach the following conclusion:

(4) At least some mental states are identical with certain physical states.[669]

In effect, with respect to causation of physical states, there is really only one shooter pulling the trigger.

Although this argument seems logically sound, as Lowe notes, some of its premises may be stated too broadly.[670] Most significantly, premise (1) can be stated in a weaker form:

(1*) Every physical state has a fully sufficient physical cause.[671]

Since causation is a transitive relation, the replacement of (1) by (1*) can support a theory of mind that avoids the physicalist conclusion (4).[672] If S_1 is a fully sufficient cause of S_2, and if S_2 is a fully sufficient cause of S_3, then S_1 is also a fully sufficient cause of S_3.[673] But this does not imply that S_3 is causally overdetermined by S_1 and S_2. Lowe does not offer a specific example here, but we could return to the example of an accidental shooting that might be employed in Tort law.

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[666] *Ibid.*
[667] *Ibid.,,* 28.
[668] *Ibid.*
[669] *Ibid.*
[670] *Ibid.,,* 29.
[671] *Ibid.,,* 30.
[672] *Ibid. See also* Lowe's discussion in his book *Personal Agency: The Metaphysics of Mind and Action* (Oxford: OUP 2010).
[673] Lowe, *Introduction to Philosophy of Mind*, 30.

Assume A deceptively advises B that a weapon B is holding is a relatively harmless paintball gun, when the gun is in fact a high powered rifle; and assume B shoots C with the gun in a paintball match and kills C. To use the terminology of Tort law, both A's deception and B's action in pulling the trigger are "actual causes" of C's death. C's death is not causally overdetermined by A and B's actions together; indeed, the "chain of causation" requires that *both* A and B's actions comprise actual causes of C's death. Questions of legal *liability*, of course, would remain. It might be that B did not breach any duty of care and thus was not "negligent" in relying on A's deceptive advice; or, it might be that B's reliance on A's advice was negligent, under the circumstances. But both A and B's conduct were in any event "actual causes" of C's death. But-for B's pulling of the trigger, C would still be alive.[674]

Consider then that mental state M is not identical with a physical state but is a cause of physical state P; and that physical cause Q is a fully sufficient cause of M.[675] This would mean that both Q and M are causes of P. P is not in this case causally overdetermined by Q and M, and premise (3) is satisfied without implying premise (4).[676] But-for M, P would not have obtained; if not M, not P. This is true even though Q also was a but-for cause of P.

Lowe employs this version of (1*) to support an emergentist view of dualist interactionism.[677] In taking that approach, Lowe commits himself to the plausibility of the assumptions that otherwise underlie the argument: notably that every state has a "fully sufficient" physical cause, which obtains in both (1) and (1*). According to Lowe, emergentist views, including his own, "hold that mental states have come into existence as a result of the natural evolution of highly complex biological entities, rather than through any kind of divine intervention by a being who exists 'outside' the spacetime universe, such as God."[678] His concern is not to defend any sort of creationist account of the mind or soul, but simply to show that the causal closure of the physical does not rule out mental causation as a real cause of physical states.

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[674] For a discussion of multiple causation in tort law, see Vincent R. Johnson and Alan Gunn, *Studies in American Tort Law* (Carolina Academic Press 4th ed. 2009), Chapter 7.
[675] *See Ibid.*,, 30-31.
[676] *Ibid.*
[677] *See Ibid.*,, 31, n. 11.
[678] *Ibid.*,, 31.

But Lowe explicitly sets aside, for the purpose of evaluating this argument, the "not altogether uncontroversial" assumption in both (1) and (1*) "that there are no *uncaused* physical states."[679] This assumption, Lowe notes, raises the issue of "free will and determinism," as well as "cosmological and theological questions of whether there was a 'first' cause."[680] Lowe also brushes aside the argument that quantum indeterminacy undermines (1) and (1*) because, he argues, quantum indeterminacy obtains "on the atomic scale, rather than at the level of neural structure and function in the brain."[681]

2. Theology, Emergence, and the Soul

Many theologians – probably the mainstream of the faith and science scholarship – like Lowe, accept the causal closure of the physical. Instead of the soul, these contemporary theologians attempt to locate human will, intentionality and moral responsibility in emergent properties of physical systems. The "soul" or "mind," in this sort of system, is the capacity for downward causality made possible by emergent properties of the brain, body, and environment.[682] Some contemporary theologians extend this concept of emergence to God Himself, either in a thorough-going way through process theology, or as a partial explanation for God's interaction with the physical world.[683]

Some aspects of emergentism are helpful for explaining the problem of the mind-body relation, as discussed in more detail below. At the outset, however, it is important to note the metaphysical commitments emergentist theologians and philosophers make before embarking on their projects.

Nancey Murphy, for example, is one of the leading Christian theologians working from an emergentist / non-reductive physicalist paradigm. Murphy describes a variety of forms of

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[679] *Ibid.,*, 30.
[680] *Ibid.*
[681] *Ibid.*
[682] *See, e.g.,* Nancey Murphy*, Bodies and Souls, or Spirited Bodies* (Cambridge: CUP 2006); Ian G. Barbour, *Nature, Human Nature, and God* (Minneapolis: Fortress Press 2002); Joel Green, *Body, Soul and Human Life: The Nature of Humanity in the Bible* (Grand Rapids: Baker Academic 2008).
[683] For a survey of these views, see Philip Clayton, "Toward a Constructive Christian Theology of Emergence," in Nancey Murphy and William J. Stoeger, S.J., *Evolution and Emergence: Systems, Organisms, Persons* (Oxford: OUPs 2007).

physicalist reductionism against which she contrasts her nonreductive physicalism.[684] Notably, Murphy does *not* object to what she calls "ontological reductionism," which she defines as "the thesis that higher-level entities are nothing but the sum of their parts."[685] One aspect of this ontological reductionism is

> the view that as one goes up the hierarchy of levels, no new kinds of metaphysical 'ingredients' need to be added to produce higher-level entities from lower. No 'vital force' or 'entelechy' must be added to get living beings from non-living materials; no immaterial mind or soul needed to get consciousness; no *Zeitgeist* to form individuals into a society.[686]

Murphy states that she "take[s] ontological reductionism to be entirely unobjectionable, so long as it is applied to the cosmos itself and no illegitimate inferences are drawn from it regarding the source of the cosmos."[687] Her objection is only to "causal" reductionism, which she defines as the view that "the behavior of the parts of a system (ultimately, the parts studied by subatomic physics) is determinative of the behavior of all higher-level entities; all causation is 'bottom-up'" – or, more prosaically, the view that "physics is doing all the work."[688] Murphy argues that physics cannot do "all the work" because lower-level causes are always embedded in higher-level *systems* generated by unique sets of *relations* among higher-level elements of the systems.[689] The systems level of relationships influences outcomes, and in fact influences the re-arrangement of elements at lower levels of causality. Therefore, Murphy argues, causation cannot be reduced all the way down to the deterministic level of physics.

Robert Van Gulick follows a similar systems-oriented model in his essay on the mind/body problem in Murphy's edited volume on *Evolution and Emergence*.[690] Van Gulick also acknowledges the *a priori* metaphysical commitment of emergentist models. Nonreductive

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[684] Nancey Murphy, "Reductionism: How Did We Fall Into It and How Can We Emerge From It," in Murphy and Stoeger, *Evolution and Emergence*,, 23.

[685] *Ibid.* at 23.

[686] *Ibid.*

[687] *Ibid.* at 25.

[688] *Ibid.* at 23, 25.

[689] *Ibid.* at 29-33.

[690] Robert Van Gulick, "Reduction, Emergence, and the Mind/Body Problem: A Philosophic Overview and Who's in Charge Here? And Who's Doing All the Work?," in Murphy and Stoeger, *Evolution and Emergence*.

physicalism, he says, "has emerged as more or less the majority view among current philosophers of mind."[691] This view "combines a pluralist view about the diversity of what needs to be explained by science with an underlying metaphysical commitment to the physical as the ultimate basis of all that is real."[692]

Similar to Murphy, Van Gulick argues that outcomes are not determined only by the "laws of physics," but rather "by the laws of physics together with *initial boundary conditions*."[693] Natural systems supply higher-order "patterns of organization" that are irreducible to their physical constituents.[694] Van Gulick argues that these higher-order patterns of organization are real entities, no less than their physical constituents.[695] Indeed, Van Gulick argues for hypothetical worlds "that are like our world in having some lawful or causal order but which do not contain any physical matter."[696] In such worlds, "patterns exist that are very much like the patterns associated in our world with acquiring, possessing, and exploiting information."[697] This suggests that the "order of higher-level patterns" in our world reflects "a much more pervasive order that simply manifests itself in our world in physical realizations."[698] There is a very subtle move behind this claim: Van Gulick takes a non-realist stance concerning physical "laws."[699] He asserts that "laws are statements or sentences in our theories of the world, not independent items among the furniture of the world itself."[700] The most basic reality, for Van Gulick, are systems of "stable self-sustaining recurrent states of the quantum flux of an irreducibly probabilistic and statistical reality."[701]

Both Murphy and Van Gulick, as leading representatives of non-reductive physicalism, pledge their *bona fides* to a non-dualistic metaphysic. But both end up substituting "systems," or, in Van

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[691] *Ibid.* at 40.
[692] *Ibid.*
[693] *Ibid.* at 82 (emphasis added).
[694] *Ibid.* at 82-83.
[695] *Ibid.*
[696] *Ibid.* at 85.
[697] *Ibid.*
[698] *Ibid.*
[699] *Ibid.* at 77, 86-87.
[700] *Ibid.*,, 77.
[701] *Ibid.* at 86.

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Gulick's case, "information systems," for the "spiritual" or "non-physical" components of the "Cartesian" and "Aristotelian" metaphysics they eschew. Why this effort to render in physicalist terms realities that in Christian theology traditionally have been thought of as belonging to a non-physical aspect of creation?

Murphy cites the triumph of atomism over the Aristotelian ontology of matter and form.[702] Murphy credits this shift to Galileo and then to Lavoisier and Dalton.[703] From atomism in biology to reductionism in chemistry, Murphy suggests, the atomist / reductionist program continued down to the level of physics.[704] Thus, Murphy argues, "much of modern science can be understood as the development of a variety of research programs that in one way or another embody and spell out the consequences of what was originally a metaphysical theory. It has been the era in which Democritus has triumphed over Aristotle."[705]

But if Murphy wants to argue that atomistic reductionism is wrong, why not look again at Aristotle? The problem seems to relate to Divine action. In a lawful or law-like universe, what "place" is there for Divine action?[706] And in a lawful or law-like universe in which creatures, including humans, exercise some degree of agency, what explanatory power lies in the concept of "Divine" agency?[707] Finally, if God acts in the universe, why does the universe exhibit so much pain and suffering (the "theodicy" problem)?[708]

As Robert John Russell notes, the question of Divine action became particularly acute because of many of the key intellectual developments of the Enlightenment:

> Newtonian mechanics seemed to depict a causally closed universe
> with little, if any, room for God's *special* action in specific events.
> With the ascendancy of deism in the eighteenth century, the scope
> of divine agency was limited to an initial act of creation. Moreover,

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[702] Murphy, "Reductionism: Falling Into and Emerging From It,", 20-21.
[703] *Ibid.*
[704] *Ibid.*
[705] *Ibid.* at 21.
[706] *See* Robert John Russell, "Introduction," in Robert John Russell, Nancey Murphy, and Arthur R. Peacocke, *Chaos and Complexity: Scientific Perspectives on Divine Action* (Rome: Vatican Observatory Publications, 2d ed. 1997),, 3-5.
[707] *Ibid.*
[708] *Ibid.*

David Hume and Immanuel Kant raised fundamental questions concerning the project of natural theology, challenged belief in miracles, undercut metaphysical speculation about causality and design, and restricted religion to the sphere of morality.[709]

These crises led to the split between liberal Schleiermachian Protestantism and Fundamentalism, as well as to the Barthian neo-orthodox project, none of which, Russell notes, provided adequate responses to the problem of Divine action.[710]

Russell provides a helpful topology of contemporary approaches to Divine action in light of this historical background.[711] These include neo-Thomism (distinguishing primary and secondary causation – the "Aristotelian" approach); process theology (God acts "persuasively" but not "exclusively" in all events); uniform action (God acts uniformly in all events and the meaning and significance of those events are subjects of human interpretation); and four "personal agent" models, in which God either acts literally and directly in the world; God is immanent in and perhaps "embodied" by an organistic world; God is a non-embodied agent in the world; or God interacts with the world in the interstices of quantum probabilities and chaos theory.[712] These different views map onto perspectives on the possibility of Divine "intervention" in the universe, including through miracles, and on the nature of such "miracles" -- for example, as suspensions of the laws of nature, or instead as acts within the laws of nature arranged in highly unusual ways.[713]

Most of the contemporary theology and science literature on Divine action, Russell notes, explores "whether there are *objectively* special divine acts that are *neither* interventions nor suspensions of the laws of nature."[714] These include "top-down" or "whole-part" causality, in which God acts either in a higher level in nature or at the level of a physical boundary or system, and "bottom-up" approaches in which God acts directly at the quantum level in ways that

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[709] *Ibid.,* 5.
[710] *Ibid.*, 5-6.
[711] *Ibid.*, 7-13.
[712] *Ibid.*
[713] *Ibid.*
[714] *Ibid.,,* 12.

indirectly affect the macroscopic world.[715]   In the small sample of non-reductive physicalist accounts of "mind" above, Van Gulick's view reflects a whole-part systems view of Divine action, and Murphy's reflects a "bottom-up" approach that relies on God's action in quantum improbabilities.[716]

Murphy knows that the problem of divine action "is, at base, a metaphysical problem – one that cannot be solved by anything less radical than a revision of our understanding of natural causation."[717]   Since she accepts the narrative that modern science's reliance on the "laws of nature" has elided the higher levels of the Medieval hierarchy of being, she must attempt to create a new metaphysic of causation.[718] According to Murphy,

> In the Medieval period, especially after the integration of the lost works of Aristotle into Western thought, God's action in the world could be explained in a way perfectly consistent with the scientific knowledge of the time. Heaven was a part of the 'physical' cosmos. God's agents, the angels, controlled the movements of the 'seven planets,' which, in turn, gave nature its rhythms. But modern science changed all that, primarily by its dependence on the notion of *laws of nature.*[719]

And so, Murphy substitutes God's influence over quantum probabilities at the bottom of the causal layers of matter for any relation between matter and non-material transcendentals at higher orders of creation.[720] Murphy also allows that God acts on the conscious actions of human agents, through varieties of religious experiences, consistent with her emergentist theory of mind.[721] Even here, however, God influences human consciousness "by stimulation of neurons" through bottom-up causation beginning at the quantum level.[722]

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[715] *Ibid.*

[716] *See* Nancey Murphy, "Divine Action in the Natural Order: Buridan's Ass and Schrodinger's Cat," in *Chaos and Complexity,*, 325-357.

[717] *Ibid.,*, 326.

[718] *Ibid.,*, 325.

[719] *Ibid.*

[720] *Id,.*, 339-357.

[721] *Ibid.*

[722] *Ibid.* at 349.

Murphy is particularly keen to avoid accounts of divine action that interfere with the law-like behavior of the universe. Since "[s]cience both presupposes for its very existence the strictly law-like behavior of all entities and processes, and constantly progresses in its quest to account for observable phenomena in terms of elegant sets of interrelated laws," an account of divine action that undermines the law-like behavior of the universe would unacceptably undermine the practice of science and destroy the program of interdisciplinarity between faith and science.[723] Murphy argues that, since the quantum level is probabilistic rather than law-like, making space for divine action at the quantum level does not interfere with the ordinary work of the sciences.[724]

The strength of Murphy's approach and others like it is that it takes seriously how the contemporary natural and physical sciences understand physical causation. We are not exactly in Newton's universe anymore, but it is not that classical physics have been elided. Classical mechanics still accurately describe the motions of particles at the macro level and at sub-relativistic speeds – the motions of things we interact with at a phenomenological level, such as navigating a car through traffic. But classical mechanics no longer serve as the final level of explanation for such phenomena, because we are able to describe the probabilistic functions of quantum mechanics at a more basic level, including in the electrons and sub-atomic particles that make up the matter configured into a "car." And this means that the universe is no longer accurately describable as a rigid, deterministic system, but instead takes on the characteristics of a stochastic field of probabilities.[725]

The problems with Murphy's approach as it stands, however, are manifold, both scientifically and theologically. The first essential problem is that Murphy's approach, and others like it (such as John Polkinghorne's), depends on a causal gap. It is the old "god of the gaps" problem writ small

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[723] *Ibid.*,, 344.

[724] *Ibid.*,, 344-345.

[725] For an accessible discussion of the relation between classical and quantum mechanics, see, e.g., Stephen M. Barr, *Modern Physics and Ancient Faith* (Grand Rapids: Univ. Notre Dame Press 2003); Brian Greene, *The Fabric of the Cosmos: Space, Time and the Texture of Reality* (New York: Vintage Books 2010). For a stinging critique of the failure of modern physics to deliver an integrated theory that unites classical and quantum mechanics, see Lee Smolin, *The Trouble With Physics: the Rise of String Theory, the Fall of Science, and What Comes Next* (New York: Houghton Mifflin Harcourt 2006);

(small as in sub-atomic). Scientifically, it is not at all clear that it will remain forever impossible to describe quantum realities in ways that close this apparent gap. Indeed, the Holy Grail of theoretical physics remains the search for a "unified theory" that would unite general relativity and quantum mechanics – a "theory of everything" ("TOE").[726] A successful TOE might or might not result in a deterministic set of unifying physical laws, but even a TOE that left quantum realm as a stochastic space likely would elide the space for bottom-up Divine intervention that Murphy hopes to preserve.

The leading candidate for producing a TOE, for example, is string theory.[727] Many versions of string theory are tied to multiverse theories, and some multiverse theories posit an infinite set of multiverses in which there is at least one universe in which every quantum possibility is realized. In such a scenario, Murphy's quantum God would vanish. There would be no need for the hypothesis that God moves our minds subatomically. Our choices in this universe would simply reflect the realization in this one universe of one set within the probability bounds determined by unifying laws, and "we" will have made different choices in other universes. All the probabilities will inevitably have been realized in all possible universes. If all possible choices are always realized, there is no room for God, or even for "choice." On the scale of the multiverse, everything simply is.

Of course, string theory and multiverses may not provide a true description of physical reality, so perhaps there is a genuine singularity, an undefinable and truly stochastic realm, at the quantum level. But banking on such gaps does not usually prove a satisfactory strategy over the long run. Moreover, contrary to Murphy's desire to develop a theory that will not impinge in any way on the practice of science, any gap theory of Divine action finally depends on the failure of the modern scientific method. The modern scientific method depends precisely on the assumption that human beings are capable of closing every gap and of obtaining a TOE. To claim that this is epistemically impossible is to speak a word against some of the presumptions of the modern scientific method.

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[726] *See* Greene, *The Fabric of the Cosmos,*, 29-37.
[727] *See Ibid.* For a sustained critique of string theory as a scientific enterprise, see Smolin, *The Trouble With Physics.*

Theologically, Murphy's approach is deeply problematic for at least two reasons, one relating to human freedom, and the second relating to Christology and soteriology. First, although it attempts to preserve human freedom, Murphy's approach ends up sounding much like the Baroque Scholastic idea of Divine "premotion" of the human will. This idea, attributed to Dominican theologian Domingo Bañez, involves God's providential first motion in the human will to move the subject towards his or her choices for or against God.[728] Bañez , of course, was the foil of the Jesuit Louis de Molina in the sixteenth century debates over providence, predestination and free will.[729]

As David Bentley Hart has argued, the Bañezian idea of premotion not only destroys human free will, but threatens to destroy creation itself. "It can plausibly be argued," Hart says, "that, in a very real sense, the Bañezian God does not create a world at all, and that his species of 'classical' Thomism amounts only to what the greatest Catholic philosopher of the twentieth century, Erich Przywara, called 'theophanism.'"[730] If there is "physical premotion," Hart argues persuasively, "all created actions would be merely diverse modalities of God's will."[731] And if this is so, then God is not really distinct from the created world: if God is merely "the supereminent source of all being, then – apart from some kind of *effective* divine indetermination of the creature's freedom in regard to specific goods – there is no ontological distinction between God and the world worth noting."[732] Indeed, the erasure of the ontological distinction between God and creation is precisely the move taken by emergentists who are radical panentheists or process theologians and who go a step further than Murphy and locate God (or "God-consciousness") as a product of or as embodied within or by the evolving universe.[733] In contrast to Murphy's implied Bañezian bent, combined with string theory and multiverses, such process theologians and radical panentheists can become the ultimate Molinists: every possible universe known to

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[728] For a discussion and critique of Bañez, see David Bentley Hart, "Providence and Causality: On Divine Innocence," in Francesca Aran Murphy and Philip G. Ziegler, eds., *The Providence of God: Deus Habet Consilium* (London: T&T Clark 2009).
[729] *See Ibid.*; *see also The Catholic Encyclopedia*, "Louis de Molina," available at http://www.newadvent.org/cathen/10436a.htm.
[730] *Ibid.*
[731] *Ibid.*
[732] *Ibid.*
[733] *See* Russell, "Introduction," in *Chaos and Complexity*,, 8.

"Godself" is indeed not only known but realized, including a universe with a purpose that is located in God.[734] Either way, little room for authentic human freedom remains.

A second problem with Murphy's approach is that its metaphysical commitments undermine orthodox Christology and thereby compromise theological anthropology and soteriology.[735] A physicalist emergentism cannot adequately account for the dual nature of Christ. The language of Chalcedon depends on a metaphysics of transcendentals and substances. This is evident, first, in the attribute to Christ of a "reasonable soul" (ψυχῆς λογικῆς):

> he is perfect in Godhead and perfect in manhood, very God and very man, of a reasonable soul (ψυχῆς λογικῆς) and [human] body consisting, consubstantial with the Father as touching his Godhead, and consubstantial with us as touching his manhood….[736]
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> ….
>
> In two natures, unconfusedly, immutably, indivisibly, inseparably [united], and that without the distinction of natures being taken away by such union, but rather the peculiar property of each nature being preserved and being united in one Person and subsistence, not separated or divided into two persons, but one and the same Son and only-begotten, God the Word, our Lord Jesus Christ….[737]

The term ψυχῆς λογικῆς was adopted in opposition to the views of Appolinaris, who held that the Incarnation involved the inhabiting or possession of a human body containing an animal soul with the Divine Logos – that in Christ, the Divine Word took the place of the human soul.[738] As

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[734] Such a move seems to inform, for example, Ted Peters, *Anticipating Omega: Science, Faith and Our Ultimate Future* (Göttingen: Vanderhoek & Ruprecht 2006). For a discussion of this notion from a panentheist perspective, see Paul Davies, "How Many Universes?," in Robert J. Russell, Ted Peters, and Nathan Illanger, *God's Action in Nature's World: Essays in Honor of Robert John Russell* (Farnham: Ashgate 2006).

[735] Cf. Stephen R.L. Clark, *Biology & Christian Ethics* (Cambridge: CUP 2000),, 92 (noting that "[t]he deconstruction of a uniquely human nature needs further commentary from Christian thinkers: after all, it is *our* nature that the Word took up, and that has been assumed to be a human one. If it was not *our nature* that he assumed, since – *qua* human beings – we have no nature, what happened in the Incarnation that we need to recall and ponder?").

[736] The Chalcedonian Definition, translated at Early Church Texts, available at http://www.earlychurchtexts.com/public/chalcedonian_definition.htm.

[737] The Chalcedonian Definition, translated at Early Church Texts, available at http://www.earlychurchtexts.com/public/chalcedonian_definition.htm.

[738] *See* Philip Schaff, *The Creeds of Christendom, With a History and Critical Notes*, comment on The Chalcedonian Definition, available at http://www.ccel.org/ccel/schaff/creeds2.iv.i.iii.html; John Behr, *The Nicene Faith: Formation of Christian Theology, Vol. 2* (Yonkers: St. Vladimir's Seminary Press 2004),, 392-401.

John Behr notes, "[t]he most serious problem concerning Apollinarius' account of Christ is not simply his claim that Christ did not assume a human soul or mind, but whether there remains any point of contact between Christ and us: 'He is not a man, but like a man, for he is not consubstantial with man in the highest dimension.'"[739] This leads to a "'failure to see in Christ the source and type of God's project of reshaping all of humanity together, and every person individually, in God's image, through the inner communication of divine life to a complete and normal human being.'"[740]

It is difficult to see how a physicalist emergentist anthropology such as Murphy's would avoid the same fate as applied to Christology. If there is no "soul," and the "mind" is merely the result of lower level physical processes, in what sense could Christ have had a nature "consubstantial (ὁμοούσιον) with us as touching his manhood?" It is important to note that the sense in which Christ is "consubstantial (ὁμοούσιον) with us" differs from the sense in which Christ is "consubstantial (ὁμοούσιον) with the Father as touching his Godhead" in that his consubstantiality with the Father implies a unity of essence, whereas his consubstantiality with humanity implies a unity of nature and not essence.[741] The Nicene Creed made plain that the Father, Son and Spirit are three persons in one essence, and preserved the Biblical witness to the fact that God is one.[742] But human beings are not God, so the way in which Christ is ὁμοούσιον

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[739] Behr, *The Nicene Faith*,, 399 (quoting Apollonarius, Frag. 45 (from the *Apodeixis*, GNO 3.1, p. 165.7-9)).
[740] *Ibid.*, Note 160 (quoting B.E. Daley, "'Heavenly Man' and 'Eternal Christ': Apollinarius and Gregory of Nyssa on the Personal Identity of the Savior," JECS 10.4 (2002),, 478).
[741] *See* Schaff, *The Creeds of Christendom*, The Chalcedonian Definition, Note 66, 67.
[742] As John Behr notes, the Trinitarian theology of the Nicene Creed was not a new invention over against the Biblical witness. *See* Behr, *The Nicene Faith, Part 1, Introduction*,, 7. As Behr argues,

> it is not enough simply to assert the identity of the 'economic' Trinity and the 'immanent' Trinity, or to emphasis that the 'economic' basis of our knowledge of the Trinity – that it is only the revelation of the Son in and through the Spirit that we can speak of God as Father – must correspond to how the Trinity actually is in 'immanent' terms. These two dimensions of Trinitarian theology, economic and immanent, should never have been separated, even if they are subsequently reunited. That Trinitarian theology results from reflecting on how the crucified and exalted Lord Jesus Christ reveals the one and only God as Father, in and through the Holy Spirit, who also enables adopted sons crucified with Christ to call upon the same God as Father, means that Trinitarian theology has less to do with the heavenly existence of the three divine persons than with this new manner of confessing the one God – as Father, in the Son, by the Holy Spirit.

Ibid.,, 8.

with us differs and relates to the transcendentals of human nature. If there *are* no transcendentals of human nature – if each person just is, as a particular person – then there does not seem to be any way in which Christ can be savingly related to *humanity*. The term ψυχῆς λογικῆς therefore continues to do crucial work in the Chalcedonian definition. It is by taking on the transcendental property of human nature shared by all persons – the ψυχῆς λογικῆς – that Christ shares in the common humanity of us all.

A response may be that the emergent mind, capable of exercising downward causality and therefore capable of moral agency, is shared by Christ with all humanity. There is simply an updating here of the Greek notion of ψυχῆς with a more scientifically accurate conception of an emergent capacity. But once this emergent capacity is conceived in this fashion, it has been remade as a transcendental, and it ceases to represent a "physicalist" account of the person.[743] In an authentically physicalist account, the fact that particular individual *homo sapiens sapiens* each possess an emergent capacity for agency is nothing but a historical accident. Within the possibilities of evolution, it may arise that some group of biologically *homo sapiens sapiens* develop a different sort of emergent capacity, or lose the existing emergent capacity. In fact, the logic of evolution says that such flux is *inevitable* – flux is simply how evolution works. There is no *physicalist* reason to identify the emergent capacity nonreductive physicalists such as Murphy equate with "mind" as a common and stable feature of human nature in which Christ could share and act savingly towards us. To make that identification is to posit a transcendental and thereby to leave the world of mere physicalism behind.

Perhaps some nonreductive physicalists would partially grant this argument with a back-handed nominalist move: go head and call it a "transcendental" if you like, but realize that this is merely a convenient term for something that in the long evolutionary scheme of things is really in evolutionary flux. This is a dubious move on its own merits because it cannot avoid words like "some*thing*" when referring to this property or capacity we are trying to define. But it also

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[743] *Cf.* Neo-Aristotelian approaches to "substance" in Joshua Hoffman, "Neo-Aristotelianism and Substance," in Dr. Tuomas E. Tahko, ed., *Contemporary Aristotelian Metaphysics* (Cambridge: CUP 2011). As will be discussed further below, I believe theological approaches like Murphy's suffer from a lack of engagement with the resurgence of Aristotelian thinking in metaphysics and the philosophy of science. *See generally*, Tuomas E. Tahko, "In Defence of Aristotelian Metaphysics," in *Contemporary Aristotelian Metaphysics*.

interferes with the concept of "freedom," in which the transcendental of ψυχῆς must play a prominent role.

Like Murphy, E.J. Lowe demonstrates that reductive physicalism need not obtain even in a purely naturalistic universe. Unfortunately, however, like Murphy, Lowe seems to refer to theistic arguments for a universe that is not merely naturalistic only in terms of arguments from a "'first' cause." Most modern theistic "first cause" arguments are of the sort that equate the Deity or "Intelligent Designer" with other causes in the universe. Lowe, Murphy, and other nonreductive physicalists, does not seem prepared to consider "causation" other than in terms of diachronic cause and effect. This is a curious posture in light of the current state of philosophical discussion about the "laws of nature."

3. The Laws of Nature

In Jewish and Christian theology, the Divine Command inheres not only in the *Torah* given to humans but also in God's commands that establish and govern all of creation. The creation poem of Genesis 1 is a series of spoken commands through which God brings order to primordial chaos: "Let there be Light," "Let there be a vault between the waters to separate water from water," and so-on. There is no question about whether the chaos will or will not obey. God speaks, and what He speaks *is*. The *midrash* on Genesis 1 in the Gospel of John identifies this Divine command with God's Wisdom, identifies God's Wisdom with Christ, distinguishes the persons of Christ and "God," and yet identifies Christ with God: "In the beginning was the Word, and the Word was with God, and the Word was God" (Ἐν ἀρχῇ ἦν ὁ Λόγος, καὶ ὁ Λόγος ἦν πρὸς τὸν Θεόν, καὶ Θεός ἦν ὁ Λόγος) (John 1:1). In Paul's epistles the Divine command and Wisdom are personified in Christ such that the *being* of the universe inheres in the *being* of Christ: "The Son is the image of the invisible God, the firstborn over all creation. For in him (ἐν αὐτῷ) all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things have been created through him (δι' αὐτοῦ) and for him (εἰς αὐτὸν). He is before all things (αὐτὸς ἔστινπρὸ πάντων), and in him all things hold together (πάντα ἐν αὐτῷ συνέστηκεν)." (Colossians 1:15-17). Creation is in him, through him, for him, and before him, -

ἐν αὐτῷ, δι' αὐτοῦ, εἰς αὐτὸν, αὐτὸς ἔστινπρὸ -- and in him (ἐν αὐτῷ) everything is synestēken – put together, synthesized, put together into an inter-locking whole, "understood."[744]

Modern scientific accounts of causality drew on a deracinated version of Divine command theory in that, after Newton, the natural "laws" were divorced from being: *this* action produces *that* reaction, in causal chains that can, in theory, be described with mathematical precision through equations that do not in themselves require any *person* to operate. To account for the entire causal chain would be to demonstrate that each action along the chain is determined by its antecedents.

In terms of the analytic philosophy of science, this sort of flat Newtonian notion of causality has been out of favor since at least David Hume's treatment of the subject. Hume, in fact denied that we can know causality at all, because of the problem of instance confirmability. The observation that B follows A in an observed instance does not guarantee that B will always follow A. We can only claim that B has always followed A in the past, and that B will always follow A in the future, if we assume that whatever properties affect the relations between B and A are stable, uniform and unchanging. But since we cannot observe every instance of the relation between A and B in the past, and since we cannot presently observe the future of relations between A and B, there is no way empirically to know that A "causes" B. Hume therefore concluded that the idea of natural "laws" is semantic or a matter of custom and not necessarily real.[745]

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[744] *See Strong's Greek Concordance*, 4919, available at http://biblesuite.com/greek/4920.htm.
[745] David Hume, *An Enquiry Concerning Human Understanding, Part II*. Hume states that "[a]ll events seem entirely loose and separate. One event follows another; but we never can observe any tie between them. They seem conjoined but never connected. And as we can have no idea of anything, which never appears to our outward sense or inward sentiment, the necessary conclusion seems to be, that we have no idea of connexion or power at all, and that these words are absolutely without any meaning, when employed either in philosophical reasoning, or in private life." Hume did not want to deny the explanatory power of causation, so he located the sense of causation in experience rather than in logical induction: "In all single instances of the operation of bodies or minds, there is nothing that produces any impression, nor consequently can suggest any idea of power or necessary connexion. But when many uniform instances appear, and the same object is always followed by the same event; we then begin to entertain the notion of cause and connexion. We then feel a new sentiment or impression, to wit, a customary connexion in the thought or imagination between one object and its usual attendant; and this sentiment is the original of that idea which we seek for." *Ibid.*

Within the philosophy of science today, Humean approaches to natural "laws" remain important.[746] Neo-Humeans focus on instance confirmability and counterfactual support as markers of things that could be called natural "laws." The greater number of instances that can be observed of B following A, the stronger the inference that A causes B; and the greater ability of the relation between A and B to obtain across other possible worlds, the stronger the modal force of the relation between A and B. But this approach assumes that natural "laws" are entirely contingent. In other possible worlds, the "laws" could be different. Natural laws therefore are not embedded in a realist metaphysic, but are accidental features of the universe we happen to inhabit.

The neo-Humean approach to natural laws does not in itself avoid determinism in a weak sense. We can still speak of laws, and of causal relations, and the systems of our universe are all that obtain for us – there is no transcendence. In principle, a present observation that B followed A could be described in terms of all the relations that ever obtained in the history of the universe and that led to A and then to B given the things we would call "laws" in this universe. But this non-realist approach to natural laws does avoid determinism in a hard sense – the universe *could have been* different, and nothing *outside* the universe determines the fate of the universe or of the things (including *homo sapiens*) within it.

This sort of metaphysic underpins the contemporary debate in analytic philosophy over the problem of human free will. Camps divide over whether the concept of "freedom" requires "libertarian" or "compatibilist" free will.[747] Libertarians argue that "freedom" means, in any given situation, the ability to choose otherwise. Compatibilists argue that "freedom" does not necessarily imply a counterfactual choice, but rather implies only that an agent's capacities are functioning properly when a choice is made.

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[746] *See, e.g.,* E. Zilsel, "The Genesis of the Concept of Physical Law," 51 Phil. Rev. 245 (1942); A.J. Ayer, "What is a Law of Nature," 36 Rev. Int. Phil. 144 (1956).
[747] *See Stanford Encyclopedia of Philosophy*, "Compatibilism," available at
http://plato.stanford.edu/entries/compatibilism/#1.

Modern philosophical theologians in the analytic mode have largely accepted these categories.[748] One attempt at a theological response to the Humean notion of natural law and causality (which also was a response to Newtonian determinism) is to invoke the need for a *first* cause. Unless the universe is eternal, something must have set the chain of causation going, and that something must itself be eternal – i.e., God. To this sort of argument, critics such as Richard Dawkins rightly ask "but what caused God?" Philosophically, this sort of argument reflects an incapacity to move beyond Humean accounts of freedom and causality. Such accounts are being located once again in Aristotle.

In his treatise "On the Soul," Aristotle stated that the "soul" and the "body" are inseparable. For example, comparing the soul to the potential power of a cutting tool and relating it to the power of sight, Aristotle said:

> the soul is actuality in the sense corresponding to the power of sight and the power in the tool; the body corresponds to what exists in potentiality; as the pupil plus the power of sight constitutes the eye, so the soul plus the body constitutes the animal.[749]

Yet Aristotle never simply *equated* the soul with bodily functions.   For example, he noted that "all those who define the soul by its power of knowing make it either an element or constructed out of the elements," and he is keen to refute this sort of reductionism.[750] Instead, for Aristotle, the soul is the form or source of the body:

> The soul is the *cause* or *source* of the living body. The terms cause and source have many senses. But the soul is the cause of its body alike in all three senses which we explicitly recognize. It is (a) the source or origin of movement, it is (b) the end, it is (c) the essence of the whole living body.[751]

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[748] *See, e.g.,* David Baggett and Jerry L. Walls , *Good God: The Theistic Foundations of Morality* (Oxford: OUP 2011).
[749] Aristotle, *De Anima*, II.1.
[750] *Ibid.*, II.2.
[751] *Id,* II.4. (emphasis added).

This reference to origin, source, and movement invokes Aristotle's concept of causation. Aristotle recognized four kinds or aspects of causation: material, formal, efficient and final.[752] The material cause is that out of which something comes, such as the bronze of a statue.[753] The formal cause is the form or account of what it is to be something, such as the shape of a statue.[754] The efficient cause is the primary source of change or rest, such as the sculptor who chips away at the marble.[755] The final cause is the end for which something is done, such as the production of a sculpture.[756]

Modern science recognizes only efficient and material causes.[757] While this may be an important methodological limitation, it is unwarranted, without further explanation, as an overarching metaphysic. Moreover, an Aristotelian or neo-Aristotelian notion of "mind" (or "soul") requires all these various senses of causation, and in particular *final* causation.[758] If some sort of Aristotelian anthropology is a response to reductive NeuroLaw, as Pardo and Patterson suggest, then we must speak of where "law" comes from, what it means for "law" to be "law," and of the ends or purposes of "law." That is, we must speak of "law" as having some transcendent *telos*, some *source* that also implies its *ends*.

In fact, even in the academic philosophy of science literature, there has been a resurgence in Aristotelian thinking about the *powers* and *dispositions* of things.[759] This move has been spurred in large part by Roy Bhaskar and other philosophers of science who espouse an approach they call "critical realism."[760] As noted in Chapter 1 above, a related move is made by many "science

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[752] *See, e.g., Stanford Encyclopedia of Philosophy*, "Aristotle on Causality," available at http://plato.stanford.edu/entries/aristotle-causality/ (last visited January 29, 2013).
[753] *Ibid.*
[754] *Ibid.*
[755] *Ibid.*
[756] *Ibid.*
[757] For a discussion of causation in modern science, see Nancey Murphy, "Divine Action, Emergence, and Scientific Explanation," in *The Cambridge Companion to Science & Religion* (Cambridge U. Press 2010), 244-47.
[758] *See Stanford Encyclopedia of Philosophy*, "Aristotle's Psychology," available at http://plato.stanford.edu/entries/aristotle-psychology/ (last visited February 9, 2013).
[759] *See* Ruth Groff and John Greco, eds, *Powers and Capacities in Philosophy: The New Aristotelianism* (London: Routledge 2013).
[760] For a definition of critical realism, see Mervyn Hartwig, *Dictionary of Critical Realism* (Routledge 2007), 96: "A movement in philosophy, social theory and cognate practices that seeks to under labour for science and other ways of knowing in order to promote the cause of TRUTH and FREEDOM, hence the transformation of social

and religion" scholars, although their version of "critical realism" differs in some important respects from the Bhaskar school.[761]   Nevertheless, there are important areas of overlap, particularly in relation to anthropology and the problem of "mind."[762]

Bhaskar's metaphysic is phenomenological, realist, and essentialist.[763] Bhaskar argues that

> [t]he world consists of things, not events. Most things are complex objects, in virtue of which they possess an ensemble of tendencies, liabilities, and powers. It is by reference to the exercise of their tendencies, liabilities and powers that the phenomena of the world are explained. Such continuing activity is in turn referred back for explanation to the essential nature of things.[764]

Similarly, Nancy Cartwright and John Pemberton state that "Aristotelian powers . . . are part of the basic ontology of nature – at least as nature is pictured through the lens of modern science."[765]   Cartwright and Pemberton argue that, although "[t]he scientific revolutionaries

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structures and other constraints that impeded that cause and their replacement with wanted and needed ones, or emancipation."

[761] *See Ibid.* at 98. The *Dictionary of Critical Realism* suggests that

> In another neck of the realist philosophical woods, the 'critical realism' of the Canadian Jesuit philosopher-theologian Bernard Lonergan (1904-84) appears to commit the epistemic fallacy in viewing the real as that which is known … as does that of the French Thomist philosopher, Jacques Maritain…. The current movement in theology known as 'critical realism' … was significantly influenced by the tradition of representative realism, but is currently being taken in a strongly Bhaskarian direction by Alister McGrath (2002). By and large, while there are obvious commonalities between all these various kinds of realisms, one can say that Bhaskarian CR is sharply distinguished from the others by its robustly transcendental and immanently critical method, its outright rejection of empiricism and positivism, its thoroughgoing emergentism, its understanding of social science as necessarily explanatory critical (entailing rejection of the fact-value and theory-practice dichotomies) and its explicitly emancipatory stance.

Ibid.

[762] The *Dictionary of Critical Realism* states that "CR's major contribution on this subject is *synchronic emergent powers materialism* … which shares with Searle's biological naturalism … a refusal of the basic terms of debate set out by dualism and reductionism, on the basis that both are rooted in an ontological idealist-materialist dichotomy. Dualism leaves consciousness as a mysterious non-corrigible intangible, whilst reductionism, in the name of materialism, puts aside the totality of a conscious being which is the very property that gives rise to questioning the nature of mind in the first place. SEPM argues that consciousness is an emergent non-reducible property of the material brain." *Ibid.* at 314-15.

[763] *See* Roy Bhaskar, *A Realist Theory of Science* (New York: Verso 1977).

[764] *Ibid. at 51.*

[765] Nancy Cartwright and John Pemberton, "Aristotelian Powers: Without Them, What Would Modern Science Do," in *Powers and Capacities in Philosophy*, *supra* Note 851, 93. *See also* Ruth Groff, "Whose Powers? Which Agency?," in *Powers and Capacities in Philosophy*, *supra* Note 851, 209 (noting that "[i]t is fair to date to the mid-1970s the contemporary retrieval of causal power for which Hume couldn't locate an original impression."). See

made fun of this kind of Aristotelianism," the notion that there are "powers" in nature that can combine to produce various sorts of "canonical effects" is essential to a non-reductive understanding of nature and to the practice of science itself.[766] They wish to elide Hume's skepticism about causation by showing how "nomological machines" produce predictable effects that support meaningful claims of causation.[767] For Cartwright and Pemberton, such effects result from a nomological machine's "emergent powers which are not to be found in its components."[768] Nomological machines, then, are not reducible to underlying "laws," but rather employ powers that *are* the canonical effects they contribute to the machine.[769] Moreover, powers are not arbitrary in relation to nomological machines. For Cartwright and Pemberton, "arrangement matters."[770] This ontological move – rendering "powers" as emergent features of nature – thus eliminates the problems of reduction and instance confirmability that so troubled Hume.[771] As Cartwright and Pemberton conclude, their account of powers "has major implications for debates about levels and about reduction. The arrangement of parts is immanent in the whole but not in each of the parts. Machine arrangements can have emergent powers not possessed by the parts."[772]

Further, as Ruth Groff observes, realism about powers as stable emergent properties of machine arrangements "carries with it implications for the theorizing of human agency. . . ."[773] Groff argues that among the emergent powers of human beings is the power to act as genuine causative agents.[774] In a chapter that explores the link between powers and agency, Groff invokes Brian Ellis' canonical discussion of how realism about essential powers differs from Humeanism.[775] Ellis identified his view with Leibniz: "[l]ike Leibniz," Ellis says, "I suppose that

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also Louis M. Guenin, "Developmental Potential," in Tuomas E. Tahko, ed., *Contemporary Aristotelian Metaphysics* (Cambridge: CUP 2011).
[766] *Ibid.* at 93-94.
[767] *Ibid.* at 94.
[768] *Ibid.*
[769] *Ibid.* at 95.
[770] *Ibid.* at 109.
[771] *Ibid.* at 105 (noting that, in contrast to Hume, "[o]ur account is a powers account precisely because we take exercisings seriously as a central part of scientific ontology.").
[772] *Ibid.* at 111.
[773] Ruth Groff, "Whose Powers? Which Agency?," in *Powers and Capacities in Philosophy*, *supra* Note 851, 207.
[774] *Ibid.* at 208.
[775] *Ibid.* at 211.

laws of nature are grounded in intrinsically powerful properties."[776] For Ellis, Groff, and other neo-Aristotelian philosophers of science, human beings possess dispositional properties relating to natural powers. For example, a person who comes in from the cold and sits by a fire becomes warm due to the fire's power to warm, and now that person also has the power "to warm some other thing, such as the body of anyone who wants to come and cuddle."[777] This implies a space for ethical action: the person who obtains the fire's power to warm may share or not share that power with others.[778]

These neo-Aristotelian philosophers *sound* like they are connected to the participatory ontology of classical Christian theology and Greek thought. But generally they are attempting to speak of powers as something emergent from lower orders of nature, without any prior referent or antecedent end. As Charlotte Witt notes, Aristotle's ontology of causal powers requires "the central presence of teleology."[779] Witt argues that "[w]ithout the teleological thread it is unclear on what basis it makes sense to extend a realist theory of causal powers from natural causation to human activity."[780] But a notion of Aristotelian teleology, Witt suggests, is missing "from many contemporary versions of realist theories of causal powers."[781]

One reason for this lacuna might reflect a failure to understand the classical Christian doctrine of creation. For example, Ellis argues that powers "are not imposed by God on things that are intrinsically powerless, nor are they just regular patterns of behavior that happen to be displayed by such things, just as if they were imposed by God."[782] Ellis' conception of how natural powers might relate to Divine causation here betrays a failure to understand the traditional Christian doctrine of creation *ex nihilo*. God neither stamps pre-existing matter with powers, nor randomly imbues things with powers by fiat. In the traditional Christian conception, created things have dispositions, powers and capacities because they participate in the being of the living Triune God,

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[776] *Ibid.*

[777] *Ibid.* at 218 (quoting Stephen Mumford and Rani Lill Anjum, "Getting Causes from Powers," at 6, in Ruth Groff, ed., *Revitalizing Causality: Realism About Causality in Philosophy and Social Science* (London: Routledge 2008)).

[778] *See Ibid.*

[779] Charlotte Witt, "Aristotelian Powers," in Ruth Groff, ed., *Revitalizing Causality*.

[780] *Ibid.* at 137

[781] *Ibid.* at 130.

[782] *Ibid.* at 212 (quoting Brian Ellis, *Scientific Essentialism* (Cambridge: CUP 2011), 265).

and moreover the dispositions, powers, and capacities of all things are finally oriented towards a *telos* in God.

In fact, as Eleonore Stump has noted, "what is distinctive about this contemporary resurgence of Aristotelianism in metaphysics is its subtle difference from standard versions of Aristotelianism, such as that which can be found in the high Middle Ages, in the work of Aquinas, for example."[783] Stump notes that contemporary neo-Aristotelianism meshes with Aquinas' thought in that both understand a material thing to comprise a dynamically organized system that cannot be elided through reduction.[784] For Aquinas, this system-level dynamic configuration was the "form" that gave the thing its "function."[785] But contemporary neo-Aristotelians are generally committed to the principle of the causal closure of the physical.[786] Aquinas, Stump suggests, would agree with the causal closure of the physical with respect to the integrity of secondary causation.[787] Using the paradigmatic example of water as a composition of matter with emergent properties, Stump notes that Aquinas would not posit any "mental stuff or panentheistic stuff or anything else non-physical which is responsible for the causal power of a water molecule to form a hydrogen bond."[788] But Aquinas would *not* accept causal closure at the level of what Stump calls the "micro-physical," because the fundamental particles that make up hydrogen and oxygen atoms taken in isolation do not each possess the powers of a water molecule.[789] The "form" of the water molecule, for Aquinas, inheres only in its configuration as a system. This is particularly important, Stump notes, for Aquinas' treatment of the human person. A neo-Aristotelian account of the human person may be "non-reductive" based on the emergent property of "mind," but it remains "physicalist" in that it recognizes no source beyond the physical.[790] The neo-Aristotelian person therefore remains subject to a dissolution into matter. For Aquinas, in contrast, a human person is a whole system with an integral form that is not subject to dissolution

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[783] Eleonore Stump, "Emergence, Causal Powers, and Aristotelianism in Metaphysics," in *Powers and Capacities in Philosophy*, *supra* Note 851, 48.
[784] *Ibid.* at 51-52.
[785] *Ibid.*
[786] *Ibid.*
[787] *Ibid.*
[788] *Ibid.*
[789] *Ibid.*
[790] *Ibid.*

into matter – that survives death.[791]   And, although Stump does not explicitly make this connection in her discussion of neo-Aristotelian metaphysics, for Aquinas the human form – the soul – finds its true *telos* in the Resurrection, when united again with matter and participating fully in the beatific vision of God.

4. Adam, Christ, and the Law

This construal of "natural" law as the participation of the human creature in the free gift of God's love returns us to one of the big questions in theology and science with which this dissertation opened: who *was* "Adam?" Even conservative Christians in contemporary theology and science discourse like to point out that, based on evidence from population genetics, there cannot have been a "literal" Adam and Eve from whom the entire human race has descended.[792] Within the millions of years of "human" evolution, with all its "natural" struggle, violence, and death, how can we speak intelligibly about the creation of the first man and woman in paradise and of their "Fall?" If so much about us is "hard wired" by evolutionary history, what sense can be made of the traditional doctrines of original righteousness and original sin?

The temptation to reductionism here is strong. But as Graham Ward has noted in his own study of "belief" and paleoanthropology, "we are not what we were. We are not stardust blown around by solar winds following a Big Bang. We are not single-cell organisms learning to swamp in a primordial soup. We are not creatures who have crawled from the swamp, climbed trees and then begun to swing among the branches."[793] Rather, we are "the most intellectually advanced thinking and self-conscious beings," capable of creating elaborate symbolic systems that can be passed along as culture.[794] We *homo sapiens* alone among the creatures of the Earth possess the extensive capacity "to generate actualities from virtualities."[795] In a more theological key, we alone among the creatures of the Earth can see the gap between the first Adam and the last

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[791] *Ibid.*
[792] *See, e.g.,* The BioLogos Forum, "Were Adam and Eve Historical Figures," available at http://biologos.org/questions/evolution-and-the-fall.
[793] Graham Ward, *Unbelievable: Why We Believe and Why We Don't* (New York: I.B. Tauris 2014), 223.
[794] *Ibid.* We might quibble with Ward's superlative "the most," which seems to lose sight of the Angels or of the possibility (likelihood?) of life elsewhere in the universe. But, yes, "the most" among the creatures of the Earth.
[795] *Ibid.* at 224.

Adam, can hear and respond to the Word of God, can receive the grace that enables us to participate as free agents in the transforming law of love.

We can say almost nothing about a "person" merely by observing genes, because genes are not "persons." Populations genetics studies can provide models of the dispersion of genes through groups of biological entities, but they can tell us nothing whatsoever about when the first "human person" emerged. Indeed, for population genetics *qua* population genetics, there simply are no "persons" – for this is a science of the movement of genes, not a philosophical, sociological, or theological description of "persons."

It is often suggested that in Romans 5:12 Adam is a type of Christ. In fact, in Paul's thought, as well as for the early Church Fathers, *Christ* is the type, the *typos*, a notion derived from the "stamp" or "seal" on an official document. There is a hint in Romans 5 of a truth that would only become clarified later in Christian theology – that the pre-incarnate Christ, the second person of the Trinity, always *was*. Whereas Arius declared that "there was a time when he [Christ] was not," Nicea established the orthodox Christology of Christ's eternal sonship. Thus Christ is and was the Redeemer, the one for whom creation was made and in whose death and resurrection creation always finds its fulfillment. Adam's failure was that he went against type – he did not conform to Christ but rather tried to become something else, and thereby the true nature of humanity was broken.

Is the *typos* of Christ reducible to a set of genes? Surely not. It resides not in genes or in any other created thing but rather in the Triune life of God Himself. We might speak, in a roughly analogical way, of ideas we hold in our minds – say, the idea of a perfect Bordeaux, ruby-red, silky, smoky, plummy, luxurious. We could labor to instantiate that idea, combining genes and *terroir* and water and light and care, and perhaps we might achieve it, to the point where upon taking a sip we exclaim, "this – *this* – is Bordeaux. Nothing else is worthy of that name."

This is what God said of Adam, when he gave him breath and a name. It is not something that God said of any other creature, even apparently some creatures that a modern population geneticist or paleoanthropologist might designate as ancestrally human based on genes or bones. Yet *that* Adam, and each of us *in* that Adam, fail to participate fully and unreservedly in the true

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nature of the true human, the nature of Christ. And so Pontius Pilot, an unwitting prophet, said of Christ: "behold, the man" (John 19:5, KJV). And so also Paul invites us to see: the sinful man, the broken seal, the first created Adam; and the true type, the seal of humanity's future, the perfect Adam, the Christ. None of this is about the definitions and categories of modern science, as helpful and important as they may be for the progress of scientific thought. It is, rather, about the fullness of what it means to be human. Reductive neurolaw by definition offers no such transcendent sources or ends.

5. Law, the Origin of the Soul, and Original Sin

Now we can move towards a conclusion: in some sense "law" is a constituent element of the human soul, present in our created goodness, prevenient in our fallenness, perfected in our resurrection with Christ. Law is part of the origin of each person's soul.

The pattern of Genesis 2 seems to reflect this order: God creates the soul of Adam ("the breath of life") and imprints on Adam's soul the law of the Garden ("you shall not eat of it"). This pattern is discussed in St. Athanasius' On the Incarnation.[796] Athanasius notes that all of creation is God's good gift.   Human beings, however, we given additional gifts: God made them in His image and "[gave] them a share of the power of his own Word, so that having as it were shadows of the Word and being made rational, they might be able to abide in blessedness, living the true life which is really that of the holy ones in paradise."   But because of their rational nature, human beings were given a power to choose whether to live in accordance with this gift of life.   The Garden and the law were therefore given to provide the means for human beings to choose to live in accordance with the grace of reason:

> And knowing again that free choice of human beings could turn either way, he secured beforehand, by a law and a set place, the grace given. For bringing them into his own paradise, he gave them a law, so that if the guarded the grace and remained good, they might have the life of paradise – without sorrow, pain or care – besides having the promise of their incorruptibility in heaven….[797]

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[796] Athanasius, *On the Incarnation of the Word*, available at http://www.ccel.org/ccel/athanasius/incarnation.i.html.
[797] *Ibid.*, 1.3.

But when human beings turned against God and transgressed the law, they lost the gift of incorruptibility and were returned to their "natural state," which in fact dissolved them as "human":

> For the transgression of the commandment returned them to the natural state, so that, just as they, not being, came to be, so also they might rightly endure in time the corruption unto non-being. For if, having a nature that did not once exist, they were called into existence by the Word's advent [parousia] and love for human beings, it followed that when human beings were bereft of the knowledge of God and had turned to things which exist not – evil is non-being, the good is being, since it has come into being from the existing God – then they were bereft also of eternal being.[798]

The Fall as a turn from the law, then, for Athanasius, produced an ontological change in the human person precisely in the loss of direct and full participation in God's eternal being secured by the law in the Garden. The loss of the law in the Garden reduces the human being towards non-being:

> But this, being decomposed, is to remain in death and corruption. For the human being is by nature mortal, having come into being from nothing. But because of his likeness to the One who Is, which, if he had guarded through his comprehension of him, would have blunted his natural corruption, he would have remained incorruptible, just as Wisdom says: "Attention to the laws is the confirmation of incorruptibility" (Wis 6:18).[799]

This view of law might be particularly consonant with a Traducian or generative view of the soul in light of original sin. As the pure law would be passed in the soul from person to person through generation, so would the broken law. But it is also helpful in connection with a creationist view of the soul, particularly when combined with a Federal understanding of Adam's headship over humanity. Adam's sin resulted in his expulsion from the Garden. The Cherubim with flaming swords bar the way back. Judicially, then, Adam has been placed outside the law. This is his curse, his sentence for lawbreaking.

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[798] *Ibid.*, 1.4.
[799] *Ibid.*

Outside the Garden, of course, Adam and his heirs remain accountable to the law and can still hear God's commands. This is evident in Cain's murder of Abel. Cain is banished in punishment for his crime, but God pronounces a law of protection over Cain: "anyone who kills Cain will suffer vengeance seven times over."[800] Yet Cain was capable of murder because the law was no longer constitutive of his soul in the way possible only in the Garden. The law had become something at least partially external, at least partially inaccessible. His knowledge of the law remained – he knew murder was evil – but his power to keep the law failed.

This separation is symbolized by the cherubim and flaming swords that bar access to the Tree of Life. (Gen. 3:24.) The Tree of Life is the pure law. To eat from the Tree of Life is to take the pure law into the soul, to nourish the soul. As the fruit of the Tree of Life metabolized into the body (we are speaking metaphorically here, of course), the law pervades a person's being, body and soul. Without the Tree of Life, a person may know the difference between good and evil, but doing the good is a struggle, and indeed the tendency is away from the good. When eating of the Tree of Life, the soul is so joined to the pure law that the law is ecstatic delight. The sweet juice of the pure law fills the mouth and runs down the beard, its fragrance occupies the nose, its taste explodes with indivisibly rich layers of flavor. There is no thought, when eating of the Tree of Life, but of that which is good and right and beautiful and just and true. There is love and no possibility of anything other.

We, as Adam's heirs, are born outside the law. But as gift, law continually presents itself to us without coercion or violence. The Tree of the Knowledge of Good and Evil was not locked behind a wall that had to be breached, nor was it surrounded by armed Cherubim. It was, rather, at the center of the Garden, open and accessible. The most severe penalty, of course, was attached to God's command not to eat: death. Yet here God's perlocutionary act of uttering the command and delineating its penalty – of establishing "law" – was inseparable from the gift of justice which flowed from God's being. There was no distinction between "justice" and "law," for the gift of "life" is participation in the life of God, who is no being like us and who gives us being. To refuse participation in God's life by equating the self with God is to engage in the absurd performance

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[800] Gen. 4:15.

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of death.   The act, therefore, is its own penalty, and not something externally imposed by force of will. It is self-chosen, self-imposed, an exile of the self from the self as created from God's ecstatic generosity, a loss of the self for which no one but the self is responsible.

6.   **Law, Participation, and Grace**

If the Fall is a fall away from the Law, are we saved by returning to the Law and keeping it? The answer in the Pauline theology of the New Testament, and in the Christian tradition as it developed in both the East and West, is no. Because of the ontological effects of sin, we cannot keep the law.

The East and West differ in various ways concerning the precise nature of the ontological effects of Adam's sin. In the East, following some of the Eastern Fathers such as Athanasius and Gregory of Nyssa, the ontological consequence of Adam's fall is typically pictured as a kind of separation, misdirection, and interruption of growth.[801]   Separated from intimate fellowship with the source of life, we experience death, and in this experience of separation, finitude and death, we fail to grow into our proper end, despair and sin.   It is more of an existential condition than a direct inheritance. In the West, following Augustine, the ontological consequence of the Fall is often pictured as more of an organic loss of an originally perfect physical capacity coupled with a quasi-biological state mysteriously passed on through sexual generation.

 It is sometimes suggested by Eastern Orthodox scholars that the East retained a higher view of post-lapsarian human capacities and individual human responsibility than the parts of the Western tradition that have been deeply influenced by Augustine.[802]   That may be true, but as

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[801] See the discussion in Bouteneff, *Beginnings, Ancient Christian Readings of the Creation Narratives*. Page number

[802] *See, e.g.,* Nonna Verna Harrison, "The Human Person as Image and Likeness of God," in Mary B. Cunningham and Elizabeth Tehokritoff, eds., *The Cambridge Companion to Orthodox Christian Theology* (Cambridge: CUP 2008); Bishop Kallistos Ware, *The Orthodox Way* (Crestwood: St. Vladimir's Seminary Press 1979). Ware states that "[f]or the Orthodox theological tradition . . . Adam's original sin affects the human race in its entirety. . . . But does it also imply an inherited guilt? Here Orthodoxy is more guarded. Original sin is not to be interpreted in juridical or quasi-biological terms, as if it were some physical 'taint' of guilt, transmitted through sexual intercourse. This picture, which normally passes for the Augustinian view, is unacceptable to Orthodoxy. The doctrine of original sin means rather that we are born into an environment where it is easy to do evil and hard to do good; easy to hurt others, and hard to heal their wounds; easy to arouse men's suspicions, and hard to win their trust." Ware, *The Orthodox Way*, 62.

noted above, even for Athanasius the Fall produced an ontological change in that the human person is no longer constituted by the Garden and the law. It is not the sort of change that appears in the paleontological or genetic record of human evolution, but it is rather a loss of direct participation in the life of God. As Athanasisus stated: "[b]ut human beings, turning away from things eternal and by the counsel of the devil turning towards things of corruption, were themselves the cause of corruption in death, being, as we already said, corruptible by nature but escaping their natural state by the grace of participation in the Word, had they remained good."[803]

This sense of ontological change in Athanasisus' account of the Fall is richly teleological. Humans were made to grow in participation in the life of God, but by sin they have moved in the direction of dissolution. In fact, he says, "the race of human beings would have been utterly dissolved had not the Master and Savior of all, the Son of God, come for the completion of death."[804] Moreover, although human beings were expelled from the Garden, God did not leave sinful humanity entirely bereft of law: "since the negligence of humans descended gradually to lower things, God again anticipated such weakness of theirs, sending the law and the prophets, known to them, so that if they shrank from looking up to the heavens and knowing the Creator, they might have instruction from those close by."[805]   The law and prophets were sent not only for the Jews, but for all of humanity: "they were for the whole inhabited world a sacred school of the knowledge of God and the soul."[806]   Nevertheless, humans remained "irrational" and "did not raise their gaze to the truth" of the law[807].

Thus God sent Christ: "what should be done, except to renew again the 'in the image,' so that through it human beings would be able once again to know him? But how could this have occurred except by the coming of the very image of God, our Savior Jesus Christ?"   But to state this in such a diachronic fashion is not entirely true to Athanasisus' sense God's continual presence in creation through Christ: "For the Word unfolded himself everywhere, above and

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[803] *On the Incarnation*, 2.1.
[804] *Ibid.*, 2.9.
[805] *Ibid.*, 3.12.
[806] *Ibid.*
[807] *Ibid.*

below and in the depths and in the breadth: above, in creation; below, in the incarnation; in the depths, in hell; in breadth, in the world. Everything is filled with the knowledge of God."[808] The presence of the Word in all of creation and all of history is an aspect of providence:

> And, as being in all creation, he is in essence outside everything but inside everything by his own power, arranging everything, and unfolding his own providence in everything to all things, and giving life to each thing and to all things together, containing the universe and not being contained, but being wholly, in every respect, in his own Father alone. So also, being in the human body, and himself giving it life, he properly gives life to the universe also, and was both in everything and outside all. And being made known from the body through the works, he was not unseen even from the working of the universe.[809]

Taking up this theme from Athanasius, we can say that the Word, the Tree of Life, and the Law are Christ, and the Garden is the presence of God. This solves the problem of originary violence concerning the law: the origin of the law is gift, not violence. Law is not violently opposed to nature or to grace. True law is the bridge between nature and grace. The restoration of true law is the means by which nature is completed by grace and the soul is united again to God. Christ present in the Eucharist is the Tree of Life made available to us again, which allows us to participate again in the true law.

This theology of law as gift bears profound implications for the problem of Christian ethics and nonviolence. To "resist an evildoer by violent means" – the best interpretation of Mathew 5:39 -- is fundamentally to act apart from the law.[810] But an evildoer's dereliction of true law is a form of self-exclusion from the peaceable city, not an unlawful from of violent resistance imposed by the faithful community.

Indeed, all this reflection on the Biblical texts reminds us that we cannot even begin to understand Adam without first confronting the Christ. The original authors and redactors of the

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[808] *Ibid.*, 3.16.
[809] *Ibid.*, 3.17.
[810] For an exegesis of this passage and a discussion about whether the command not to resist an evildoer is absolute or only forbids resistance "by evil means," see Glen Stassen, *Living the Sermon on the Mount: A Practical Hope for Grace and Deliverance* (Josey-Bass 2006); Hays, *The Moral Vision of the New Testament*.

Genesis creation accounts probably had no intention at all of portraying the idea of the Fall and original sin as it subsequently developed in Christian thought.   The connection comes to light most plainly in the Apostle Paul's use of Adam as a type of Christ. Paul, of course, did not write in a vacuum, and scholars wonder about possible connections between Paul's understanding of Adam and some of the Second Temple Jewish texts that portray Adam as a sort of superman. Yet even in these Second Temple texts, Adam is primarily a figure of Israel. This is consistent with the likely original purposes of the texts in their canonical form, as a reminder of Israel's identity for the returnees from the Babylonian captivity. And for Paul, Christ is the fulfillment of Israel's hope -- indeed, Christ is the true Israel.

Now we see the pattern emerge: to outsiders, Israel was a historical footnote, at best: a minor, fractured and defeated power, now but a cultural annoyance to the pax Romana, an annoyance the Empire would not tolerate and that the Emperor Titus would crush under his heels. In Christ, Israel is revealed to all the world to be what Israel has always knew itself to be: the elect people of God called as a light to all the nations.

To outsiders, the *adam* is ephemeral, a ghost in the machine of chance and fate, an epiphenomenon of folk psychology that always collapses under its own weight and that science will soon fully explain. In Christ, the *adam i*s revealed to all the world what it always knew itself to be: the very good of creation, the gift of divine love, the rebellious sinner that chose death rather than life, the redeemed person empowered to live as the resurrected new creation and become united with God.

This suggests that Adam's prelapsarian capacities were not things we can empirically measure. Both prior to and after the Fall, the narratives present Adam as a creature in continuity with the created order, including with all his descendants. Whether Adam was already perfect and fell away from perfection, or whether Adam's perfection consisted in his participatory movement towards theosis -- or both -- in either event his created capacity for divinization, a capacity inherent in his soul, was broken.

The fall is thus historical and trans-historical, much like the Resurrection of Christ. Christ is risen indeed, and the tomb is empty. Yet even as the event of the Resurrection breaks into history it

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transcends history, because it is the breaking-in of the consummation of history into time. In the Resurrection, eternity touches time in a manner that both can be observed -- "see his head, his hands, his feet" -- and surpasses the finite capacity of observation: he is "seated at the right hand of God," who "cannot be seen."

Adam is indeed fallen, and the way back to the Garden is barred by the Cherubim. We have no empirical access to the Garden. The event of the Fall broke into history and indeed broke history, the history of the human soul's unhindered participation in God's life. It was the anti-resurrection. The study of history, in genetics and bones and anthropological comparisons, cannot reveal Adam in the Garden, any more than Christ as seated at God's right hand could be observed through a telescope. We can observe now, in history, the open graves of our mouths and the empty tombs of our souls. But we can only know of how humanity transcends the grave through the life, death and resurrection of Christ. Only in Christ can we really get to know Adam.

This does not mean that the scientific study of human evolution and neurobiology fail to reveal truth about human nature. Our bodies and minds are no less the result of evolutionary change over deep time than any other aspect of the universe. We are made from the "dust of the earth." Yet that is not all we are. We have the "breath of life" and we are "living souls." A Christian theology of the person surely conflicts with a reductionistic materialist's theology of the person. But this does not imply that Christian theology conflicts with "science," if science is understood as the empirical study of natural history. The human person is more than its "natural history" and reflection on humanity's true nature requires more than empiricism alone offers. A full account offers a multitude of finally complementary narratives.

So the fact that our evolutionary "hard wiring" predisposes us to act in various ways, sometimes violent and sometimes altruistic, does not in itself preclude the Garden, in which we could have always acted in accordance with the divine law of love -- unless we choose to limit our account of the human person to what can be empirically observed about the interaction of biochemicals in time. It is indeed merely the problem of agency taken from the specific to the general. Am I choosing to write this book, or are the meanings latent in these words illusory, a signifier only of deterministic brain activity? Do human beings ever choose? Did human beings ever choose? If

human being did and do choose, it is not difficult to imagine a threshold of accountability, a possibility of a "first choice." If we do not choose, then there is no first or last choice, but only change.

Indeed, the realization that human beings conduct many of their daily activities in an automatic or sub-conscious mode is not a new insight of neuroscience. David Eagleman refers to this when he acknowledges that "[t]he existence of free will in human behavior is the subject of an ancient and heated debate."[811] Indeed! Yet he never even attempts to explore the contours of that debate. A key problem in that debate is the phenomenological observation, known from ancient times, that human beings often act automatically, under apparent mental compulsion, or otherwise outside the zone of conscious control. What contemporary neuroscience brings to the table is a deeper understanding of the physical element of at least some of these phenomena.

In fact, such a focus on habits and practices is precisely what virtue theory, which informs many kinds of moral theology, is all about.[812] Moral theologians and philosophers, however, will want to inquire about the development of the *habit* itself.[813] Isn't the "largest bit" of the story, from a qualitative perspective, the initial development of habits and practices, through some exercise of the conscious will, that lead to habituated action? As Peter Hampson suggests, "[f]or Aquinas, *habitus* refers to the ways in which repeated *acts* become perfected dispositions to act for good or ill; that is how, if repeated, they can become part of our second nature."[814] Hampson notes that, "[i]n psychological terms, the deployment of a well-developed habitus is more like a demonstration of flexible expertise, sensitive to different situational demands, routinized but not robotic. . . ."[815] Far from undermining traditional accounts of moral action, then, neuroscience simply fleshes out the physical picture of what theology and philosophy already knew: behaviors

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[811] *Ibid.* at 162.
[812] *See, e.g.,* Rachana Kamtekar, "Ancient Virtue Ethics," and Jean Porter, "Virtue Ethics in the Medieval Period," in *The Cambridge Companion to Virtue Ethics* (Cambridge: CUP 2013).
[813] *See, e.g.,* William C. Mattison, III, *Introducing Moral Theology: True Happiness and the Virtues* (Ada: Brazos Press 2008).
[814] Peter Hampson, "'By Knowledge and by Love:' The Integrative Role of Habitus in Christian Psychology," Edification: The Transdisciplinary Journal of Christian Psychology 6:5 (2012).
[815] *Ibid.*

become ingrained in the "soul" and changing them requires prolonged and sometimes difficult habituation into new behaviors.

Christos Yannaras is one contemporary theologian who has fruitfully explored these themes. Yannaras is a Greek Orthodox theologian who has written extensively on theological anthropology and ethics.[816] In *The Freedom of Morality*, Yannaras addresses the seeming aporia between "freedom" and the strictures of "morality." Yannaras grounds his account in the personal and relational being of the Triune God. God's personal existence as Trinity constitutes His being, and therefore God's being is free, not contingent on some prior essence.[817] "When the Christian revelation declares that 'God is love, (1 Jn 4:16)'" Yannaras argues, "it is not referring to one among many properties of God's 'behavior,' but to what God *is* as the fullness of trinitarian and personal communion." Human existence "derives its ontological significance from the fact of divine love, the only love which gives substance to being."[818] Human persons, who are created to partake in the divine love, therefore must be "free" creatures.[819]

Human freedom does not imply a capacity for absolutely libertarian choice. It is, rather, "the freedom of love and of personal communion," a capacity to relate existentially to God.[820] As such, human beings are not subject to any kind of "natural predetermination."[821] A human being can reject this relationship, but to do so is to reject "the ontological precondition for his existence. . . ."[822]

The ostensibly libertarian choice to pursue one's own purposes apart from God is in fact a rejection of the self and the foreclosure of the freedom of love. The Fall occurs when the human person "freely renounces his possibility of participating in true life, in personal relationship and loving communion – the only possibility for man to *be* as a hypostasis of personal

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[816] For a brief biography of Yannaras, *see* Christos Yannaras, *The Freedom of Morality* (Yonkers: St. Vladimir's Seminary Press 1984), Forward by Bishop Kallistos of Diocletia.
[817] *Ibid.* at 18.
[818] *Ibid.* at 19.
[819] *Ibid.*
[820] *Ibid.* at 20.
[821] *Ibid.* at 25.
[822] *Ibid.*

distinctiveness."[823] The Fall fragments the communality of human beings with God, each other and the rest of creation. The Fall "has irrevocably split nature, and condemned the will of all other human persons to be merely an individual will expressing and enforcing the necessities of the fragmented nature."[824] This is a kind of non-being or non-existence, not a juridical category.[825] For Yannaras, "[t]he God of the Church as known and proclaimed by Orthodox experience and tradition has never had anything to do with the God of the Roman juridical tradition, the God of Anselm and Abelard. . . ."[826] Judgment and Hell are states of self-imposed exclusion from communion with God and therefore from genuine human existence.[827]

Yannaras' relational ontology leads him to view the Biblical Law not as a deontological code of obligation imposed from above, but rather as a gracious description of the principles of communion already present, as it were, from below. For Yannaras, "Torah" is analogous to principles of aesthetics in art and music.[828] The Law was given to Israel to identify and demarcate what it meant to participate in the life of the covenant community. Christ's "fulfillment" of the Law is the full realization of love, through which the Law is disclosed as thoroughly personal, indeed as a *person*, "the very person of Christ, the perfect image of God."[829] The *telos* of the Law therefore is love.[830] This *telos* of the Law means that Christian faith and practice are not matters of positivistic legal observance. Instead, Christian faith and practice center on the communal life of the Church and in particular on the Eucharistic meal, by which we participate in Christ's fulfillment of the Law through self-giving love.[831] This embodied practice demonstrates that Christian anthropology is non-dualistic. "The distinction between soul and body," Yannaras notes, "is not an ontological distinction, like that between nature and person or between nature

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[823] *Ibid.* at 29.
[824] *Ibid.* at 31.
[825] *Ibid.* at 35.
[826] *Ibid.* at 35.
[827] *Ibid.* at 35-36.
[828] *Ibid.* at 54.
[829] *Ibid.* at 56.
[830] *Ibid.*
[831] *Ibid.* at 92-111.

and energies; it does not relate to man's *being*, to his *mode of existence.*[832] The soul and the body are "distinct natural energies" of "the one human nature."[833]

Yannaras does not apply these observations to secular positive law, but he does address the role and nature of the Church Canons. He interprets St. Paul's treatment of the Law in terms of transcendence. He argues that, for Paul, the Law is a form of separation leading to death, but that "[t]he cross of Christ, that ultimate consequence of the Law, the fulfillment of the curse and of death, is the end of the Law and transcendence of the Law."[834] The Church Canons, then, cannot be understood legalistically, in ways that suggest separation and death. Instead, the Canons are ascetical principles that reflect "the ontology of the Church, the mode of existence within the church body."[835] They demonstrate, within the context of their times and places, the corporate ascetical disciplines required to transcend the passions that separate us from full participation in God's life. It is finally not through deontological rules but through "physical acts of asceticism, practical rejection of individuality, fasting, continence, freedom from the cares of the consumer, participation of the body in prayer and the labor of serving others" – the practices of the life of faith – that human persons become free from "subservience to natural necessity" and "confinement in existential individuality."[836]

Robert Spaemann is another philosophical theologian who has addressed freedom, virtue and causality in a richly theological key. In his book "Persons," Spaemann seeks to integrate a teleological and relational account of theological anthropology.[837] Like Yannaras, Spaemann ties the nature of human "persons" to God's personal nature as Trinity. But while Yannaras, in the vein of the Cappadocian Fathers, focuses on *relationality*, Spaemann, in the vein of Augustine and the Western Doctors, focuses on knowledge, and particularly on self-knowledge.

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[832] *Ibid.* at 111.
[833] *Ibid.* at 112.
[834] *Ibid.* at 176.
[835] *Ibid.* at 188.
[836] *Ibid.* at 267.
[837] Robert Spaemann, *Persons (trans Oliver O'Donovan): The Difference Between 'Someone' and 'Something'* (Oxford: OUP 2007).

"Persons," Spaemann notes, "are not something else the world contains, over and above inanimate objects, plants, animals, and human beings. But human beings are connected to everything else the world contains at a deeper level than other things to each other. That is what it means to say that they are persons."[838] Where Yannaras tends to see individuation as a product of the Fall, however, Spaemann argues that individuation is part of any living organism's, and any person's, ontology: "Coming to be of a new something, individuation, cannot be described as an emergent property. If drive, or pursuit, individuates experience, life cannot be comprehended as the *property* of an existent but only as its *being*. 'Life is the being of living things.' Persons are living things, and their being is life, there individuation that of a living organism."[839] Indeed, for Spaemann, individual self-reflexivity demonstrates that materialist reductionism fails:

> Only of *my* hunger, mine from the outset, can I become aware. But what does my hunger mean? That we cannot say precisely. We can only say that there is a hunger which, when it surfaces in consciousness, surfaces in my consciousness as my hunger. *Awareness* of life is the irreducible paradigm for life and experience of every kind.... This casts new light back on the ontological status of psychological states. The reductionist attempt to treat them as ontological phantoms, seen without being believed, comes to grief if there is actually no clear dividing line between states of mind and awareness of states of mind. We have no idea what states of mind of which no one was aware could be like.[840]

Nevertheless, for Spaemann, the ability to *transcend* individuality is a uniquely *human* quality among the creatures of the Earth. "No beast reflects upon the fact that the world surrounding it is no more than its world, relative to it specific organization," he notes, and "[n]o beast thinks beyond the scope of its own surrounding world to conceive itself as simply a feature of some other animal's world. . . ."[841]   Like Yannaras, Spaemann wishes to preserve God's freedom concerning creation, and to connect human persons to God's creative freedom. But Spaemann follows Aquinas in recognizing each individual human person as a "divine idea." The divine idea of a person is not in itself a person – "a human being is not called a person unless he or she exists

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[838] *Ibid.* at 4.

[839] *Ibid.* at 43.

[840] *Ibid.* at 56.

[841] *Ibid.* at 64.

outside God's mind, *extra causum*." This means, for Spaemann, that "[e]xistence carries with it the moment of sheer facticity, which cannot be got round, and which implies God's sheer creative freedom.[842] Yet this sheer facticity, this contingency of personal existence on God's creative gift, shows that self-knowledge requires a personal encounter with transcendence: "The reality of a human person and all its depth and complexity is accessible only to someone who invests something of himself or herself in the encounter. It is not the most impersonal, but the most personal observation that reveals most of what reality is in itself. It is one of those persistent prejudices of modern thought to think that the less subjective something is, the more objective."[843]

For both Yannaras and Spaemann, then, as for Tertullian, Lactantius, Augustine and Aquinas, the notion of "libertarian" freedom is not the heart of what it means to be "human." To be human is to be able to know the source and end of the self, and thereby to know that one *is* known by God. To be "free" is to be "human," to "know fully as I am known" (1 Cor. 13:12), to find life, fellowship, and love in God. The truly "natural" law – the law of love, the law of the Garden – if the receipt of the gift of life from God who creates, redeems, and fulfills human "being" in Christ.

Both Yannaras and Spaemann show that, for Christian theology, the concept of human "freedom" must focus not so much on modern liberal ideas such as "agency," and more on classical concepts of being and the good.[844] Freedom, in Christian theology and Biblical thought, is not so much "freedom to" as "freedom from" and "freedom for."[845] This is illustrated by the "tree of the knowledge of good and evil" in the Bible's Second Creation narrative.[846] God's command not to eat from this tree carried with it the consequence of death: "but from the tree of the knowledge of good and evil you shall not eat, for in the day that you eat from it you will surely die."[847]

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[842] *Ibid.* at 71.
[843] *Ibid.* at 89.
[844] *See* David C. Schindler, *The Perfection of Freedom: Schiller, Schelling, and Hegel Between the Ancients and the Moderns* (Eugene: Wipf & Stock / Cascade Books 2013) (noting that "our current conception of freedom is deeply problematic" because it focuses on means rather than on ends).
[845] *See* Robert Spaemann, *Persons: The Difference Between 'Someone' and 'Something'* (Oxford: OUP 1996), Chapter 16.
[846] Gen. 2:16-17.
[847] Gen. 2:17 (NASB).

A participatory concept of "law," together with a consideration of both universal and particular human nature, thus may help us move towards a more cohesive account of the relation between "pre-" and "post-"lapsarian humanity. If there is a universal human nature, and each individual person is a particular instantiation of that universal, then any particular person's inhuman act affects our common humanity. Something about universal human nature itself becomes altered. Potentialities, teleologies, and tendencies are introduced that previously were not present. In the next, concluding chapter, we examine what these ideas might mean for natural law theory and political theology.

Chapter 6: Revitalizing the Soul of the Law

The discussion of law, neurolaw, and the philosophy of mind in the previous Chapters highlights a potential conflict. A traditional Christian theological account of law requires a participatory ontology through which the created order reflects God's own orderliness, a sense of human freedom through which human beings can choose to live in harmony with or in opposition to God's law as instantiated in creation and encoded by His command, and a kind of human intellect through which human beings can craft social structures, including positive law, which reflect our created end, which is the Resurrection, *theosis*, the beatific vision, life fully *with* God. But modern "natural" science elides the transcendence required for this kind of thick ontology. Nevertheless, we identified one important stream within the contemporary philosophy of science literature concerning the "laws of nature" that advocates for a "new Aristotelianism" that focuses on the "powers" of entities rather than on "laws." In many ways, this new Aristotelianism echoes pre-modern philosophical and theological arguments about essence and existence.

This Chapter moves the discussion into how a coherent theory of natural law could be articulated and defended, consistent with the methodological perspective articulated in Chapter 1, and in light of the sources and arguments considered in Chapters 2-5. In particular, this Chapter argues from a phenomenological perspective that a meaningful concept of "law" requires a thick metaphysical account of "essence" – ultimately an account rooted in the being of God. Such a perspective on natural law differs significantly from the "new natural law" arguments that have come to represent the "conservative" perspective in the Western culture wars. In fact, the supposed conservatism of the new natural lawyers is radically modern and heterodox, while natural law theory that unashamedly entails particular theological claims is truly "conservative" of orthodoxy.

1. The New Natural Law

In recent decades, there has been a resurgence in "natural law" theory among some analytic philosophers. Philosophers such as Germain Grisez, John Finnis, and Robert George have spearheaded a movement in "new" natural law theory that is designed to appeal, at least in its

first principles, to all rational persons regardless of religious or theological commitments.[848] The "new" natural law theory, however, turns out to represent another effort to define "law" without theological context.[849]

Finnis identifies seven goods that he claims are self-evident to all rational persons: (1) life; (2) knowledge; (3) play; (4) aesthetic experience; (5) sociability or friendship; (6) practical reasonableness; and (7) religion.[850] These goods are not ordered hierarchically, but Finnis explains that the principles of practical reason enable human beings to make rational decisions about how all these goods could be instantiated in an ordered society. The first principle of practical reason, for Finnis, is the Thomistic aphorism that "good is to be pursued and done and evil is to be avoided."[851]

The new natural law theory is controversial and problematic. Indeed, the subtle critique implied by the adjective "new" demonstrates that many ethicists attracted to theories of inherent moral goods find the Grisez-Finnis approach troubling.[852] In his critique of the Grisez-Finnis approach, for example, Russell Hittinger argues that the fundamental problem with that approach "lies in a failure to interrelate systematically practical reason with a philosophy of nature."[853] Hittinger notes that Grisez believes "speculative reason, including its metaphysical mode, is able to affirm little, if anything, concerning God as an end of human striving."[854] This leads Grisez and Finnis away from associating their method too closely with Augustine, Aquinas, or other pre-modern Christian natural law theorists. Indeed, notwithstanding their reference to Aquinas' first principle

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[848] *See* Robert George, *In Defense of Natural Law* (Oxford: Clarendon Press 1999); William E. May, "Germain Grisez on Moral Principles and Moral Norms: Natural and Christian," in Robert George, ed*., Natural Law & Moral Inquiry* (Washington D.C.: Georgetown Univ. Press 1998). May argues that Grisez's version of natural law theory, though it posits general principles of practical reason to which all persons have access, is also specifically Christian in that Grisez also recognizes some additional moral principles that can be known only through revelation.
[849] Some Catholic moral theologians have described debates between the new natural law theorists and proportionalists as a "schism." *See* Todd A. Salzman, *What Are They Saying About Catholic Ethical Method* (New York: Paulist Press 2003),, 17. As Salzman notes, the new natural law theorists criticize Aquinas for coming close to committing the naturalistic fallacy (deriving an "is" from an "ought") and further criticize the subsequent manualist tradition for actually committing the naturalistic fallacy. *Ibid.* at 20.
[850] John Finnis, *Natural Law and Natural Rights* (Oxford: OUP 1980), 81.
[851] *Ibid. See also* Germain Grisez, *The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2*, 10. Finnis relies heavily upon Grisez for this point.
[852] The adjective "new" was first applied by Russell Hittinger. *See Ibid.* at 5.
[853] *Ibid.* at 8.
[854] *Ibid.* at 20.

concerning pursuing good and avoiding evil, Grisez and Finnis eschew the label of "Thomist," in part to avoid interpretive disputes surrounding Aquinas' own work.[855]

The new natural law theorists are keen to distinguish themselves from both materialistic monism and Caretesian dualism.[856] Patrick Lee and Robert George, for example, argue that human beings are animals with a capacity for agency.[857] The capacity for intentional agency, they suggest, is the principle of action that defines human beings as body-soul composites.[858] Without the sense organs and the brain, the human person cannot understand or will, yet understanding and willing cannot merely be identified with sense organs or the brain.[859]

Although other animals can also perform acts of understanding and willing, Lee and George argue, "human beings fundamentally differ from other animals because they [human beings] perform actions which manifest a transcendence of matter not possessed by other animals."[860] Human beings are capable of conceptual thought, which "radically distinguishes them from other animals."[861] For Lee and George, conceptual thought differs from sense perception in that "[w]hat one senses, perceives, or imagines – what one grasps in *bodily* cognitive acts – is always a *this*, with a particular, albeit sometimes vague, contour," whereas conceptual thought is capable of obtaining insight about "a nature, property or form that can be (and usually is) instantiated in many, innumerable cases and which grounds explanations for why things (or

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[855] Russell Hittinger, *A Critique of the New Natural Law Theory* (South Bend: Univ. Notre Dame Press 1987), 8-9. Grisez responded to Hittinger in "A Critique of Russell Hittinger's Book, A Critique of the New Natural Law Theory," New Scholasticism 62 (1988), 62-74. Hittinger responded with a terse paragraph in which Hittinger said "[a]t least in this piece, he [Grisez] reduces the philosophical issues to an argument from authority, which in this case is his own." Russell Hittinger, "Response to Professor Grisez's Critique," New Scholasticism 62 (1988), 466. My purpose here is not to enter into the specifically internecine Roman Catholic debates about the new natural law theory which seem to this non-Roman catholic Christian perhaps to be more related to questions about Papal infallibility and the encyclical *Humanae Vitae's* teaching on contraception than to broader questions of philosophy and theology. I do agree with Hittinger, Jean Porter, and others, however, that the new natural law theory finally reflects a distorted theology that tends toward the separation of being and reason, in contrast to the historic Christian "natural law" tradition, and I further argue in this section that this causes significant problems in response to neurolaw.
[856] Patrick Lee and Robert George, *Body-Self Dualism in Contemporary Ethics and Politics* (Cambridge: CUP 2008).
[857] *Ibid.*
[858] *Ibid.* at 17.
[859] *Ibid.*
[860] *Ibid.* at 52.
[861] *Ibid.* at 56.

relations, as in logic) are as they are."[862] Moreover, the human capacity for conceptual thought

allows humans to "reflect back upon themselves and their place in reality."[863] Animals other than

humans, Lee and George claim, "give no evidence at all" of being capable of conceptual thought

or self-reflection.[864] It is therefore the capacity for rationality that defines what human beings

are and that render humans capable, in ways animals are not, of free choice and moral agency.[865]

For Lee and George, the *kind* of freedom humans possess is libertarian freedom: "that is, … not

determined by the events that preceded it, but … determined by the person making the choice

in the very act of choosing."[866] In at least some choices, Lee and George insist, "the events and

realities" antecedent to the choice, including the person's "character," are not sufficient to bring

about the choice, such that the person "could have chosen the other option, or not chosen at all,

under the very same conditions."[867] The "principal objection" to this libertarian position, Lee and

George assert, is the "principle of rational explanation" – the notion that a *rational* choice is

determined by rationality or else the "choice" is irrational and random and not a "choice."[868]

They rebut this argument by distinguishing a "rational" choice from a "moral" or "best" choice.[869]

A "rational" choice, they assert, is simply one in which "one sees a distinctive benefit" in the

choice.[870]

Lee and George argue that their anthropology is "not incompatible with theologically based key

propositions" concerning the *imago Dei*, the immortality of the soul, and the resurrection of the

body.[871]   The same sort of argument is common to all new natural law theorists: rational

arguments, understood on their own terms, establish a foundation for further theological

reflection. The project thus represents a "natural theology" of law.

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[862] *Ibid.* at 55.
[863] *Ibid.* at 56.
[864] *Ibid.*
[865] *Ibid.* at 59-60.
[866] *Ibid.* at 60.
[867] *Ibid.*
[868] *Ibid.* at 64.
[869] *Ibid.*
[870] *Ibid.*
[871] *Ibid.* at 50-51.

This brief discussion of Lee and George's notion of "rationality," agency, embodiment and the soul, however, demonstrate precisely why their project ultimately fails. A very particular metaphysic of "nature" is already smuggled into Lee and George's presumptively neutral discussion of agency. They betray their presumptions when they argue that the deterministic assumptions of the scientific method do not define the limits of "every entity which exists."[872] "In fact," they note, "renowned scientists such as Werner Heisenberg held this very position."[873] "Free choices and thoughts," they suggest, "are entities of this sort" (the sort that are not explicable by the scientific method). This passing reference to the Heisenberg Uncertainty Principle and to "free choices and thoughts" as "entities" obviously encodes a metaphysic of "nature," being reason and causality – and one derived straight from Kant and Paley.

In this sense, the new natural law theorists engage in the same sort of "natural theology" as proponents of "intelligent design" ("ID") theory.[874] These kinds of natural theologies represent an apologetic program dictated by modernity. They accept the premise that human rationality is a neutral arbiter among competing truth claims and argue that facts "consistent with" Christianity can be ascertained by all rational persons from self-evident first principles. ID theorists do not claim their proofs establish there is a God, nor do new natural law theorists claim their principles require a Divine source. Both, however, claim that their efforts clear a common ground on which theists and non-theists can parlay.

There are many empirical, philosophical, and theological problems with these claims. Empirically, neither ID theory nor the new natural lawyers take evolutionary biology seriously on its own terms. ID theorists consistently misunderstand or misrepresent what evolutionary biology means by "randomness" in natural selection. ID theorists claim that against the random background noise of natural history there are discernible patterns of "design" from which it can be inferred that a "Designer" exists. Such patterns may take the form of specified informational content in DNA or of "irreducibly complex" biomechanical systems such as the bacterial flagellum.[875] The

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[872] *Ibid.* at 63.
[873] *Ibid.*
[874] *See* Chapter 1
[875] *See* Michael Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (New York: Free Press 1996); Michael J. Behe, *The Edge of Evolution: The Search for the Limits of Darwinism* (New York: Free Press 2007)

empirical problem is that "randomness" in evolutionary theory, properly understood, is a statement about *ex ante* predictability and not about *ex post* observations. No evolutionary biologist would deny that there is "order" evident in the observable universe – that DNA molecules provide "instructions" for the expression of particular proteins and that that there are complex biological structures with specific functions in particular organisms. The evolutionary biologist's claim, however, is that the higher level order inherent in something like a particular complex biological structure is not predictable from *a priori* observations of the genetic material and biosphere existing at any earlier time.[876] The order that *presently* exists is a *contingent* order, and that contingency is bound up in billions of years of evolutionary history that could have unfolded in paths too vast to quantify.[877] Life as we know it is orderly, but not necessary.

In a similar fashion, the new natural lawyers suggest that some moral principles are the necessary result of basic principles of rationality, such as the law against non-contradiction. This inherently is a claim that these principles of rationality are a fundamental and necessary property of the universe and that the moral principles derived from them are likewise necessary.[878] Such a claim, however, fails to comprehend the contingency of biological evolution. The moral principles the new natural lawyers are concerned with purport to govern *human* activity. Human beings are a product of biological evolution, like all other life on Earth. Our beliefs about rationality may be no more than epiphenomena of contingent processes. The principles of logic and reason may *appear to us* inviolable, but this appearance may simply reflect our rather puny status as large-brained primates adapted to one of the billions upon billions of planets orbiting one of the billions upon billions of stars in one of the billions upon billions of galaxies in what we perceive to be the

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[876] *See, e.g.,* Mark Ridley, *Evolution* (Blackwell 3d ed. 2004),, 5 (noting that "[e]volution does not proceed along some grand, predictable course. Instead, the details of evolution depend on the environment that a population happens to live in and the genetic variants that happen to arise (by almost random processes) in that population.").

[877] *See Ibid.* There are, however, some evolutionary biologists who do not identify with ID theory but who argue that the "convergence" of common biological forms within separate evolutionary pathways suggests that the contingency of evolutionary history is highly constrained by universal boundary conditions. *See* Simon Conway Morris, *Life's Solution: Inevitable Humans in A Lonely Universe* (Cambridge: CUP 2003).

[878] *See* Chapter 3.

universe – which may only be one of billions upon billions of universes in the multiverse, or one of infinite universes or multiverses.

Philosophically, then, both ID theorists and the new natural lawyers adopt a naïve form of foundationalism. They assume that a scientific, ethical, and/or legal system can be established from the bottom up based on rational foundations that cannot be challenged and that are sufficient to support the resulting edifice. This sort of naïve foundationalism, however, consistently fails, because the supposed foundations turn out to require more basic unverifiable assumptions for their own support.

Theologically, both ID theorists and the new natural lawyers claim they are not making theological claims. Instead, they suggest that their arguments are neutrally accessible to religious and non-religious people and stand on their own, even though they are *consistent* with various theological and religious claims. The unintended result of this position is a further *separation* of "faith" and "reason." It looks like a Kantian move because it is a response to the modern Kantian turn that is resigned, at least for the sake of argument, to separation of reason and sentiment. The "God" resulting from this modern form of apologetic ends up looking flatly immanent, defined, constrained, and revealed entirely by human reason. Indeed, the "God" of this apologia seems to *be* human reason. In this way, the theological problems with ID theory and the new natural law are related to the philosophical problems, which in turn are related to fundamental failures to take evolutionary biology seriously. The lonely primate mind stretching out from within the incomprehensibly vast sea of the multiverse (whether "real" or only imaginatively counterfactual) remains incapable of establishing its own existence, much less the existence of universal "laws" or of its God.

Hittinger is therefore correct when he argues that "[w]e should admit the truth: it is not advisable to suppress the issues in a philosophy of nature and then, as it were, to take the ethics and run."[879] As Christian theology has always recognized, if "nature" is in fact "creation," a gift of the transcendent and yet personal creator-God, then what it *means* to "reason", to "be," and to "act"

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[879] *Ibid.* at 194.

– what it means to be *free* – differs radically from any concepts in which such a God is absent. The very intelligibility of the universe *depends* on the first fact of that the universe is "creation." In "creation" there are no "acts" apart from "being"; causes are not univocal; and there is neither determinism nor "libertarian" freedom. In "creation," what is "good" and "true" is not designated as such in virtue of its correspondence with a neutral rationality, but rather what is "rational" is designated as such in virtue of its participation in and orientation towards its final cause in God. As Hittinger notes, "[a]ny effort to extract a part of the ethic [of common morality based in a shared notion of creation] in the absence of its proper foundations, or to assign that part to some other foundation, is tantamount to constructing a materially different ethic."[880]

2. Jean Porter, Stanley Hauerwas, and "Nature as Reason"

In this respect Jean Porter's philosophy of natural law is superior to the "new" natural law. Porter notes that the Scholastic concept of natural law, like Grisez and Finnis' approach, understood natural law as a "product of reason."[881] But, Porter argues, the Scholastics "interpreted reason itself in theological terms."[882] Like Hittinger, Porter argues that modern attempts to articulate a universally compelling and rationally defensible natural law ethic have failed because there simply is no possibility of rational inquiry outside culturally specific traditions.[883]

Porter's line of argument at this point seems to run in the direction of some Protestant critiques of natural law, as she acknowledges.[884] She notes that "[r]ecently, Protestant reappraisals [of natural law theory] have retrieved aspects of the earlier tradition that many Catholic theologians have rejected, particularly its emphasis on prerational nature as a source for moral discernment."[885] One of these Protestant thinkers is Stanley Hauerwas.[886]

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[880] *Ibid.* at 195.
[881] Jean Porter, *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids: Eerdmans 2005),, 27.
[882] *Ibid.*
[883] *Ibid.* at 29. Porter acknowledges the influence of Alasdair MacIntyre when she asserts that "[w]e need not adopt the deep skepticism of some postmodernists in order to defend the possibility that rational inquiry can *only* take place within some context of culturally specific practices, mores, and traditions." *Ibid.*7
[884] *Ibid.* at 40.
[885] *Ibid.*
[886] *Ibid.*

Hauerwas has been critical of natural law because, he argues, "the power of natural law as a systematic idea was developed in and for the Roman imperium and then for 'Christendom.' Thus, ironically, 'natural law' became the means of codifying a particular moral tradition."[887] Hauerwas is particularly concerned about what he understands as a conflation of "nature" and "grace" in Catholic natural law ethics.[888] This approach, Hauerwas suggests, "is bound to use Christ to underwrite the integrity of the 'natural,' since he [Christ] is seen as epitomizing the fulfillment of the human vocation."[889] But for Hauerwas these categories of the "natural" and the "graced," as well as the categories ordinarily emphasized in Protestant ethics – "covenant" and "redemption" – are abstractions that should not take priority over the narrative of the community shaped by God's love for the world in Christ.[890] Otherwise, the rightness or wrongness of particular actions is derived from "nature" and specifically Christian convictions only offer, at best, some supplemental motivation for an abstract "morality."[891] This means that learning how to be "moral" becomes an exercise in the analysis of logical propositions rather than a specific sort of communal formation in particular virtues, habits and practices.[892] The Church then loses its ability to function as a counter-cultural community, particularly in Western democracies with historic links to modern natural law theories.[893]

One of the most disturbing results of the tendency to identify what is "natural" with the prevailing culture, Hauerwas suggests, is that "violence and coercion become conceptually intelligible from a natural law standpoint."[894] The language of natural "rights," he says, "in spite of its potential for good, contains within its logic a powerful justification for violence."[895] This is in part a result of grounding ethical reflection in anthropology, even an anthropology connected to Christology: "[i]t is certainly right that life in Christ makes us more nearly what we should be, but that is not

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[887] Stanley Hauerwas, *The Peaceable Kingdom: A Primer in Christian Ethics* (Univ. Notre Dame Press 1983),, 51. Hauerwas bemoans the fact that "[m]oral theologians came to look more like lawyers than theologians. They were people skilled in adjudication of cases for the troubled conscience (no mean or small skill)." *Ibid.*
[888] *Ibid.* at 56.
[889] *Ibid.*
[890] *Ibid.* at 57.
[891] *Ibid.*
[892] *Ibid.* at 58.
[893] *Ibid.* at 59.
[894] *Ibid.* at 61.
[895] *Ibid.*

to say we must start with the human to determine what it means to be a disciple of Christ. While the way of life taught by Christ is meant to be an ethic for all people, it does not follow that we can know what such an ethic involves 'objectively' by looking at the human."[896] Instead, also echoing Alasdaire MacIntyre, Hauerwas notes that all action is historically situated.[897] The emphasis on narrative reminds us "that we do not know what it means to call God creator or redeemer apart from the story of his activity with Israel and Jesus. The language of creation and redemption, nature and grace, is a secondary theological language, that is sometimes mistaken for the story itself."[898]

Given this emphasis on the particularity of the Christian narrative, how does Hauerwas avoid the spectre of voluntarism?   Would Hauerwas agree with other Protestant versions of divine command ethics that God could counterfactually have issued any command at all – say, a command to torture babies – and thereby established that command as "moral?"[899] In response to these concerns, Hauerwas refers to God's inherent character, which we learn "most clearly … in the life and death of Jesus Christ."[900] The "foundation" of Christian ethics is not in any form of rational foundationalism, but rather "[i]f we have a 'foundation' it is the story of Christ."[901] This foundation is not given in excess of reason, but is itself a claim about reality – a *metaphysical* claim, although Hauerwas does not use the term "metaphysics" in this text.[902] God's commands "make sense within his purpose of creating a people capable of witnessing in the world to the kingdom."[903]

Hauerwas' narratival approach as articulated in *The Peaceable Kingdom* might help us navigate some of the tensions occasioned by modern evolutionary biology and paleoanthropology. The human creature is manifestly selfish and violent as well as social and altruistic. Prior to modern

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[896] *Ibid.* at 58.
[897] *Ibid.* at 61.
[898] *Ibid.* at 62-63.
[899] *See Ibid.* at 65-66.
[900] *Ibid.* at 67. Hauerwas does not reference the Euthyphro Dilemma here, but he is responding in classical fashion to the concerns raised by the Dilemma. *Cf.* David Baggett and Jerry Walls, *Good God: The Theistic Foundations of Morality* (discussing the Euthyphro Dilemma and potential responses).
[901] Porter, *Nature as Reason,*, 65-66.
[902] *Ibid.*, 67-68.
[903] *Ibid.,* 69.

evolutionary science, Christian theology referred to the doctrine of the Fall to account for the selfishness and violence. But it is now clear – unless we wish to adopt the epistemology of the young earth creationists – that selfishness, death and violence characterized "nature" for many billions of years prior to the emergence of "humans" and for the four million years or so of "human" evolutionary history prior to the emergence of *homo sapiens sapiens*. Indeed, a leading introduction to the modern philosophy of biology bears the title "Sex and Death," an apt summary of the brute facts of evolution.[904]

In a northern Spanish cave called El Sidrón lie thousands of bone fragments once thought to be the remains of Republican soldiers.[905] They are, in fact, the remains of twelve Neanderthals who died about 50,000 years ago: an infant, two children, three adolescents, three adult males and three adult females.[906] mtDNA analysis of the remains suggests that this was a social / family group in which the males were biologically closely related – they were perhaps brothers – with adult females from different lineages and multiple children related to one of the females.[907] The site also contains hundreds of Mousterian stone tools made *in situ*.[908] Here was a Neanderthal family group that lived, ate, raised children, and died together.

Their deaths probably were violent. Their bones show telltale signs of butchering. It seems that the flesh and meat was removed from their carcasses with stone tools. The evidence suggests cannibalism.[909] Perhaps this group sat around the fire inside El Sidrón one quiet evening knapping hand axes and flints, when a rival group attacked, killed them, and ate their flesh, simply because the rival group was hungry.[910]

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[904] Kim Sterelny and Paul E. Griffiths, *Sex and Death: An Introduction to Philosophy of Biology* (Chicago: Univ. Chicago Press 1999).

[905] *See* Steven S. Hall, "Last of the Neanderthals," National Geographic, October 2008, available at http://ngm.nationalgeographic.com/2008/10/neanderthals/hall-text/1.

[906] Ian Tattersall, *Masters of the Planet* (Macmillan 2012), 172; Carlos Lalueze-Fox, *et al.*, "Genetic Evidence for Patrilocal Mating Behavior Among Neanderthal Groups," Proceedings of the National Academy of Sciences of the United States of America, November 12, 2010, *available at* http://www.pnas.org/content/108/1/250.full.

[907] Tattersall, *supra* Note 52, 173-74; Lalueze-Fox, *supra* Note 52.

[908] Lalueze-Fox, *supra* Note 52.

[909] Tattersall, *supra* Note 52, 172.

[910] *Ibid.* at 172-73.

This story, like most recreations of Neanderthal and other paleo-human life, is contestable and has been contested in the scientific literature.[911] Nevertheless, it raises it raises a fascinating question: was there "law" for Neanderthals or other early human / hominid species?[912] Was this an act of "murder?"

As the Neanderthal remains at El Sidrón remind us, there was something like "murder" prior to what theology has traditionally thought of as the time of Adam and Cain.[913] Yet Hauerwas might say – with Conor Cunningham in DPI – that we should not look to such abstractions of "nature" for the content of theology and ethics (and for Hauerwas, ethics *is* theology). For "Adam" we should look to Christ, not to the Neanderthals at El Sidrón.

There is a significant lacuna in such an approach, however, because – again, unless we want to adopt the epistemology of the young earth creationists – we cannot deny that our "human" proclivities, tendencies, unconscious reactions, raw emotional responses, epistemic limitations, and so-on – our human "nature" – is inseparable from our bodies, which are connected with our deep and dark evolutionary past.[914] Moreover, it is unclear how billions of years of evolution, including millions of years of "human" evolution, fit into the narrative to which Hauerwas refers. The Biblical narrative and the narrative of the Christian Tradition know nothing of Darwinian

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[911] *See* Linda Vigilant and Kevin E. Langergraber, "Inconclusive Evidence for Patrilocality in Neanderthals," PNAS May 3, 2011, *available at* http://www.pnas.org/content/108/18/E87.full?ijkey=5e99dcbca8ece609d9c725468c9dbfbfcd026345&keytype2=tf_ipsecsha; Caules Lalueza-Fox, *et al.*, *Reply to Vigilant and Langergraber: Patrilocality in Neanderthals is Still the Best Explanation*, PNAS May 3, 2011, available at http://www.pnas.org/content/108/18/E88.full.

[912] Scientific convention is to refer to as "human" all hominid species dating back to the split in evolutionary lineage from chimpanzees about four million years ago. As will be explored further in this Chapter, this is a tendentious usage that simply begs the question what it means to be "human." Many hominid species referred to in the scientific literature as "human," including Neanderthals, were not even direct evolutionary antecedents of contemporary humans (*homo sapiens sapiens*). There was some genetic intermixing between early modern humans and Neanderthals and perhaps some other archaic humans. Comparative DNA analysis suggest that the contemporary human genome includes only small traces of Neanderthal and Denisovan DNA, although the traces that have survived may be important for immune system function. *See, e.g.,* Benjamin Vernot and Joshua Akey, "Resurrecting Surviving Neandertal Lineages from Modern Human Genomes*,"* Science 28:1017-1021 (February 28, 2014); Sriram Sankararamam, et al., "The Genomic Landscape of Neanderthal Ancestry in Present-Day Humans," Nature 507:354-457 (January 29, 2014); Laurent Abi-Rached, et al., Science 7:89-94 (October 7, 2011).

[913] *See* Chapter 3.1.

[914] It should be noted here that the reference to Neanderthals in relation to the "human" evolutionary past is illustrative only. We – *homo sapiens sapiens* – are not descendants of Neanderthals, although there was evidently some interbreeding between anatomically modern humans and Neanderthals at some point in the last tens of thousands of years.

evolution. Those narratives suggest an unmarred original creation, stricken with the catastrophe of the Fall, restored in Christ finally at the eschaton. The most significant "narrative" attempts by theology to incorporate evolutionary biology are those reflected in process theology – in other words, they are efforts that significantly alter the orthodox framework of the Trinity, Christology, creation, and eschatology.[915]

Jean Porter also accepts the MacIntyreian / Hauerwasian critique of pure reason, but she returns to Aquinas in an effort to retain some notion of "nature" that is neither opposed to "grace" nor collapsed into "grace." For Porter, the necessary bridge is teleology.[916] Aquinas' account of natural law, Porter argues, "is essentially teleological – that is to say, it is developed and structured through reflection on the purpose, or end, of human life, and the way this end incorporates and brings order to the diverse inclinations of our complex specific nature."[917]

Porter also accepts the "critical realist" stance in theology and science, which commits her to "construing nature in a way that is responsive to our best speculative understanding of the world around us, which today comes to us largely, though not exclusively, through the natural sciences."[918] Indeed, Porter specifically relies on Alister McGrath's approach to critical realism.[919] However, Porter criticizes what she perceives as naïve realism in McGrath's understanding of "science" and the scientific portrait of "nature." Porter wishes to navigate between outright postmodern social constructivism and modern foundationalism. She finds her way via a kind of "speculative realism" through which Macintyrean tradition-specific inquiry "can in some instances attain to a highly developed theoretical account of a given subject matter, of such a kind as to reveal proper divisions and causal connections within a field of inquiry."[920]

Porter's approach to the nature-grace question reflects this critical realist orientation. She suggests that Aquinas' connection between the virtues and the natural law requires "a kind of

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[915] *See* the discussion of process theology in Chapter 1, *supra.*
[916] *Ibid.*, 49-50.
[917] Porter, Nature as Reason,, 50.
[918] *Ibid.*, 58.
[919] *Ibid.*, 58-59.
[920] *Ibid.*, 64.

happiness that is connatural to the human person."[921] Porter argues that Aquinas maintained a clear distinction between nature and grace that was central to his theology, but that Aquinas never assumed the existence of a state of "pure nature."[922] The first humans, for Porter's Aquinas, were created in a state of grace. Human nature has been distorted, but not entirely erased, by original and actual sin. There are virtues and principles of action that are proper to human nature as it now is, yet there are also pervasive human tendencies (such as narrow self-love) that are not proper to human nature as such. Moreover, there are virtues and principles of action that are in excess of human nature as it now is – that are infused – but that move human persons back toward the state of grace (beatitude).[923] For Porter, this distinction allows us to reflect on human nature as it now is and to develop principles of "natural law" that are appropriate to human nature but that do not imply the *ad extra* of grace.[924] Nature, for Porter's Aquinas, "broadly considered is intelligible on its own terms, and as such it has independent theological significance as a reflection of the wisdom of God."[925] Porter contrasts this with what she describes as the contemporary Catholic view, in which the nature-grace distinction is maintained only as a formal doctrinal principle, because "everything is permeated by grace, and at any rate all creation is a gratuitous gift of God."[926]

Porter argues that the nature-grace distinction is vital to the Thomistic dictum that grace does not pervert nature but perfects nature. The infused virtues do not wash out or cancel the acquired virtues. "'Nature as reason,'" Porter says, "informs the infused as well as the acquired virtues, even though the two kinds of virtues are specifically different, insofar as they are directed toward distinct ends."[927] In particular, for Porter, the acquired virtue of justice, which is reflected in ordinary relationships of obligation, is complemented and completed by the infused virtue of

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[921] *Ibid.*, 379.
[922] *Ibid.*, 384.
[923] *Ibid.*, 384-85.
[924] *Ibid.*, 385. Porter states that "just as we can distinguish, albeit imperfectly, between what is natural to the human person as such and what reflects particular social/cultural expressions, so we can distinguish between what is natural to us and what stems from grace." *Ibid.*
[925] *Ibid.*, 386-87.
[926] *Ibid.*, 386.
[927] *Ibid.*, 389.

charity.[928] Justice and love do not compete: love fulfills justice. This move allows Porter to offer a more positive concept of human "rights" than Hauerwas. Reflection on human nature as such, on Porter's reading of the Scholastics, "implies that all persons are naturally equal in some respects."[929] This notion of natural equality "leads to an expansive construal of the scope of justice, and it also implies limits on the scope of authority and obedience."[930]

Porter's approach is attractive in that it seeks to avoid the positivism of the new natural law theory but still offers the prospect of some account of objective human goods that could inform systems of positive law. But while Hauerwas' narratival approach seems to require a particular story of grace that seems hard to square with the brute facts of natural history, Porter's critically realist approach seems to require a particular concept of nature that does not realistically grapple with "nature red in tooth and claw." On Porter's account of Aquinas, the virtue of justice is connatural with the human person because we naturally exist in certain kinds of reciprocal relationships, such as families. But *why* is that so? *Why* are there "families? Does the "natural" history of "families" reveal anything about the essential nature of such arrangements?

Philosophers of biology suggest that the answer is "no." "Natural" history is the history of change. As the authors of *Sex and Death* note,

> Virtually all humans now live in environments that differ in important ways from the environments in which we evolved. The foods most of us eat are unlike those yielded by hunter-gatherer lifestyles…. The wide availability of artificial light has changed our daily life rhythms. The social groups in which we now live differ in size, and perhaps in composition, from those in which we evolved. Of course, there was no single ancestral human environment. For much of human evolution we have lived in a wide variety of physical and social environments. But the range of our ancestral environments probably overlapped very little with the current range.[931]

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[928] *Ibid.*, 390-91.
[929] *Ibid.*, 394.
[930] *Ibid.*
[931] Sterelny and Griffiths, *Sex and Death*,, 314.

This means that "the link between selective history and current utility [is] fragile."[932]   In other words, it is not so much the case that "family" arrangements are connatural to humans as that these are the sort of arrangements that we happen now to observe via the accidents of history. Moreover, "environmental change can change developmental outcomes."[933]   Some set of environmental factors led to the predominance of "family" arrangements in the recent contingency of human evolution, but changing environmental factors may lead to different arrangements. "Nature" is not anything essential within the domain of natural science; it is change.

The observation that power structures within social groups – whether the "pecking order" in a flock of chickens, the grooming hierarchy in a troop of Chimpanzees, or the arrangement of labor in a human tribal or family group – can change over time under environmental pressures challenges the idea advanced by Hauerwas, Porter, and other theologians and philosophers that law is tied to reason and that reason is a gift that produces peace. *In* "nature red in tooth and claw," it seems that "law" is a function of power and violence. An argument for any form of "natural law" therefore must grapple with the problem of originary violence. Is the *origin* of law power and violence, or cooperation and peace? This question is taken up in the following sections.

3. The Violence of the Law

In Hamilton, New Jersey, not far from the State capital, there is a government office building that houses the New Jersey State Police forensics laboratories.[934] These include the sorts of labs made familiar by television series such as "CSI": a room in which human remains are reconstructed to learn the identities of victims; a room in which DNA is sequenced to help identify a murderer or rapist; a room in which bullets recovered from dead bodies are compared under a microscope with test rounds to determine whether an accused's gun was used in the crime. There is also a less well-known sort of lab: cyber forensics.

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[932] *Ibid.*
[933] *Ibid.*, 315.
[934] *See* New Jersey State Police Office of Forensic Sciences Website, available at http://www.njsp.org/divorg/invest/forensics.html.

The cyber forensic technicians spend most of their time investigating online child pornography cases. "Child pornography" is really a poor term for the sorts of materials these investigators confront. A better term is "child rape." These are horrifying videos and pictures of children as young as eighteen months old being subjected to anal, vaginal, and oral rape by adult men. The children frequently cry and scream as they endure this abuse. My friends in the local Prosecutor's Office tell me that the images being produced and traded are becoming more and more violent: children smeared in feces while they are being raped, children locked in dog crates, children forced to engage in sadomasochistic bondage acts.

The law in New Jersey, and throughout the United States, prohibits even the possession of such images. I have never met anyone, from the most leftist of ACLU members to the most rightist of off-the-grid Libertarians to the most calculating of utilitarians to the most steely-eyed of deterministic neuroscientists, who will say that the production and distribution of child pornography should be lawful. I have also never met anyone who would argue that it is an inappropriately violent act to arrest and segregate child pornographers / rapists. This is as clear an ethical universal as we are likely to find: child rape is wrong and child rapists should be subject to legal sanctions; and the investigation and arrest of child pornographers / rapists in order to protect actual and potential child victims is a virtuous act. But the protection of children against such acts – even within the bounds of the law, without vigilantism -- requires violence.

In the earthly city, it seems, law *always* finally implies violence. Chairman Mao once quipped that "political power grows out of the barrel of a gun."[935] On the first day of law school, our Constitutional Law professor, distinguished federal appellate judge John J. Gibbons, introduced us to the study of law with this quote. His purpose was to contrast the arbitrary rule of power from the rule of law. It was a masterful lesson: a *polis* grounded in commonly held constitutional legal principles functions by reason and not by power.

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[935] "Problems of War and Strategy" (November 6, 1938), Selected Works, Vol. II, p. 224, available at http://www.marxists.org/reference/archive/mao/selected-works/volume-2/mswv2_12.htm. In this text, Mao argued that a proletariat revolution could not occur in China without an armed struggle against Japanese imperialism. He further noted that "[o]ur principle is that the Party commands the gun, and the gun must never be allowed to command the party." *Ibid.* Thus, even Mao recognized that violence cannot comprise the fundamental principle of society.

This is not only true of extreme cases involving child rapists. One thing practicing lawyers learn quickly that is not taught in law school is that a victory in court in a civil case does not automatically translate into money in the bank. The court issues a judgment, which in itself is just a piece of paper with some text requiring one party to pay the other the amount awarded. That paper in itself has no inherent value. There is money in the bank only if the judgment is executed upon and the responsible party transfers funds or assets in full or partial satisfaction of the judgment. The case is not really over when the final judgment is issued: the money still must be paid or collected.[936]

The reason why parties comply with judgments finally is coercive power. Failure to comply with a court order can lead to sanctions for contempt of court, which may include fines, seizure of assets by armed U.S. Marshalls, or jail time. As you enter a federal court building in the United States, just before passing through the metal detectors, you may notice a copy of the U.S. Constitution's Bill of Rights etched into the marble wall. It is an awesome and inspiring symbol. The quip that, in America, our Temple is the Courthouse and our Priestly and Acolyte classes are judges and lawyers seems tangible in that moment.

Of course, many, perhaps most, civil litigants routinely comply with judgments without direct threat of contempt sanctions. We might attribute this to the social contract through which parties bring their disputes before a constitutionally-appointed judge for a decision under the rule of law. But a judgment's final inherent value – and the reason why judgments can often be used as security for third-party transactions – lies in what stands behind the paper: the power of the U.S. federal government.

Sometimes judgments remain unsatisfied because the losing party lacks sufficient assets from which the judgment could be palbid. And, of course, some parties game the system by using corporate law and other means to render themselves judgment proof. But even here, the coercive power of the law is evident: the *winning* party cannot lawfully extract the judgment's

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[936] A judgment also may have value if it can be used as security for a loan or other transaction involving a third party. Even in such cases, the value of the judgment as an asset inheres only in the probability that the amounts finally will be collected.

value from an insolvent or defaulting party through revenge killings, beat-downs, cement loafers, or other forms of self-help commonly employed by organized crime gangs. To do so is to risk arrest and incarceration by armed government police forces. Of course, the law's coercive power is even more immediately evident in criminal cases. No one does jail time only because of a social contract.[937]

Experiences such as these make us wonder whether Judge Gibbons' real purpose in offering the quote from Mao was more subtle than an easy contrast between totalitarianism and Constitutional democracy. *Even in a constitutional democracy*, political authority is finally secured by the barrel of a gun. The constitutional social contract in itself is a thin veil that is easily torn. Many citizens refuse the terms of the social contract and live outside the bounds of the law.

Some Christian theologians criticize the liberal notion of constitutional democracy and the social contract itself, on theological grounds, and argue for forms of Christian Socialism or other types of governmental structures.[938] But even under such structures – indeed, perhaps even more so – the peace that is the goal of the governmental form must be secured by the force of law. There is no form of earthly *polis* in which the law is entirely consensual. Human experience tells us that some will *not* desire the peace of the city. Scripture and Tradition tell us the same. There is no earthly city without a police power.

Jacques Derrida has noted that the language of the law is inherently violent. In his essay *Force of the Law: The 'Mystical Foundation of Authority,'* Derrida notes that the phrase "to enforce the law" reminds us that "law is always an authorized force, a force that justifies itself or is

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[937] This is not to suggest that the prison system in the United States functions effectively. Strict mandatory sentencing guidelines for non-violent offenses, the disproportionate number incarcerated of young African-American men, and the perverse incentives of the prison-industrial complex raise numerous issues about the function of prisons in contemporary culture. *See, e.g.,* The Sentencing Project, "Facts About Prisons and People in Prison" (Jan. 2014), available athttp://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf. Nevertheless, very few informed commentators argue that incarceration should be eliminated for every class of offender (say, violent sex offenders or mass murderers). In any event, whatever sort of rehabilitative program might be suggested in place of prison, such programs must at some point be mandatory and thus backed by coercion and force.
[938] *See*, *e.g.*, Milbank, *Theology and Social Theory*.

justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable."[939] Indeed, Derrida argues, "there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept,* the possibility of being 'enforced,' applied by force."[940] Derrida asks in this essay a perennial question for the rule of law: how is the force or violence of the law distinguished from violence that is unjust?

Derrida's essay was written in French but delivered at an American law school in an English translation.[941] He playfully notes the irony that his contractual agreement to deliver the essay as a keynote address in a symposium on law and deconstruction required – forced – him to use a language that was not his native tongue. This very act of translation, with its inevitable changes in nuance and idiom, fails to do justice to the original text. In the same way, legal concepts often lose the force of their meaning in translation.

A basic example, for Derrida, is the German term *Gewalt*.[942] In English and French, the term is often translated "violence," but in the German idiom it also signifies "legitimate power, authority, public force," including *Gesetzegebende Gewalt* (legislative power), *geistliche Gewalt* (the spiritual power of the church), and *Staatsgewalt* (the authority of the state).[943] But what is the difference between bare *Gewalt* and legitimate *Gewalt*? The modifiers "legislative," "church," and "state" represent institutions that at some time came into being and claimed legitimate power through some act of "originary violence."[944] What transmutes unjust originary violence into justified authority?

Derrida refers here to one of Pascal's Penseés: " *Justice, force.* – It is just that what is just should be obeyed; it is necessary that what is strongest should be followed."[945] There is no justice, Derrida concludes, without force; and the compulsion to follow arises from the strength of the

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[939] Jaques Derrida, "Force of the Law: the "Mystical Foundation of Authority," 11 Cardozo L. Rev. 920, 925 (1989-1990).
[940] *Ibid.*
[941] *See Ibid.* at 920.
[942] *Ibid.* at 927.
[943] *Ibid.*
[944] *Ibid.* at 927.
[945] *Ibid.* at 935 (quoting Pascal, *Penseés*, 298).

force applied rather than anything inherent in the law.[946] "Justice," then is merely a word applied to the strong. Derrida again quotes Pascal: "And so, since it was not possible to make the just strong, the strong have been made just." [947]

But if justice is only power, why do people ever obey the law, rather than living in perpetual revolt? Derrida refers to another of Pascal's Penseés, which refers in turn to Montaigne's concepts of custom and equity. Pascal seems at first to suggest that there is indeed a transcendent source of justice: "Justice without might is helpless; might without justice is tyrannical. Justice without might is gainsaid, because there are always offenders; might without justice is condemned."[948] But Pascal immediately notes that "justice" seems impossible to define and quickly devolves to power:

> Justice is subject to dispute; might is easily recognised and is not disputed. So we cannot give might to justice, because might has gainsaid justice and has declared that it is she herself who is just. And thus, being unable to make what is just strong, we have made what is strong just.[949]

For Pascal, the notion of "natural law" offers no succor:

> Men admit that justice does not consist in these customs, but that it resides in natural laws, common to every country. They would certainly maintain it obstinately, if reckless chance which has distributed human laws had encountered even one which was universal; but the farce is that the caprice of men has so many vagaries that there is no such law. Theft, incest, infanticide, parricide, have all had a place among virtuous actions. Can anything be more ridiculous than that a man should have the right to kill me because he lives on the other side of the water, and because his ruler has a quarrel with mine, though I have none with him?[950]

Finally, Pascal says, the foundation of authority is "mystical" and cannot be reduced to first principles:

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[946] *Ibid.* at 935, 937.
[947] *Ibid.* (quoting Pascal, *Penseés*, 298).
[948] Pascal, *Penseés* 294.
[949] *Ibid.*
[950] *Ibid.*

The result of this confusion is that one affirms the essence of justice to be the authority of the legislator; another, the interest of the sovereign; another, present custom, and this is the most sure. Nothing, according to reason alone, is just itself; all changes with time. Custom creates the whole of equity, for the simple reason that it is accepted. It is the mystical foundation of its authority; whoever carries it back to first principles destroys it.[951]

Derrida notes that in this paragraph on the mystical foundation of authority, Pascal is referencing Montaigne.[952] Montaigne, Derrida points out, referred to the "legitimate fictions" of the law "on which it founds the truth of its justice."[953] Derrida finds a distinction between Pascal and Montaigne. The heart of the problem, for Pascal, is sin: "There are, no doubt, natural laws; but this fine thing called reason has corrupted everything," Pascal says, and further "Our justice comes to nothing before divine justice."[954] But it is possible, says Derrida, to "set aside the functional mechanism of the Pascalian critique, if we dissociate it from Christian pessimism," and to find in Montaigne "the basis for a modern critical philosophy" of law and justice.[955] For Derrida, the mystical authority of justice derives from performativity.[956] The discourse of "law" itself possesses a mystical performative power from which it derives its force.

Because law is founded in a mystical performative power, for Derrida, law is always subject to deconstruction.[957] This may be a "stroke of luck for politics, and for all historical progress," Derrida suggests, for law then is infinitely malleable.[958] But the paradox, he argues, is that justice in itself, "outside or beyond law," is not deconstructible because justice is itself a performative act of deconstruction.[959] That is, "Deconstruction is justice."[960] As a mystical event, justice simply presents itself to us as "an experience of the impossible." "It is just that there be law," Derrida

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[951] *Ibid.*

[952] Derrida, "Force of Law," at 939 (citing Pascal, *Penseés* 294 and Montaigne, Essais III, XIII, De l'expérience).

[953] *Ibid.*

[954] *Ibid.* (quoting Pascal, *Penseés* 294 and 233 ("The finite is annihilated in the presence of the infinite, and becomes a pure nothing. So our spirit before God, so our justice before divine justice.").

[955] *Ibid.* at 941.

[956] *Ibid.* at 943.

[957] *Ibid.* at 943. Derrida states that "[t]he structure I am describing here is a structure in which law (*droit*) is essentially deconstructible, whether because it is founded, constructed on interpretable

[958] *Ibid.* at 943, 945.

[959] *Ibid.* at 945.

[960] *Ibid.*

says, "but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice; that is to say of moments in which the decision between just and unjust is never insured by a rule."[961]

Michel Foucault similarly develops the relation between law and the violence of punishment for violation of the law in *Discipline & Punish: the Birth of the Prison*.[962] Foucault describes in hoary detail the methods of public bodily punishment encoded in European legal systems prior to reforms in the eighteenth and nineteenth centuries.[963] Such torturous public punishments, Foucault notes, were gradually replaced with the prison system, in which prisoners' bodies are removed from public view. This represented, for Foucault, a shift from the body to the soul: "[t]he expiation that once rained down upon the body," he said, "must be replaced by a punishment that acts in depth on the heart, the thoughts, the will, the inclinations."[964] This was not a soul born *into* sin as in Christian doctrine, but rather a soul born "*out of* methods of punishment, supervision and constraint"[965] Contrary to the Thomistic claim that the soul is the form of the body, Foucault stated that "the soul is the prison of the body," because the "soul" is not a personal substance but rather a political economy of secrecy, fear, coercion and imprisonment.[966]

4. Biopolitics in the State of Exception

In the Auschwitz death camp there is a room in Cell Block 11 containing a long table and several chairs. When the camp was in operation, a Gestapo judge sat at the table hearing cases against prisoners charged with "serious" crimes, such as attempted escape or political subversion. At

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[961] *Ibid.* at 947.

[962] Michel Foucault, *Discipline & Punish: The Birth of the Prison* (New York: Pantheon 1975).

[963] In his first chapter, "The body of the condemned," Foucault recounts the gruesome execution of Damiens Robert-François Damiens, who had attempted to kill King Louis XV. Damiens was torn with hot pincers, burned with molten lead, oil, resin, wax and sulphur, and drawn and quartered. The drawing-and-quartering was botched and could be completed only after Damiens' arms and legs were hacked with blades.

[964] *Ibid.* at 16.

[965] *Ibid.* at 29 (emphasis added).

[966] *Ibid.* at 30.

one end of the courtyard outside Cell Block 11 stands a brick wall, still pockmarked with bullet holes, against which those condemned by the judge were executed.[967]

None of those "tried" in the Auschwitz court had the benefit of representation by counsel. There are no published law codes or judicial precedents specifying any rules of due process or substantive limitations on judicial power. There is no record of any acquittals.

Not all the inmates of Auschwitz-Birkenau, of course, appeared before the Getsapo court – indeed, the vast majority never received any judicial process. Many, particularly the very young or old, the sick and infirm, were sorted for the gas chambers immediately upon debarking the train inside the gates of Birkenau. Others were gassed after some time working in the camp factories. Many died of exhaustion and disease, and still others were summarily executed by their guards. At Auschwitz-Birkenau alone, about a million people died in this fashion, without even a false veneer of law.[968]

So why is there a court room in Cell Block 11? Why were some prisoners put through show trials before they were executed?

Theologian Miroslav Volf tells the story of his involuntary service in the Yugoslavian military and his interrogation by his commander, "Captain G."[969] Volf was accused of serving as a CIA spy and of subverting the communist regime because he had married an American and studied theology. He was threatened with eight years in prison at the hands of a military tribunal. As a soldier, he was not entitled to legal counsel. "To be accused was to be condemned," he recalls, "and to be condemned was to be ruined … unless I confessed."[970] After many weeks of this practice, Volf's interrogations abruptly ended. Why was Volf never tried?

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[967] A photograph of the execution wall is available at the U.S. Holocaust Museum, http://www.ushmm.org/wlc/en/media_ph.php?ModuleId=10005189&MediaId=752.
[968] See "Auschwitz: Inside the Nazi State," available at http://www.pbs.org/auschwitz/40-45/killing/; U.S. Holocaust Museum, Holocaust Encyclopedia, "Auschwitz," available at http://www.ushmm.org/wlc/en/article.php?ModuleId=10005189.
[969] Miroslav Volf, *The End of Memory: Remembering Rightly in a Violent World* (Grand Rapids: Eerdmans 2006).
[970] *Ibid.* at 3.

History offers countless other examples of such summary justice, and untold multitudes have suffered similar abuse without any historical memory. It seems that powerful human beings need to cloak their violence against the powerless with a simulacrum of judicial process.

In his book *Homo Sacer*, Italian political philosopher Giorgio Agamben observes that in the state of exception the law is "suspended."[971] When faced with a perceived threat or emergency, the sovereign declares a "state of exception" under which the ordinary rules of procedure, evidence, and judgment no longer apply. In the state of exception there is no law but the will of the sovereign, and thus there is no "law" at all.

Agamben highlights the problem of the relation between constituting and constituted power. Constituted power is that which is exercised with an existing state / juridical framework. Constituting power is that which legitimates the state / juridical framework in the first instance.[972] Agamben suggests that the problem of constitutive power "is increasingly dismissed as a prejudice or a merely factual matter," creating a circularity by which the problem of legitimate power simply is referred to a Constitutional document, which hangs in mid-air.[973] The fundamental problem, he argues, is metaphysical: what is the relation between potentiality (the possibility of constituting law) and actuality (law as constituted).   "Until a new and coherent ontology of potentiality . . . has replaced the ontology founded on the primacy of actuality and its relation to potentiality," he argues, "a political theory freed form the aporias of sovereignty remains unthinkable."[974]

Agamben demonstrates that this problem of constituting and constituted power is a manifestation of the Aristotelian relationship between potentiality and act, *dynamis* and *energia*.[975] How, if at all, is potentiality different from act? Potentiality in the Aristotelian sense,

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[971] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Palo Alto: Stanford Univ. Press 1998).
[972] *Id*, 3.1,, 39-40.
[973] *Ibid.,* 3.1,, 40.
[974] *Ibid.,* 3.2,, 44.
[975] *Ibid.*, 3.3,, 44-48. For a critique of Agamben on this point, see Conor Cunningham, "Nihilism and Theology: Who Stands at the Door?" in *The Oxford Handbook of Theology and Modern European Thought* (Oxford: OUP 2013). Cunningham argues that Agamben seeks to develop his constructive, demonic, nihilism (after all, the Devil wants a kingdom, so there is no point in going all napalm on us), by way of reinterpreting Aristotle's division of actuality and potentiality. He does this in a bid to 'decreate' us." *Ibid.* at 326.

Agamben argues, is the ability not to do or be: "'Every potentiality is impotentiality of the same and with respect to the same'" or "'What is potential can both be and not be.'"[976] This means that when potentiality passes into act, that which is potential "sets aside its own potential not to be (its *adynamia*)."[977] Therefore it is through potentiality that "Being founds itself *sovereignly*," for the passage to actuality implies the sovereign freedom not to be or act.[978] This means that constituting power is never exhausted by constituted power. Sovereign power can remain in reserve, as un-given potentiality.[979] As Conor Cunningham notes, Agamben plays on the voluntarist notion of *potential dei absoluta*.[980]

Agamben then explores the figure of *homo sacer*, the person in Roman law placed under the sacred ban. The *homo sacer* was not subject to execution by the State, but neither was it a crime of homicide for anyone to kill him. This placed the *homo sacer* paradoxically both under and outside the law. The same dynamic, Agamben notes, obtained in the Germanic *wargus*, the "werewolf" who is banned from the city and its law.[981] Agamben defines this as the origin of politics: "[n]ot simple natural life, but life exposed to death (bare life or sacred life) is the originary political element."[982]

Agamben thereby deconstructs the Hobbseian response to the state of nature: the city and its laws do not limit the violence of the state of nature, but rather the state of nature exists within the city, in the human condition of bare life, through which the citizen may become *homo sacer* / wolf-man in the state of exception.[983] The potential of the state of exception, moreover, bears within in the potential for the dissolution of the city itself: "[t]he transformation into a werewolf corresponds perfectly to the state of exception, during which (necessarily limited) time the city

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[976] *Ibid.* (quoting Aristotle, *Metaphysics* 1046a, 32; 1050b, 10).
[977] *Ibid.*, 3.3,, 46. This is how Agamben construes Aristotle's statement that "[a] thing is said to be potential if, when the act of which it is said to be potential is realized, there will be nothing im-potential (that is, there will be nothing able not to be)." *See Ibid.*,, 45 (quoting Aristotle, *Metaphysics*, 1047a, 24-26).
[978] *Ibid.*
[979] *Ibid.*
[980] Conor Cunningham, "Nihilism and Theology: Who Stands at the Door?, "in *Oxford Handbook to Modern European Thought and Theology* (Oxford: OUP 2012).
[981] *Homo Sacer*, 6.1,, 104-105.
[982] *Homo Sacer*, 4.1, 88.
[983] *Ibid.*

is dissolved and men enter into a zone in which they are no longer distinct from beasts."[984] Thus, "[t]he state of nature is, in truth, a state of exception, in which the city appears for an instant (which is at the same time a chronological interval and a nontemporal moment) *tanquam disoluta*."[985]

The paradigm of this dynamic, Agamben argues, is the concentration camp. In the camp, the governing "law" is pure biopolitics, the assertion of power over the body, as evidenced vividly in the gruesome Nazi medical experiments on inmates.[986] "The camp," Agamben says, "was also the most absolute biopolitical space ever to have been realized, in which power confronts nothing but pure life, without any mediation."[987] "Law" and "fact" become indistinguishable in the camp: the fact of bare life is law.[988] And as Western politics have come to define humanity in terms of bare life, to perpetuate the state of exception, and thereby to declare all persons not persons but rather *homo sacer* and *wargus*, the camp has superseded the city as our basic political paradigm.[989]

Agamben does not resolve this aporia, but he concludes with an appeal to reconstitute Western metaphysics.[990] As Graham Ward has noted, Agamben makes use of Pauline thinking about the person, about faith and love, "but there is no analysis of the third in the Pauline trilogue of virtues – hope."[991] Ward adopts Agamben's critique of the state of exception but only as a starting point to illuminate the contemporary situation and to bring it into the light of Christian eschatological hope.[992]

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[984] *Ibid.*, 6.2,, 107.
[985] *Ibid.*, 6.3,, 109.
[986] *Ibid.*, 5,, 154-159.
[987] *Ibid.*, 7.3,, 171.
[988] *Ibid.*, 7.3,, 170.
[989] *Ibid.*, § Threshold,, 181.
[990] *Ibid.*,, 188.
[991] Graham Ward, *The Politics of Discipleship: Becoming Postmaterial Citizens* (Grand Rapids: Baker Academic 2009),, 179.
[992] *Ibid.*

Earlier in his essay on *Homo Sacer*, Agamben refers to an article by Emmanuel Levinas, *Reflections on the Philosophy of Hitlerism*.[993] In that essay, Levinas locates the philosophy of National Socialism in "the essential possibility of *elemental evil* into which we can be led by logic and against which Western philosophy had not sufficiently insured itself."[994]

Within the Jewish and Christian traditions, Levinas argued, human beings are free to transcend the vicissitudes of history, including of their own personal histories. "This freedom," he said, "which is infinite with regard to any attachment and through which no attachment is ultimately definitive, lies at the base of the Christian notion of the soul."[995] Although the body remains stuck in the slipstream of history, through renewal of the soul a person "can regain the nudity he had during the first days of creation."[996] Because each soul always retains this potential to renew itself, there remains an "equal dignity of each and every soul, which is independent of the material or social conditions of people…."[997] Indeed, freedom from history is the ultimate freedom: "The salvation that Christianity wishes to bring us lies in the way it promises to reopen the finality brought about by the flow of moments of a past that is forever challenged, forever called into question, to go beyond the absolute contradiction of a past that is subordinate to the present."[998] The modern alternatives to this paradigm, for Levinas, were Liberalism, Marxism, and National Socialism. Each of these programs displaced this notion of the soul.

For Levinas, liberalism retained the notion of choice but replaced the soul with a Kantian realm of pure, dispassionate reason. This produced dislocation and skepticism, which attempt to keep concrete human history at a distance.[999] The seeds of National Socialism are present in this

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[993] *Homo Sacer*, 4.3,, 151-52. *See* Emmanuel Levinas, "Reflections on the Philosophy of Hitlerism," Critical Inquiry 17:63 (1990) (trans. Seán Hand).
[994] *Ibid.* at 63.
[995] *Ibid.* at 65.
[996] *Ibid.*
[997] *Ibid.* at 66.
[998] *Ibid.* at 65.
[999] *Ibid.*

paradigm, because "[t]hought becomes a game."[1000] People shy away from personal commitment to spiritual values.[1001]

Materialist Marxism "confused the self [*le moi*] with the body … at the price of a pure and simple negation of the spirit."[1002] Thus, the Marxists "placed the body in nature, and accorded it no exceptional standing in the universe."[1003] For such materialists, "the whole of the spirit's essence lies in the fact that it is chained to the body."[1004] Here again are seeds of National Socialism's exercise of power over the body.

National Socialism, in turn, replaced the soul with ideas. These were not ideas freely appropriated by reason, thereby creating a community of peers.[1005] Rather, this was a framework of ideas – the *Blut und Boden* of the Aryan ideal of history – propagated by force. The violence attached to ideas propagated by force does not dissipate when the ideas find acquiescence in subjects. Instead, the force remains, universalizing one final ideal: "war and conquest."[1006]

5. From the State of Exception to the State of Grace

How did we move from the grand Christian theological connection between law and the order of creation to something as deracinated as Oliver Wendell Holmes, Jr.'s "three generations of imbeciles is enough," Agamben's state of exception, or David Eagleman's neurolaw? Why do even non-reductive physicalists insist on the causal closure of the physical? Most contemporary religion and science scholars, as we have noted, trace their views on neurobiology and the soul

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[1000] *Ibid.* at 69.
[1001] *Ibid.* at 69-70.
[1002] *Ibid.* at 68.
[1003] *Ibid.*
[1004] *Ibid.*
[1005] *Ibid.* at 69-70. In an authentic community of ideas, Levinas says,

> The idea propagated detaches itself essentially from its point of departure. In spite of the unique accent communicated to it by its creator, it becomes a common heritage. It is fundamentally anonymous. The person who accepts it becomes its master, as does the person who proposes it. The propagation of an idea thus creates a community of 'masters'; it is a process of equalization. To convert or persuade is to create peers.

> *Ibid.* at 70.

[1006] *Ibid.* at 71.

to Galileo's scientific move back towards atomism. The narrative is that science has finally show the top-down hierarchical Aristotelian cosmos to be false and that theology, like other disciplines, including law, must adjust accordingly. But this empirical shift in perspective, which of course was warranted by Copernicus and Galileo's observations and by the subsequent observations of the physical and biological sciences, is not the whole story.

Some historians and theologians argue that modernity is a *theological* construction, rooted in late medieval nominalism and voluntarism.[1007]   The shift that gives energy to something like Eagleman's fascist version of neurolaw then is not scientific; it is theological.

For example, historian Brad Gregory notes, "the alleged incompatibility between science and religion derives not from science but in the first instance from a seemingly arcane metaphysical presupposition of some medieval scholastic thinkers."[1008] This metaphysical presupposition was that God shares being with creation (a "univocity of being" between God and creation); that God's will is radically non-contingent, including on God's essential nature or being; and that God's providence, including his governance of creation, because of its radical non-contingency, was arbitrary.[1009]

If God's will was arbitrary, then it could be known only by revelation, and not by reason, and likewise nature could only be known by empirical investigation of natural phenomena and not by abstract reasoning about the relations between transcendent universals and immanent particulars.[1010]   Nominalist theologian William of Ockham (c. 1287-1347) is known today for "Ockham's Razor," which is interpreted in contemporary discourse as a general principle of

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[1007] *See, e.g.*, Amos Funkenstein, *Theology and the Scientific Imagination: From the Middle Ages to the Seventeenth Century* (Princeton Univ. Press 1986), 57-62; Michael Allen Gillespie, *The Theological Origins of Modernity* (Univ. of Chicago Press 2008), 19-43; Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Harvard. Univ. Press 2012), 32-73.
[1008] Gregory, *The Unintended Reformation*, 33.
[1009] *See* Gregory, *The Unintended Reformation*, 33-37; Gillespie, *The Theological Origins of Modernity*, 23; Catherine Pickstock, "Duns Scotus: His Historical and Contemporary Significance," 21 Modern Theology 543 (2005).
[1010] Gillespie, *The Theological Origins of Modernity*, 23; John Milbank, "Law vs. Milbank: Belief and the Gods – Part 4," IAI News January 31, 2016, available at http://iainews.iai.tv/articles/law-vs-milbank-belief-and-the-gods-part-4-auid-622.

parsimony in theorizing about natural phenomena.[1011] Ockham's Razor, however, originally was directed at excessive speculation about transcendent universals.[1012]

The nature of Scotus' actual views and the extent of Scotus' actual influence on the development of modern thought are hotly debated among contemporary historians, theologians and philosophers.[1013] Unfortunately, even among accomplished thinkers such as Brad Gregory, the lines of debate sometimes become drawn according to highly polemical confessional lines. I cannot pretend to offer a judgment about these larger issues, but it seems clear that it if God's being was univocal with the being of creation, the "need" for God as a causal agent diminished.[1014] It is at least in part because of the increasing loss of a sense of God's absolute transcendence over creation prompted at least in part by Scholastic nominalism and voluntarism that the physicist Pierre-Simon Laplace (1749-1827) could eventually (reportedly) exclaim that

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[1011] *Ibid.*

[1012] *Ibid.*

[1013] *See, e.g.,* John Hare, "Scotus on Morality and Nature," 9 Medieval Philosophy and Theology 15 (2000); "Editor's Introduction: John Duns Scotus and Modern Theology," 21 Modern Theology 539 (2005); Olivier Boulnois, "Reading Duns Scotus from History to Philosophy," 21 Modern Theology 603 (2005). As Hare and others argue, it may be that Scotus used the *language* of univocity in recognition of the limits of human language, while continuing to hold that God was ontologically entirely transcendent of creation. *See id; see also* Thomas Williams, "The Doctrine of Univocity is True and Salutary," 21 Modern Theology 575 (2005); Nelson H. Minnich, Joshua Benson, Hans J. Hillerbrand, Simon Ditchfield, Paul F. Grendler, and Brad S. Gregory "Forum Essay on The Unintended Reformation," 98 The Catholic Historical Review 503, 508-509 (comments of Joshua Benson) (2012). Nevertheless, this sort of language had consequences as it filtered through the Reformation and the Enlightenment. *See Ibid.*, 513. As Gregory argues,

> Even if we follow those interpreters [of Scotus] who, as Benson indicates, regard Scotus's conception of being as a semantic theory of religious language rather than an ontology, it would at most qualify the character of Scotus' contribution …. A more adequate account would then inquire about the process whereby Scotus's semantic theory was taken as a metaphysics such that God and creation *were* conceived ontological as (infinite and finite) differentiations within the more encompassing *reality* of being…. For, whatever the particularities of the history, it seems clear not only that this happened, but also that, in combination with Occam's razor applied to an either/or distinction between natural and supernatural causality, it explains why so many scholars and scientists today mistakenly assume that central claims of revealed religion are rendered implausible in proportion as scientific explanation of natural regularities proceeds apace.

Ibid. For a balanced discussion of the role of Scotus in relation to Aristotelian / Thomistic virtue ethics, *see* Jean Porter, "Virtue Ethics in the Medieval Period," in *The Cambridge Companion to Virtue Ethics* (Cambridge Univ. Press 2013).

[1014] *Ibid.*

he had no need of God as a "hypothesis" in assessing natural causation.[1015] Further, Laplace

argued that nominalist scientific empiricism should be applied to law and politics: "Let us apply

to the political and moral sciences the method founded upon observation and calculation, which

has served us so well in the natural sciences."[1016]

Political philosopher Jean Bethke Elshtain suggests that the rule of law was ultimately weakened

by these trends. In her Gifford lectures, Elshtain noted how the nominalistic sense of will, power,

justice and law has informed Western concepts of political sovereignty since the late Middle

Ages:

> *If* there is a vital move in theology, law and ethics with nominalism,
> it is this: An emphasis on the primacy of will over intellect is lodged
> as the gravamen of understandings of power and authority – a
> seismic shift from realist emphases. Within medieval realism, even
> as Jesus, the Mediator, help us to 'rise to meet him,' as Augustine
> puts it, so an enduring fabric and structure of unchanging law
> forges a connection between God and human beings.   Human
> reason has access to it and can come to know and embrace the law
> freely. The grounding of ethics lies in law. There is an element of
> predictability here: You can 'take it to the bank,' as we nowadays
> say. [1017]

Elshtain connects this nominalist tendency with legal positivism:

> By contrast, the rise of a command-obedience account of law, what
> in modernity came to be called legal positivism, turned, at least in
> its early foundations, on the theory of a willful supreme being who
> might as well have created things differently than he did – and
> might yet do so by undoing what he has done. . . .   Remaining on
> the trail of the will in theology and politics – the voluntarist
> tendency – earthly sovereignty is to social, political, and religious

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[1015] Napoleon is reported to have replied "Ah! c'est une belle hypothèse; ça explique beaucoup de choses" ("Ah, it is a fine hypothesis; it explains so many things"). *See* Carl Boyer, *A History of Mathematics* (Wiley 2d ed. 1991), 464. In fact, this account of Laplace's comments might be apocryphal, but nevertheless it was widely repeated and became part of the intellectual milieu in which "science" and "faith" came to be viewed as separate, and competing, domains. *See, e.g.,* Martin E. Marty, R. Scott Appleby, Helen Hardacre, Everett Mendelsohn, eds., *Fundamentalisms and Society: Reclaiming the Sciences, the Family, and Education* (Univ. Chicago Press 1997), 30.
[1016] Laplace, *Philosophical Essay on Probabilities*, (John Wiley & Sons, 1902), 107-08.
[1017] Jean Bethke Elshtain, *Sovereignty: God, State and Self* (The Gifford Lectures) (Basic Books 2008) ,, 50-51.

> life as God's sovereignty is to the emergence of law and dominion
> in the first instance. [1018]

Here is the trace of Derrida's argument about the founding event of justice and law as always an act of violence.[1019] If the founding event of God's justice, the giving of the law in the Garden, is just an arbitrary act of will, a rule that God could change at any moment, then the same can be said of the human exercise of authority as derived from God. Elshtain notes that

> In strong articulations of voluntarist theory, God holds the potential power in reserve – power as *absoluta* – and possesses the latent power to alter prior revelations of divine law and natural law as reason-based in favor of an alternative command structure. . . .
>
> The "sovereign" or ruler, whether pontiff, emperor, or king, might be understood to be above the law and not beholden to it lest he choose to be so. . . .[1020]

Seen in this light, perhaps Jacques Derrida was not aware of how traditional and Augustinian his position turns out to be. "Justice" indeed is finally ineffable because it is an aspect of the being of God, and thus is wholly other than creation. And yet as creation participates in God it participates in justice, instantiating justice as a gift that flows from the life of God. Justice, then,

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[1018] *Ibid.*

[1019] Jaques Derrida, "Force of the Law: the "Mystical Foundation of Authority," 11 Cardozo L. Rev. 920, 925 (1989-1990).

[1020] Jean Bethke Elshtain, *Sovereignty: God, State and Self*,, 50-51. *But see* Heiko Augustinus Oberman, *The Harvest of Medieval Theology: Gabriel Biel and Late Medieval Nominalism* (The Labyrinth Press 1983), 96-98. Oberman notes that, in the voluntarist thought of Ockham's disciple, Gabriel Biel, "God does not will something because it is good or right. If that were the case, God's will would be subject to created principles of morality, whereas Biel is convinced that nothing can be called good unless it be accepted as such by the 'uncreated principle,' God." *Ibid.* at 96. Moreover, for Biel, "God can do something which he himself has declared unjust; however, if he does it, it then becomes right; therefore the will of God is the first rule of all justice." *Ibid.* Nevertheless, Oberman notes that Biel did not radically separate God's will from God's being, but rather that Biel attempted to preserve divine simplicity by rejecting distinctions between God's will and being. *Ibid.* at 99. In so doing, Oberman argues, Biel preserved a notion of natural law as a stable, universal principle, albeit in a form somewhat different from Thomas Aquinas, particularly in the possibility that God might temporarily suspend some of His commandments. *Ibid.* at 110. Nevertheless, for Biel "[i]nsofar as the wisdom of God which is involved in the establishment of the natural law is beyond human intellectual capacities, it would have been possible for god to have decided in favor of a natural law different from the present one." *Ibid.* at 100. The present natural law exists "*de facto*" because God has in his inscrutable wisdom made it so. *Ibid.* This seems to introduce an uncomfortable possible division between God's being and His will. Brad Gregory suggests that Oberman's assessment of nominalism is excessively sanguine because of Oberman's personal disdain for Thomism. Gregory, *The Unintended Reformation*, 401 n. 30.

is encountered and not constructed. We cannot own or control justice, but we encounter it as it presents itself to us, and we can participate in it or not.[1021]

But as God was elided from the equations of law and justice, first the absolute human sovereign, and then autonomous self, and then the irrational self, and finally the mercilessly deterministic brain, began to take His place. As John Milbank observes,

> In the thought of the nominalists . . . the Trinity loses its significance as a prime location for discussing will and understanding in God and the relationship of God to the world. No longer is the world participatorily enfolded within the divine expressive Logos, but instead a bare divine unity starkly confronts the other distinct unities which he has ordained. . . . This dominance of logic and of the potential absoluta is finally brought to a peak by Hobbes: 'The right of Nature, whereby God reigneth over men, and punisheth those that break his Lawes, is to be derived, not from his creating them, as if he required obedience as of gratitude for his benefits; but from his Irresistible Power.'"[1022]

Reductive neurobiology elides the concept of "law" and reduces any notions of self or social governance to chemistry, physics, and chance. Law is therefore suspended by reductive

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[1021] Indeed, as Oliver O'Donovan has noted, the distinction between creator and creation requires us to maintain that in God's divine freedom *this* creation is not necessary, but rather is contingent on God's free decision. Oliver O'Donovan, *Resurrection and Moral Order: An Outline for Evangelical Ethics* (Eerdmans 2nd ed. 1994), 39. As O'Donovan notes, "although we may perhaps dare to speak, by way of analogy and hesitantly, of a divine love that 'had' to express itself in creation, as soon as we go beyond that to suggest that it had to create this world and not some other one, we say in effect that the 'creation' is not a creation at all, but an emanation, a reflection of the inner law of God's being, sharing its necessity and thus, in some sense, sharing its divinity." *Ibid.* But insofar as God *has* willed to create *this* world, O'Donovan further argues, "there is no reason why this proper theological concern should not be fully accommodated within a teleological and generic understanding of created order." *Ibid.* Therefore the *source* of "justice" is indeed ineffable, since it lies in the being and will of God. But though it is ineffable, it is not bereft of human apprehension, if we, too, are God's creatures.

[1022] John Milbank, *Theology and Social Theory*,, 15-16 (quoting Thomas Hobbes, *Leviathan*.)) Hobbes' nominalist and voluntarist views concerning law, power and sovereignty were, of course, hotly contested in their own time and formed the substrate of ideas that led to the English Civil War (1642-1651). *See* Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English Revolution* (Penguin 1984). A notable contrast to Hobbes was Sir Edward Coke, Chief Justice of the Court of Common Pleas in the early seventeenth century, who decided the famous *Bonham's Case*, 77 Eng. Rep. 107 (1610), which suggested the practice of judicial review. As Coke stated in his opinion, "it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be voIbid." For a comparison of Coke and Hobbes see James R. Stoner, Jr.*, Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism* (University Press of Kansas 1992).

neurolaw. The suspension of law, however, results in a state of exception, in which the sovereign acts arbitrarily in the absence of law. The "sovereign," for reductive neurolaw, is not a god or a person, but rather is pure nature. Moreover, law always involves force or power. Is law just the "force of nature?" But perhaps Levinas hints at a direction for the inquiry Agamben opened concerning *homo sacer* / the *wargus*, metaphysics, and law, which is the connection we have argued for between "law" and the human "soul."

Here, Foucault's study of the prison is penetrating and important, but he misses some important distinctions. What he calls the "soul" is in fact what the Greeks, Romans and Christians called the *polis*. In this respect, his analysis of the City as a "power" of fear and psychological coercion is nothing new. The question is whether that power is always enslaving or can be redeemed and redemptive. As Milbank and Ward suggest, Christian theology understood that the true City, the Heavenly City, is a place of peaceable, uncoerced participation and not violent imposition. But Christian theology also recognized the conundrum of law, power and violence when the Heavenly City is not yet realized, and it understood positive law in relation to the preparation of the soul for that greater City.

Reductive neurolaw suggests that our neural circuitry is like the "gatekeeper" in Kafka's parable "Before the Law."[1023] (This of course reflects a theme raised at the start of this Dissertation: "We all stand before the law; such is the lot of man."[1024]) The gatekeeper convinces a man who desires access to the law that the law is inaccessible to ordinary people, that other, more frightening gatekeepers guard the law's impenetrable inner sanctum. The gatekeeper takes everything the man owns, all the man's possessions, his health, his years of life, spent in the vain hope that the gatekeeper will grant access to the law. At the end of his life, exhausted and dying, the man asks the gatekeeper, "Everyone strives after the law … so how is it that in these many years no one except me has requested entry?" The gatekeeper replies: "Here no one else can gain entry, since this entrance was assigned only to you. I'm going now to close it."

[1023] In The Trial (CreateSpace 2011); Ian Johnston Trans., available at
http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm.
[1024] Conor Cunningham, *DPI*,, 414.

Kafka's gatekeeper is pure force, the force of the man's own self-consuming anxiety, which reduces the man to meaningless servitude. The gatekeeper in fact guards no sacred sign and offers no protection from higher powers, for there is no sacred sign, and there are no higher powers. There is only the man's meaningless pursuit of a law he cannot find because he cannot escape his self-deception. And so, many law and neurobiology scholars tell us, are we captive to the self-deceptive pursuit of meaning beyond our gatekeeper-brains.

Commenting on Kafka's parable, Giorgio Agamben remarks that "life under a law that is force without signifying resembles life in the state of exception, in which the most innocent gesture or the smallest forgetfulness can have most extreme consequences."[1025] This is a state in which law cannot protect us from tyranny. The law that ordinarily stands between the average person and the powerful ruler has been suspended, meaning there is no law but power. This is the only intellectually honest conclusion to Eagleman's reductive concept of neurolaw: "law" that is reduced to an epiphenomenon of brain activity is just a "force without signifying." It is the destruction of "reason," and therefore of "law," and therefore of "societies" and "persons." In the work of reductive neurolaw scholars, we have met Kafka's Gatekeeper, Hobbes' Leviathan, and Agamben's state of exception, and it is us – or rather, it is our brains.

However, the history of human evolution in the supposed state of pure nature, unfortunately for the project of reductive neurolaw, is deeply ambiguous. There is strong evidence of "altruism" and cooperation, yet there is also strong evidence of competition and violence. Moreover, in neurolaw's state of pure nature there is no procedure for deriving how humans "ought" to live from the "is" of neurobiology. At any moment in the flow of evolutionary time, it might be possible to describe a fitness landscape of human behaviors, with highly localized accounts of an ordinary distribution of behavior ranges. Yet there is no principled way to construct a legal system that would seek to "correct" any particular behavior along any of these behavioral fitness curves. The act of attempting to effect such "corrections" itself would simply represent another

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[1025] Agamben, Homo Sacer, 52.

adaptive behavior. And the legal machinery necessary to implement such corrective action necessarily would imply force and violence.

Reductive neurolaw therefore is nothing other than the inexorable rule of natural selection, but with "nature" itself stripped of goals and purposes. It is pure force – the "force of the law" without law. Thus the legal system of reductive neurolaw would perfectly enact the state of exception. With no rule of law, the will of the most powerful persons or groups would marginalize, exclude, control, and eventually replace and extinguish the less powerful, until the race of humanity is comprised only of the master race – except that not even the promised master race would make its *parousia*, since the fitness landscape changes ever and the cycle of competition is a world without end.[1026] Indeed, the pure nature imagined by reductive neurolaw destroys even "nature" itself. There is no whole – "nature" – which selects for its parts, and there are no parts oriented towards a whole. Finally, only these three remain -- time, energy, and change – and the greatest of these is change.[1027]

6. Law and *Christian* Participation in Violence

The response to Eagleman, Sloan Wilson and other reductive neurolawyers, then, must return *ad fontes* to Christ, scripture, and the Apostolic and Patristic tradition, with its rich metaphysics, to recover a sense of transcendence. Our archeology of law in the classical Christian tradition has demonstrated that the concept of law was tied to the participation of the human soul in the life of God. Law reflected an order of love and peace. The Gospels bear witness to the early Christian claim that Christ, the "prince of peace," was the fulfillment of the law. The founding event of law was an event of love: the creation of the universe by the free outpouring of the Divine *Logos*. A human person or community's failure to participate in the Divine law, with the resulting penalty,

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[1026] Cf. the "Glory Be":
Glory be to the Father,
and to the Son,
and to the Holy Spirit.
As it was in the beginning,
is now,
and ever shall be,
world without end.
Amen.
[1027] Cf. 1 Cor. 13:13: "And now these three remain: faith, hope and love. But the greatest of these is love."

was not an imposition of violence but a consequence of the human decision towards the bondage of sin and away from the freedom of law.

It would be overly simplistic, however, to posit a stark contrast between Agamben's archeology of the camp as a state of legal suspension and the Christian tradition of legal thought. Already in Augustine, there is a tension, often a severe tension, between the law of love handed down by Jesus in the Sermon on the Mount and the role of positive law in the earthly city. Very few, if any, contemporary Christian political theologians will want to defend all of Augustine's actions against the Donatists. There are at least two related axes to this tension: the "vertical" axis of the relation between God's being, God's will, and God's law; and the "horizontal" axis of the relation between the Church as the new community founded by Christ and the earthly city. This section works on both of these axes: first, it explores further the relation between "law" and a founding act of arbitrary violence; and second, it explores the relation between the Church, the Christian ethic of nonviolence, and positive law.

Tertullian and Lactantius, writing to mitigate the persecution of Christians by the Roman state, advocated a broad concept of religious freedom based on a theological concept of human dignity.[1028] Augustine, writing to Christian rulers facing the Donatist controversy, takes a different approach.

The exercise of violence in the service of the law, for Augustine, could represent an act of love, if such violence was necessary to secure the peace and foster the conditions under which people could move towards God. This included not only general breaches of the peace, but also specifically religious concerns – particularly when, as is often the case, those religious concerns bled into general breaches of the peace. The persecuted Church could become the persecutor.

This is illustrated starkly in Augustine's writings against the Donatists. In his treatise *The Correction of the Donatists*, Augustine advised the Emperor:

> For both the physician is irksome to the raging madman, and a
> father to his undisciplined son,—the former because of the

[1028] *See* Chapter 2.4 and 2.5 above.

restraint, the latter because of the chastisement which he inflicts;
yet both are acting in love. But if they were to neglect their charge,
and allow them to perish, this mistaken kindness would more truly
be accounted cruelty. [1029]

Augustine argued that the Donatists could not position themselves as martyrs, because true persecution occurs only when a person is unjustly punished for disobeying a law that contradicts truth. A person who disobeys a law that promotes truth, however, is justly punished and therefore not a martyr.[1030] Since the laws against the Donatists were in the service of the true Church, those who disobeyed them were justly punished and not martyrs. Moreover, since just laws can be enforced by violence, the punishment received is not a form of unjust persecution.[1031]

And, since the Church seeks man's salvation, persecution inflicted on behalf of the Church should be seen as an act of love: "Moreover, she persecutes in the spirit of love, they in the spirit of wrath; she that she may correct, they that they may overthrow: she that she may recall from error, they that they may drive headlong into error." [1032] Love demands that Christian rulers not shrink from inflicting pain: "What then is the function of brotherly love? Does it, because it fears the short lived fires of the furnace for a few, therefore abandon all to the eternal fires of hell?"[1033] Finally, Augustine argued, it is an act of faith in God's provision of civil authorities to invoke the force of law rather than merely enduring schism: "When the Church, therefore, was reduced to these straits in its affliction, anyone who thinks that anything was to be endured, rather than that the assistance of God, to be rendered through the agency of Christian emperors, should be

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[1029] ¶7, available at http://www.ccel.org/ccel/schaff/npnf104.v.vi.iv.html.
[1030] ¶8.
[1031] ¶10.
[1032] ¶11. Augustine stated that

> Finally, she persecutes her enemies and arrests them, until they become weary in their
> vain opinions, so that they should make advance in the truth; but they, returning evil
> for good, because we take measures for their good, to secure their eternal salvation,
> endeavor even to strip us of our temporal safety, being so in love with murder, that
> they commit it on their own persons, when they cannot find victims in any others.

[1033] ¶14

sought, does not sufficiently observe that no good account could possibly be rendered for neglect of this precaution."[1034]

This view was tied to Augustine's theology of history. He recognized that the Apostles who were persecuted for Christ's sake did not invoke civil law on their own behalf, but he argued that this illustration fails to "consider the different character of that age, and that everything comes in its own season. For what emperor had as yet believed in Christ, so as to serve Him in the cause of piety by enacting laws against impiety. . . ."[1035] Christian Kings should indeed view the persecution of schism as part of their sacred duty: "In this way, therefore, kings can serve the Lord, even in so far as they are kings, when they do in His service what they could not do were they not kings."[1036]

Not surprisingly, how one interprets the political theology underlying Augustine's activity against the Donatists depends in large part on one's perception of the value of his goals. A sympathetic Catholic Augustinian may take Augustine's expressed motives at face value: he was deeply concerned with the unity of the body of Christ, and encouraged strong but still moderated civil legal action to bring this schismatic group back into fellowship.[1037] Anabaptist and other peace church writers may interpret Augustine's role in the Donatist controversy as the height of Constantianism – for them, a grave heresy in its own right.

7. Jesus, Law and Violence

Augustine's willingness to encourage the use government force against the Donatists, and to some extent the contemporary Catholic Church's softer Augustinianism, stand in stark contrast to Anabaptist and other theologians who emphasize an ethic of peace.

Christian pacifists, however, generally have not offered a satisfying response to the dilemma of using force or allowing innocent people to suffer violence. There seem to be at least two broad

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[1034] ¶18
[1035] ¶19
[1036] *Ibid.*
[1037] *See, e.g.,* Donald X. Burt, *Friendship and Society: An Introduction to Augustine's Practical Philosophy* (Grand Rapids: Eerdmans 1999),, 215-218. Burt notes that Augustine allowed, but did not favor, the use of the death penalty in cases of heresy, and that he was more tolerant of outsiders such as Jews and Pagans than of the Donatists, whom he viewed as insiders under the Church's direct jurisdiction. *See Ibid.* at 218-221.

streams of thought (with many sub-branches) among pacifists. One is a quietist strand exemplified in Robert Brimlow's essay titled "What About Hitler" in a recent collection of essays offering an apologetic for Christian pacifism.[1038] Brimlow attempts in that essay to respond to the common belief that the violence of war was just and necessary to stop the Nazi machine – a belief finally held, famously, even by the great Christian pacifist Dietrich Bonhoeffer.

Brimlow admirably does not shy away from the connection between the violence of large-scale war against Hitler and the violence of any state action against a dangerous person: "I think it is important," he says,

> for us to bear in mind that when we think of just war and the just war tradition that we are also referring -- at least implicitly -- to the state's police power as well [as] to the war-making power of the state in international affairs. The justifications for each is the same, so much so that I have referred to police powers and war powers as flip sides of the same coin. And the ultimate source of those justifications is the same. It lies in the fundamental function of nation-states.[1039]

The justification for violence by nation-states against despots and criminals, Brimlow argues, is in turn rooted in the presumptive right of self preservation. Indeed, he says, "[t]o paraphrase Hobbes again, the threat of the sword underlies every statute, every treaty, as well as every interpersonal relationship."[1040]

For Brimlow, then, all exercises of war and police power are founded on a sinful desire to preserve the self at the expense of others. In contrast, he argues, "[w]e are heirs to a new politics of faith and love that overturns the politics of the nations and rejects the violence of states. This new politics makes love of God and love of neighbor our sole virtues from which everything else flows, and thus replaces the primacy of the right of self-preservation."[1041] There is little doubt, he concludes, that if we were to confront a new Hitler with such an ethic, "given that we are dealing

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[1038] Robert Brimlow, "What About Hitler," in Tripp York and Justin Bronson Barringer, eds., *A Faith Not Worth Fighting For: Addressing Commonly Asked Questions About Christian Nonviolence* (Eugene: Wipf and Stock 2012).
[1039] *Ibid.* at 52.
[1040] *Ibid.* at 55.
[1041] *Ibid.* at 56.

with a powerful evildoer, the result is that we will fail."[1042] Apparently, then, Christians would be obligated to leave the innocents consumed in this new Hitler's genocide to their fates, or at best to suffer martyrdom with them. Brimlow does not quite draw out the consequences of his ethic for law in ordinary circumstances, but it seems hard to escape the conclusion that all state coercion, including all positive law of any kind, is sinful and invalid, and that all legal institutions represent only ungodly powers.

There is something that rings true in Brimlow's attempt to wrestle with the demonic ghost of Hitler. He is right to decry the "Hitlerization of politics," by which Christians and others justify fights to the death (often quite literally) over every threat or disagreement.[1043] Brimlow's account fails, however, because of his cramped understanding of the virtues, which leads to a devolution of the self.

For Brimlow, apparently, *any* self-regard must comprise a form of violence against God and against neighbor. The doesn't seem to be any room in Brimlow's thought for a self-regard that *derives from* love, in which the self is known and received *as gift*. And this deprives Brimlow's ethic of a self that is even capable of loving God or neighbor, and therefore of love itself.

Other Christian pacifists, led by Gerald Schlabach, have argued for "just policing" ethic instead of "just *war*" theory.[1044] Schlabach acknowledges that policing is a lacuna in Christian pacifist thought.[1045] He also readily admits that "[n]o community can do without some kind of police function. No Christian community. No human community."[1046] Schlabach further notes that the peace churches have advocated for the rule of law, and particularly international law, as a hedge

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[1042] *Ibid.*
[1043] *Ibid.* at 52.
[1044] Gerald W. Schlabach, "Must Christian Pacifists Reject a Police Force," in *A Faith Worth Not Fighting For*; Schlabach, ed., *Just Policing, Not War: An Alternative Response to World Violence* (Collegville: Liturgical Press 2007).
[1045] Schlabach, "Must Christian Pacifists Reject a Police Force," p. 61. Schlabach acknowledges that
> As we turn to ask whether Christian pacifism entails a rejection of police force, readers may quickly realize that this is where those practitioners of nonviolence are often ambivalent. Frankly, Christian pacifists have not had a consistent answer to this question.... Ethically, they have not always been sure how to square actual practices with their peace theology.
[1046] *Ibid.* at 66.

against war, which necessarily implies the police function.[1047] Schlabach agrees that a rule of law

backed by a "just" police force requires the potential exercise of force: if "terrorist crimes against

humanity should be treated within the rubric of prosecuting criminals not waging war," he says,

"we must assume that *as* criminals, the perpetrators would probably refuse to turn themselves

in."[1048]   Therefore, "some kind of SWAT team with recourse to lethal violence still seems

necessary," along with "prison guards to hold the criminal terrorists they apprehend."[1049]

Schlabach and his co-authors describes a number of practices that could distinguish "just

policing" from war, including community policing models, strengthening international

organizations such as the United Nations, and the networking of non-governmental organizations

through new technologies.[1050]

Stanley Hauerwas' work reflects the tension between the nodes of Anabaptist thought

represented by Brimlow and Schlabach. In one of his seminal works, *The Peaceable Kingdom*,

Hauerwas starkly reverses Mao's pragmatic thesis: Christians, he says, "cannot seek justice from

the barrel of a gun; and we must be suspicious of that justice that relies on manipulation of our

less than worthy motives, for God does not rule creation through coercion, but through a

cross."[1051]   In *The Peaceable Kingdom*, Hauerwas argues that this ethic of radical nonviolence

extends even to efforts to promote justice for others:

> We must be a people who have learned to be patient in the face of
> injustice. But it may be objected: Surely that is too easily said if
> you are not the ones who are suffering from injustice. Precisely,
> but that does not mean that we ought to legitimize the use of force
> to overcome injustice. Such legitimation often comes from the
> attempt to have justice without risking the self, as when we ask the
> 'state' or the 'revolution' to see that justice is done, but in a manner
> that does not significantly affect our own material position. If we
> are to be a helpful and patient people in a world of injustice,

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[1047] Schlabach, *Just Policing, Not War*,, 99 (noting that Mennonites have faced this question with varying degrees of consistency when their own ministries have positioned Mennonites to take governmental roles in health systems, welfare programs, international development agencies, and so on. Yet these state functions already assume the rule of law, made possible through policing." A

[1048] *Ibid.* at 80.

[1049] *Ibid.*

[1050] *Ibid.* at 153-67.

[1051] Stanley Hauerwas, *The Peaceable Kingdom* (South Bend: Notre Dame Univ. Press 1983),, 104.

> however, we cannot just identify with the 'cause' of the poor, we must be like them poor and powerless.[1052]

Nevertheless, Hauerwas insists that injustice must be resisted: "Those who are violent, who are also our neighbors, must be resisted, but resisted on our terms, because not to resist is to abandon them to sin and injustice."[1053] Yet the primary form of this resistance, for Hauerwas, is not violent action, but the power of the Church's life in its witness to the story of the Gospel, its sacraments, and its prayers.[1054]

Is this an adequate response of love to the child who is being raped in snuff films distributed by a child pornographer? If a Christian knows where and when the rape is occurring, should she contact the police? Can a Christian serve as a lawmaker, lawyer, judge, police officer, investigator, or other government official whose job involves locating, arresting, and prosecuting child rapist pornographers?

Hauerwas is not deaf to these questions. He asks, "Can Christians ever be justified in resorting to arms to do 'some good?' Are Christians not unjust if they allow another person to be injured or even killed if they might prevent that by the use of violence?"[1055] His response is that he has "some sympathy" for this view, and that "it certainly cannot be discounted as a possibility for Christians," but that the exercise of power is dangerous because it is intoxicating and corrupting.[1056] Moreover, "true justice," he says, "never comes through violence, nor can it be based on violence."[1057] He seems to view Christian participation in any sort of state violence as a rare and extreme possibility, at most.

At the same time, Hauerwas suggests that Christians might participate in a society's government depending on the nature of the society and the nature of the role to be performed.[1058] "Most governmental functions, even within the military," he suggests, "do not depend on coercion and

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[1052] *Ibid.* at 105.
[1053] *Ibid.* at 106.
[1054] *Ibid.* at 106-111.
[1055] *Ibid.* at 114.
[1056] *Ibid.*
[1057] *Ibid.*
[1058] *Ibid.* at 169, Note 19.

violence."[1059]   This might even mean that a Christian could serve as a police officer or prison warden, so long as they also "work to help their societies develop the kind of people and institutions that make possible a government that can be just without resort to violence."[1060]

The problem with Hauerwas' qualification here is that he is wrong about the dependent relation between "most governmental functions" and "coercion and violence."   All "governmental functions" are *governmental* only insofar as they are authorized by law. An act that purports to be "governmental" but is not authorized by law is not properly considered an act of "government"; such an act is simply an exercise of individual or group power. The rule of law is what defines something as properly "governmental." And in any earthly society, the rule of law, always, without exception, even in societies based on social contracts, is finally secured by power and violence. Anyone who participates in any function of government, including the arrest and detention of child rapists, is implicated in state violence.

This conundrum was recognized in a recent symposium on Hauwerwas and the law at Duke Divinity School. Law professor and theologian Cathleen Kaveny stated the problem succinctly:

> Unlike the 'peaceable kingdom' of Jesus, earthly kingdoms are inherently built on violence – not only the violence of warfare, but also the threats of coercive force that ultimately and undeniably back any system of positive law. The law, in other words, describes and implements the operating system of the strikingly unpeaceable secular world. Upon what basis could Hauerwas possibly engage it?[1061]

Kaveny notes that she writes from the Roman Catholic tradition, "which tends to recognize more continuities between nature and grace, and therefore more possibilities for natural theology and natural ethics (sometimes called natural law) than Hauerwas ordinarily acknowledges."[1062] As Kaveny notes, Hauerwas' theological project is a sharp critique of any "natural theology" that purportedly is "defensible and intelligible on grounds fully independent from the complete and

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[1059] *Ibid.*
[1060] *Ibid.*
[1061] Cathleen Kaveny, "Hauerwas and the Law: Framing a Productive Conversation," 75 Law & Contemp. Prob. 135 (2012).
[1062] *Ibid.*

vigorous account of reality offered by Christianity. . . ."[1063] Kaveny notes two ways in which Hauerwas' broader theological project could interface with the law: through the casuistic tradition of the common law, and through Barth's covenantal framework for creation.[1064] The common law, Kaveny notes, is a historically embodied narrative reflected in the practices of the community governed by the law – much as Hauerwas understands the relationship between the Church, the Church's practices, and scripture.[1065] Barth's understanding of creation and covenant – that God's purpose in creating was the establishment of covenant – Kaveny suggests, supplies the basis for *ad hoc* engagement between the Church and the world on matters such as law.[1066] This, again, corresponds to Hauerwas' account of theology, particularly his aversion to natural theology, and ethics.[1067] Kaveny concludes that "[a]lthough Hauerwas may be opposed to 'Christendom,' he ought not to dismiss the efforts of Christians to discern, over the centuries, the concrete requirements of morality in particular cases and controversies, in light of the demands of justice, demands that are themselves shaped by the biblical narrative."[1068]

Hauerwas responded to some of these questions and suggestions at the symposium in his conversation with H. Jefferson Powell, a former student of Hauerwas' who is an attorney with the U.S. Department of Justice.[1069] Hauerwas noted that he identifies himself as a "theocrat" in the sense that he takes the claim "Jesus is Lord" as a statement of public truth.[1070] However, he said,

> That doesn't mean I want the rule of priests. Indeed, that would be the worst possible thing. What we have fundamentally in this country is a rule of lawyers. Now that is not all bad. I assume that elite law practice very much determines some of the limits on our political life that I think is very much to the good.[1071]

[1063] *Ibid.*
[1064] *Ibid.* at 145-151.
[1065] *Ibid.*
[1066] *Ibid.*
[1067] *Ibid.*
[1068] *Ibid.* at 157.
[1069] John D. Inazu, ed., "A Dialogue Between a Theologian and a Lawyer," 75 Law & Contemp. Prob. 221 (2012).
[1070] *Ibid.* at 223.
[1071] *Ibid.*

Those "limits," of course, imply the sorts of restraints that suggest state violence. Hauerwas attempted to negotiate this boundary by distinguishing certain legal processes from the sort of "violence" Christian faith forbids. "Violence," he suggested, "is an analogical description. It works pretty well as a description of killing someone, but there may be forms of force that those of us associated with nonviolence can understand as an alternative to more determinative forms of violence."[1072] Consistent with his focus on casuistry, he suggested that Christians committed to nonviolence could work with other Christians "to see how we can make the law, as nearly as possible, a service into the community in which those called to the police function are more nearly able to fulfill that calling nonviolently. They are called *peace* officers."[1073] Hauerwas also notes that John Howard Yoder, the thought leader of contemporary pacifist Anabaptism, never thought of "law" as univocally violent. Rather, Hauerwas noted, "Yoder observed that lawyers write wills and contracts, defend the poor against housing authority, defend people against capital punishment, prosecute, judge, postpone environmental rules, structure corporate mergers leveraged with junk bonds, and so on."[1074] The "'so on,'" Hauerwas suggested, "makes clear that the many things done in the name of 'the law' are not morally the same."[1075] In short, Hauerwas agreed that Kaveny had read him well and that her constructive proposal for viewing the common law as a narrative that provides points of contact between creation, Church, and culture, was important.[1076]

Hauerwas' conversation with these legal scholars, together with Schlabach's work on just policing, may represent something of a breakthrough for reconciling Christianity's non-violent ethic with its emphasis on law. A similarly clear but limited endorsement of police power can be found on the Mennonite Central Committee's publication "Pursuing Peace." The document notes that

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[1072] *Ibid.* at 229.
[1073] *Ibid.*
[1074] Stanley Hauerwas, "Hauerwas on Hauerwas and the Law," 75 Law & Contemp. Prob. 233, 237 (2012).
[1075] *Ibid.*
[1076] *Ibid.* In typical Hauerwasian fashion, however, he offered this qualification about the notion of covenant: "I have never trusted Calvinists, other than Barth, when they talk about contracts being a form of covenant. When Calvinists talk that way about contracts, it usually indicates they are representatives of a rapacious business practice and they would eat you alive if they were able." *Ibid.*

Romans 13 says that God has established governing authorities to support the good and to punish the wrongdoer. This refers to government's ordering function, policing role and judicial processes. However, this is not a blanket authorization for war, as sometimes interpreted. Moreover, our nation's best ideals call for freedom, justice and peace for all people. . . .

Christians should recognize that there are varying levels of force and some have greater legitimacy than others. A military invasion intended to overthrow a regime and bring a society to its knees is very different than the use of a limited armed force to protect the lives of people who are in great peril. Christian pacifists will condemn the former, but perhaps not the latter.[1077]

The same document further describes a more open attitude towards policing:

Mennonites and Brethren in Christ have been uneasily silent about the issue of participation in domestic police forces. Most people avoid training for or joining a police force because of the traditional resistance to "bearing the sword." At the same time, these same people have few qualms in calling on the police for protection when they are threatened.

By promoting restorative justice principles and programs, Mennonites and Brethren in Christ have made significant contributions to the development of alternatives to the criminal justice system. We believe that restorative justice processes are appropriate ways to deal with those who commit crime. But offenders still need to be apprehended and brought to the restorative justice table. And that may require some measure of force. [1078]

[1077] Esther Epp-Tiessen, Pursuing Peace: The Essence of Mennonite Central Committee (Mennonite Central Committee 2009), Response to FAQ No. 3, available at
http://peace.mcc.org/system/files/Pursuing%20peace%2009_press.pdf.
[1078] *Ibid.,* Response to FAQ No. 5. The document continues:

> What do we have to say about this? Mennonites and Brethren in Christ have begun to talk more about policing. Some suggest that pacifists should be **in** the system, helping to promote and train officers in conflict resolution, mediation and other techniques which lessen the tendency to resort to force. Other people suggest that Mennonites should support community policing–a model of policing in which officers develop strong and healthy relationships with particular communities, thereby reducing the need for guns and the threat of violent force. Still others suggest that Mennonites should be helping to envision, develop and test completely nonviolent forms of policing. Minimally, it is important that

Finally, in response to the question "What about evil people like Adolph Hitler," the MCC's "Pursuing Peace" manual states that "[p]eople who commit abhorrent acts of violence should be held accountable for their crimes through national and international mechanisms of law, such as the International Criminal Court. Christian pacifists should support legal and nonviolent means which hold evildoers to account for their actions."[1079]

Schalbach's work on just policing suggests some potentially rich connections between Anabaptist and pietist peacemaking theologies and the broader catholic-Augustinian tradition (indeed, Schlabach, a Mennonite convert to Catholicism, describes himself as a Mennonite Catholic).[1080] Brimlow's approach, in contrast, seems to undermine the classical Christian virtues.

For Aquinas, for example, the instinct of self-preservation is part of the natural law and is not intrinsically evil. Yet, unlike Hobbes, Aquinas did not take self-preservation to be the most fundamental good.[1081] Virtue might require actions contrary to self-preservation in order to pursue a higher good – as in the highest example of the virtue of courage, which for Thomas was martyrdom. But there is no sense in Aquinas' account of the virtues, or in his connection between natural law, the virtues, and positive law, that *all* law which preserves the self against the unlawful actions of others must inherently be sinfully selfish and violent.

Of course, a pacifist such as Brimlow will not be overly taken with Thomas' account of the virtues in relation to the justice of violence and war. But Brimlow's account of the virtues also seems to conflict with scripture – even with the scripture from which he apparently derives his account of virtue and politics. It is frequently observed that Jesus' restatement of the *shema* and accompanying "Golden Rule" presumes self-love: "'Love the Lord your God with all your heart and with all your soul and with all your mind.' This is the first and greatest commandment. And

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congregations help individuals who are interested in policing as a career to discern God's will for their lives.

Ibid.

[1079] *Ibid.,* Response to FAQ No. 6.
[1080] *See* Prof. Schalbach's faculty page at the University of St. Thomas, available at http://www.stthomas.edu/theology/faculty/gwschlabach.htm, and his personal website, available at
[1081] *See* Hobbes, *Leviathan*, xiii, ¶14.

the second is like it: 'Love your neighbor as yourself.' All the Law and the Prophets hang on these two commandments."[1082] The first of Jesus' two great commandments is derived from the *shema* in Deuteronomy 6:5, which supplies the epilogue to the Ten Commandments: "Hear, O Israel: The Lord our God, the Lord is one. Love the Lord your God with all your heart and with all your soul and with all your strength." This second of the two great commandments of Jesus seems to be derived from Leviticus 19:18: "Do not seek revenge or bear a grudge against anyone among your people, but love your neighbor as yourself. I am the LORD." For Jesus, offering himself as the fulfillment of Israel's law,[1083] the integrity of the self is presumed – love God with all *your* heart and *your* soul and *your* mind – and the integrity of the self is a model for community – love your neighbor *as* yourself.[1084]

In the Sermon on the Mount Jesus goes on to deconstruct and rebuild what all of this means in light of the Kingdom he inaugurates. It is striking to read the *herem* warfare commands in Deuteronomy 7 immediately following in the text after the Ten Commandments and the *shema* in Deuteronomy 5 and 6:

[1082] Matthew 22: 37-40 (NIV); *see also* Luke 10:27 (NIV) ("Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbor as yourself."); Mark 12:29-31 (The most important [commandment]," answered Jesus, "is this: 'Hear, O Israel, the Lord our God, the Lord is one. Love the Lord your God with all your heart and with all your soul and with all your mind and with all your strength.' The second is this: 'Love your neighbor as yourself.' There is no commandment greater than these.").

[1083] Jesus said,

> Do not think that I have come to abolish the Law or the Prophets; I have not come to abolish them but to fulfill them. For truly I tell you, until heaven and earth disappear, not the smallest letter, not the least stroke of a pen, will by any means disappear from the Law until everything is accomplished. Therefore anyone who sets aside one of the least of these commands and teaches others accordingly will be called least in the kingdom of heaven, but whoever practices and teaches these commands will be called great in the kingdom of heaven. For I tell you that unless your righteousness surpasses that of the Pharisees and the teachers of the law, you will certainly not enter the kingdom of heaven.

Matt. 5:17-20.

[1084] As Oliver O'Donovan notes, "[t]he Augustinian *ipse praemium* had no trouble with the *praemium*, the 'for me,' because it laid the stress upon the *ipse*. Everything depended upon the object. The criticism of self-interestedness was expressed as a criticism of an inadequate object of love, a 'private,' *i.e.* a diminished and restricted, good. When the object of love is God himself, the author of all love and of all subjects who love, there need be no more anxious enquiry about right and wrong love, selfish and unselfish love, noble and ignoble love." Oliver O'Donovan, *Resurrection and Moral Order: An Outline for Evangelical Ethics*, at 250.

When the LORD your God brings you into the land you are entering to possess and drives out before you many nations —the Hittites, Girgashites, Amorites, Canaanites, Perizzites, Hivites and Jebusites, seven nations larger and stronger than you— and when the LORD your God has delivered them over to you and you have defeated them, then you must destroy them totally. Make no treaty with them, and show them no mercy. . . .

This is what you are to do to them: Break down their altars, smash their sacred stones, cut down their Asherah poles and burn their idols in the fire. For you are a people holy to the LORD your God. The LORD your God has chosen you out of all the peoples on the face of the earth to be his people, his treasured possession. . . .

You must destroy all the peoples the LORD your God gives over to you. . . .[1085]

In this light, the love command of Leviticus 19:18 seems far more pinched: it applies, after all, only to anyone *"among your people"* – there is no sense in which a Girgashite was counted as a "neighbor."   In the Deuteronomic law, Israel's self-preservation was not just grudgingly permitted. Violence in support of self-preservation was in fact Divinely ordained. God's incentive to Israel in Deuteronomy 7 involved their own health, security and wealth:

If you pay attention to these laws and are careful to follow them, then the LORD your God will keep his covenant of love with you, as he swore to your ancestors. He will love you and bless you and increase your numbers. He will bless the fruit of your womb, the crops of your land—your grain, new wine and olive oil —the calves of your herds and the lambs of your flocks in the land he swore to your ancestors to give you. You will be blessed more than any other people; none of your men or women will be childless, nor will any of your livestock be without young. [15] The LORD will keep you free from every disease. He will not inflict on you the horrible diseases you knew in Egypt, but he will inflict them on all who hate you. You must destroy all the peoples the LORD your God gives over to you. Do not look on them with pity and do not serve their gods, for that will be a snare to you.[1086]

[1085] Deut. 7: 1-26 (NIV).
[1086] Deut. 7: 12-15.

Mountains of ink have been spilled by detractors and defenders of the Bible alike concerning these holy war texts.[1087] There is no simple answer to the problem of violence in these texts. Even with all due consideration for their ancient near eastern context, on their face they involve God commanding His people to commit what today we would call religious genocide.[1088]

Yet whatever else we might say about these texts hermeneutically, they do encode a value that remains central for the Church: purity in our worship, which *is* purity in our love. In his ethical judo in the Sermon on the Mount, Jesus flips his religious interlocutors and demands that they conduct *herem* warfare on the greed and lust within their own souls. And, most crucially for Christian political theology and ethics, in response to the lawyer's question, Jesus extends the "neighbor" principle to anyone in distress, including the enemy and the outcast.[1089] There is no question that *herem* warfare against peoples, nations or religions is illegitimate for the Church. But Jesus retains the focus in the *shema* and in the Levitical law on the integrity of the self. For Jesus, the law does not annihilate the self. Rather, the law fulfills the true self, which is given by God.

8. Radical Orthodoxy: Law and Violence, Law and Theocracy

Hauerwas' critique of "secular reason" resonates with the similar critique offered by Radical Orthodoxy, and indeed Hauerwas has aligned himself in some respects with Radical Orthodoxy. Radical Orthodoxy, however does not shy away from engagement with the secular authorities, including law and politics. Indeed, Radical Orthodoxy thinkers are regularly accused of

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[1087] Richard Dawkins famously stated that "[t]he God of the Old Testament is arguably the most unpleasant character in all fiction: jealous and proud of it; a petty, unjust, unforgiving control-freak; a vindictive, bloodthirsty ethnic cleanser; a misogynistic, homophobic, racist, infanticidal, genocidal, filicidal, pestilential, megalomaniacal, sadomasochistic, capriciously malevolent bully." Richard Dawkins, The God Delusion (Boston: Mariner Books 2008), 51.

[1088] Some evangelical commenters attempt to cabin the *herem* commands to the context of heavily fortified military cities. *See* Richard S. Hess, "Apologetic Issues in the Old Testament," in Douglas Groothuis, *Christian Apologetics: A Comprehensive Case for Biblical Faith* (Downers Grove: IVP Academic 2011); Paul Copan and Matt Flannagan, *Did God Really Command Genocide?: Coming to Terms with the Justice of God* (Grand Rapids: Baker Books 2014). There do not seem to be any such limitations in Deuteronomy 7, however, and in any event the violence of launching a military incursion into someone else's land is hardly diminished by the fact that the defenders have erected military outposts to protect their farms, wives and children against pillagers and invaders. For another creative reading of these texts, which suggests that they are clearly violent but not "literal," see Douglas S. Earl, *The Joshua Delusion? Rethinking Genocide in the Bible* (Eugene: Wipf & Stock / Cascade Books 2010).

[1089] Luke 10:25-27.

Constantianism by Hauerwasians and Yoderites, and not without good reason. As John Milbank has argued, Radical Orthodoxy is more inclined to argue that "charity without power, an ineffective charity, is not really charity at all but rather an impossible aspiration, because it is ironically *doing* nothing."[1090] Milbank outlines this dilemma clearly:

> So the dilemma would seem to be this: Christianity announces and shapes a new realm of non-violence which proclaims the power of weakness, a power operating through collaboration and reconciliation. But this power is still power: indeed it is the only entirely powerful power, because any exercise of violence always leaves on vulnerable; a house divided against itself cannot stand. Hence, the practice of peace is not a matter of isolated individual motivation; it is rather a matter of a shared habit and an achieved practice. . . . At the very least, one might say, the New Testament makes it quite clear that Christians are involved in paradoxical warfare: a power-struggle in which one seeks to extend the powerful reach of the very sphere of 'powerlessness' (which is yet that of genuine power) itself. But does this mean some adoption of the coercive and utilitarian instruments of worldly power on the part of the *ecclesia*?[1091]

Milbank agrees with the Mennonite / pacifist / Hauerwasian notion that "the church itself is the true polity" and that there is a "possibility of 'living beyond the law' in terms of a new social and political practice."[1092] He recognizes with Hauerwas "the specifically *Catholic* witness of the churches of the Radical Reformation and their later descendants, including the Quakers."[1093] Yet, Milbank notes, "even if one agrees with the Mennonite tradition that the church itself is the place where charity is combined with power of a new and more genuinely powerful kind, there remains the question of the relationship of this power to contaminated, compromised, coercive power."[1094] For Milbank, the merging of Jewish and Roman political history and law after Constantine can

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[1090] John Milbank, Forward to Chris K. Huebner & Tripp York, eds. *The Gift of Difference: Radical Orthodoxy, Radical Reformation* (CMU Press 2010).
[1091] *Ibid.* at xiii.
[1092] *Ibid.* at xiv.
[1093] *Ibid.*
[1094] *Ibid.*

be read as a more emphatic recognition that the gospel transcends and fulfills, yet does not abolish, the literal and political level of the Old Testament, just as charity fulfills and surpasses yet does not abolish the need to pass laws and administer justice. Of course there is ambiguity here: the danger that *ecclesia* will be submerged in *regnum*. Yet *regnum* also gets qualified as *ecclesia*: the Justinian code really did make laws more human; codes of warfare really did become more constrained; state and social welfare really did expand within Byzantium later in the West.[1095]

Milbank goes so far as to defend Christian monarchy and the use of the sword in cases of extreme threat to the just order that makes the institution of the Church possible: "[s]hocking as it may seem," he says, "because God creates us as hybrid material-spiritual creatures, *ecclesia* includes certain physical spaces which it is arguable that, *in extremis*, one may have physically to defend. Certainly in the name of secular justice rather than 'defense of the holy,' yet without the space of justice the offer of the sacred cannot really be made."[1096]

What can a Christian pacifistic ethic say to this example? Stanley Hauerwas argues that such "What Would You Do If" arguments often betray a lack of eschatological imagination and patience. In response to my example about child pornographers / rapists, for example, one pacifist writer suggested that Christians should be involved in therapeutic interventions with the perpetrators rather than supporting law enforcement efforts against them.[1097] While therapeutic interventions certainly are worthy and important, however, what happens when the perpetrator refuses therapy, or proves refractory to treatment (the vast majority of child rapists are serial recidivists)? Must the Church simply refrain from further action and await Christ's return? Is Christian eschatology then simply entirely unrealized?

Graham Ward pursues this sort of analysis in his book *The Politics of Discipleship: Becoming Postmaterial Citizens*.[1098] For Ward, the theopolitical vision of Biblical eschatology is undeniably

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[1095] *Ibid.*, xv.
[1096] *Ibid.* at xvi.
[1097] *See* comments at Running Heads, *Milbank, Military Academies, and the Peace of Christ*, http://www.runningheads.net/2012/07/20/milbank-military-academies-and-the-peace-of-christ/
[1098] Graham Ward, The Politics of Discipleship: Becoming Postmaterial Citizens (Grand Rapids: Baker Academic 2009).

theocratic.[1099] John the Seer's vision of the Heavenly City, Ward notes, portrays a three-fold hierarchical order: God and the Lamb, the kings of the earth, and the people.[1100] Ward notes that the Church is absent from the Seer's vision of the Heavenly City – the kings and the people adore God directly with "no hieratic order mediating between absolute sovereignty and the masses."[1101] With Oliver O'Donovan, Ward understands the Church as "a moment in the coming kingdom," and it is the recognition of this momentary status that "saves the church from 'theocratic tyranny.'"[1102]

Nevertheless, Ward says, "[a]cknowledging our theocratic condition and the theocratic resonance that governs the eschatological remainder sharpens the distinctions" between the Church and the putatively secular state, "so that contestation becomes inevitable."[1103] Such contestation is not a failure. Rather, it "is a manifestation of the liveliness of civil society and a refusal of the zero degree dialectic that depoliticization encourages."[1104] Moreover, "contestation is not war; it can be honest talk that sets out practices of coexistence and common values."[1105]

Ward envisions a trans-national alliance of religious leaders and organizations that subvert the secularizing discourse of liberal modernity: "Religion will not go away; it will not be repressed; it will not succumb to instrumental reasoning. There will be no new Enlightenment."[1106] In Ward's vision, then, the "postsecular state" must work with religions and religious institutions, including the Church, that are transformative of the state. For Ward, eschatology becomes realized as the Church and the State finally become one community of kings and people who require no mediatory political structures before God and the Lamb. Ward's Constantinian theo-politics finally deconstructs secular power through the eschatological dissolution of the earthly *regnum*

[1099] *Ibid.* at 294-301.
[1100] *Ibid.* at 296.
[1101] *Ibid.* at 297.
[1102] *Ibid.* at 299 n. 29.
[1103] *Ibid.* at 299.
[1104] *Ibid.*
[1105] *Ibid.*
[1106] *Ibid.* at 301.

when the kings and the people adore the Lamb together in the fully realized Heavenly City. But we are not there yet.

9. Law and the Tale of Two Cities

Augustine believed that there would be no need for law in the heavenly city. In this Augustinian vein, John Milbank also has suggested that law is an accommodation to the Fall that will be done away with in the eschaton. Perhaps it is correct that the institutions of the law – courts, judges, penal systems, and the like – will not be required when sin is no more. Even here, the eschatological picture given by scripture is hazy. In his first letter to the Cornithians, St. Paul takes the congregation to task for tolerating lawsuits between Christians in the secular courts, and urges them to resolve their disputes internally.[1107] His argument is that the Church should not submit to the secular judicial system because the Church will finally stand in judgment over the world: "Or do you not know that the Lord's people will judge the world? And if you are to judge the world, are you not competent to judge trivial cases? Do you not know that we will judge angels?"[1108] It seems that Paul envisioned some sort of legal process in the eschaton.

Moreover, as Milbank has recognized in his more recent work, governance, and therefore "law," was part of the cultural mandate given to humanity prior to the Fall in Genesis 2.[1109] Milbank acknowledges that Aquinas "recuperated both the ancient Greek academic-peripatetic *and* the Greek Patristic sense that political rule would have existed even despite the fact of sin."[1110] Indeed, as Aquinas suggested, love is not the absence of law: it is the *law* of love, the *law* of reason proceeding from the Divine *Logos*, in which all creation participates. This is the Law that was in the Garden, and it was good. We humans are, in our creaturely goodness, prior to our fallenness, embodied in a universe embedded with law. In this sense, the Fall is a fall away from Law, and our redemption is a restoration of our capacity to enjoy the freedom of God's Law.

When we are united with Christ, R.R. Reno argues,

[1107] I Cor. 6:1-11.
[1108] I Cor. 6:2-3.
[1109] John Milbank, *Beyond Secular Order: The Representation of Being and the Representation of the People* (London: Wiley-Blackwell 2013).   Page #
[1110] *Ibid.*,, 123.

> Christ the good shepherd infuses in us the power of his own
> dominion, and we are able to master our sinfulness and obey 'the
> law of the Spirit of life' (Rom. 6:3-4). Thus, we are not released
> from the original structure of divine commandment, the 'shalt not
> eat' that is spoken in the very beginning. Instead, we bear 'the
> image of the man of heaven' (1 Cor. 15:49) who was obedient unto
> death. In him we 'become slaves of righteousness' (Rom. 6:18).[1111]

The law of love thus is an *erotic* bond. It consumes the soul with longing, delight and awe (Psalm 119:20, 70, 120). It penetrates the very heart of our being (Psalm 40:8). It is sweeter than honey, it revives, it gives joy, it enlightens, it endures eternally (Psalm 19; 119:160).

Oliver O'Donovan likewise argues that a shared, collective life – that is, a *political* life – is the true end of human freedom. As O'Donovan argues, "[h]uman freedom consists not only in the power to act alone, but in the power to act together, as a co-operating fellowship."[1112] The bond of this fellowship, O'Donovan notes, is love: "love is the principle which confers unifying order both upon the moral field and upon the character of the moral subject. It is the fulfillment of the moral law on the one hand, and the form of the virtues on the other."[1113] Moreover, O'Donovan argues, love is *ordered towards* the true ends of all of creation, and thus love, morality, virtue, and law entail an ontological realism. The ordering of love, O'Donovan states, "is the free conformity of our agency to the order of things which is given in reality."[1114] And this reality, O'Donovan correctly asserts, has an "eschatological reference."[1115] The consummation of love is the return of the risen Christ who fulfills the Church's faith and hope with love.[1116] O'Donovan concludes that "[t]he true moral life of the Christian community is its love, and its love is unintelligible except as a participation in the life of the one who reveals himself to us as Love, except, that is, as the entry of mankind and of the restored creation upon its supernatural end."[1117] But, O'Donovan cautions, we must not confuse the hope of that future realization with our actual present condition. Echoing Barth, O'Donovan affirms that God has spoken his "Yes" over all

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[1111] *Ibid.* at 72.
[1112] Oliver O'Donovan, *Resurrection and Moral Order*, 163.
[1113] *Ibid.,,* 226.
[1114] *Ibid.*, 236.
[1115] *Ibid.*, 245.
[1116] *Ibid.*
[1117] *Ibid.*, 246.

creation in Christ, which also implies God's "No" to all that is opposes the love of Christ.[1118] The future hope infuses and informs how we live in the present, but remains future, which in the present requires faith that is "always open to repentance, able to relax the compulsive grip of self-justification upon the past," and that is "renewed and sustained, not out of the agent's established character but by continual conversion."[1119] Although O'Donovan does not connect this theme directly to positive law as such, it clearly suggests that positive law, like any other human cultural act that can point us always back towards God, can comprise part of God's "Yes" over creation and participate in God's eternal love.[1120]

This participatory understanding of law addresses the problem of originary violence but not of applied violence. Applied violence must be addressed in a casuistic way depending on the particulars of time, place, culture, and in light of eschatological time. This distinction helps resolve some of the problems of pacifist quietism and is evident in the work of Schlabach. It further shows why Augustine's approach to the Donatists was wrong or mostly wrong because it does distinguish the Church from the World – to some extent, contrary to Milbank and Ward. But it also helps bridge the gaps between Milbank, Ward, O'Donovan and Hauerwas, because it

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[1118] *Ibid.*, 255-56.

[1119] *Ibid.*, 256.

[1120] O'Donovan further notes that the final verdict of "yes" or "no" belongs only to God:

> We are not able to draw quick conclusions from appearances as to whether someone is a good or a bad person, a saved or a damned soul. The invasive reality which touches and shapes human lives is nothing other than the eschatological judgment of God in Christ; and only when that judgment is finally manifest can we expect to see clearly with what design it has cut through the fabric of human conduct. The words 'Judge not, that you not be judged (Mt. 7:1) are not intended, as a liberal indifferentism can so easily construe them, to forbid moral judgment. There is a tolerance which comes from not taking moral questions seriously, from regarding the difference between right and wrong sceptically because of the ambiguities with which human behavior confronts us. There is another tolerance, quite different in spirit from this, which comes from taking moral questions so seriously that we recognize the point at which they exceed our competence to resolve them. We can speak and think about the right and wrong of acts, the values of virtues and traits of character; but when it comes to pronouncing a verdict on a human being's life in its totality, we know that too much is hidden from us to permit any anticipation of God's final word.

Ibid., 256-258. In baptism, however, we are given a visible sign of the invisible work of God's grace. *Ibid.*, 259. To this we might also add that in the Eucharist the promise of God's future "Yes" breaks into the present, and that in the prayers and mission of the Church through the Spirit the hope of God's future "Yes" proceeds throughout the present Earth.

allows for institutions that as participants in the divine law are already in a sense participating in the Church, and this in turn opens space for members of the Church to participate in appropriate institutions of law. This is not a Neihbuhrian surrender, but a positive role for law. Further, it overcomes to efforts "scientize" or "naturalize" the law, such as neurolaw, by insisting that the origin of law is supernatural.

And yet, the Heavenly City still lies before us. We have not yet arrived. As Oliver O'Donovan notes, in the present, "[l]aws come in many forms and stand at variable distances from reality."[1121] But this does not mean we can ignore some part of the moral law in favor of another. Rather, we must see the "*interconnectedness*" of every aspect of the moral law.[1122]

In particular, O'Donovan says, "we may speak of a two-way control between the law of love and the detailed moral laws."[1123] In this understanding, "love is the 'sum' and 'fulfillment' of laws; it is the culmination and final outcome. The sum is not totaled without its constitutive elements; the fulfillment completes, without superseding, what has gone before it."[1124] The coherence of the moral field under the law of love helps us navigate the specific demands of action in our present world and time.[1125] In fact, it is the fulfillment of the law in Christ that enables the agent to rejoins the law that must be lived out in this present world and time with the universal law of love: "from where does such coherence come, if not from a 'second law giving,' a self-disclosure on the part of God himself with a law that interprets the plurality of laws, and is therefore at the same time a Gospel? It is not for no reason that Saint Paul read that passage from Deuteronomy as a prophecy of Christ."[1126]

O'Donovan's take on the connection between "law" and "gospel" is tied to his view of how moral action relates to the narrative of salvation. Our actions in the present world and time are not

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[1121] Oliver O'Donovan, *Ethics as Theology Vol. 2: Finding and Seeking* (Grand Rapids: Eerdmans 2014), 197.
[1122] *Ibid.* at 198.
[1123] *Ibid.* at 200.
[1124] *Ibid.*
[1125] The themes of "self," "world," and "time" are critical to O'Donovan's theological ethics, as is evident in the title of Volume 1 of his planned trilogy on "Ethics as Theology." O'Donovan, *Ethics as Theology Vol. 1: Self, World, and Time* (Grand Rapids: Eerdmans 2013).
[1126] O'Donovan, Finding and Seeking, 201. The passage referred to is Deut. 30:12-14: "the word is very near you; it is in your mouth and in your heart, so that you can do it." *See* Rom. 10:8.

predetermined by the moral law or by scripture. O'Donovan suggests that "[w]ere [ethics] to posit an ideal relation of text to action which, in the name of obedience to scriptural authority, effectively abolished thinking, it would abolish morality, and thereby abolish itself."[1127] Obedience is not the rote application of a predetermined outcome, but rather the exercise of reasoned deliberation that searches out what faithful action requires.[1128] The agent's *freedom* arises from recognizing that the resurrection of Christ is the center of history through which the redemption of historical time is revealed.[1129]

The contingency of the self within this present world and this present time, and thus the contingency of moral indeterminacy, is thereby superseded by the fulfillment of eschatological time. In the hope of this fulfillment, "[t]he risen life of the last Adam gives hope to the first Adam in the midst of God's created work. The risen life of the last Adam inaugurates the Creator's purpose to consummate all life, past, present, and future, in the reign of life."[1130] This hope "is the mark of true freedom," which allows the agent to "see the moral law from a new vantage-points as a witness to God's purpose to order and bless the human race."[1131] Then, "[w]hat previously looked like disconnected arbitrary norms come together to form a coherent 'law of Christ,' the love of neighbor as self."[1132]

This sort of freedom does not seem evident anywhere in the "natural history" of the human species. Its possibility is not buried in fossilized bones or burned into static neural pathways. If our "ordinary" or "natural" lives seem constrained by the power of our evolutionary past, that fact is no threat to any orthodox conception of "freedom." The real possibility of "freedom" is only *remembered* by its absence, *revealed* in scripture and in Christ, and *realized* in the death and resurrection of Christ.

Human beings seem unique among the creatures of the Earth in our development of elaborate cultural systems, including in particular systems of positive law, which acknowledge and attempt

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[1127] O'Donovan, *Self, World, and Time*, 77.
[1128] *Ibid.*
[1129] *Ibid.* at 92.
[1130] *Ibid.* at 93.
[1131] O'Donovan, *Finding and Seeking*, 8.
[1132] *Ibid.*

to compensate for a the knowledge that we are not as we *should* be.[1133] We know something is missing. We know we cannot "choose" the good – that is, the good as utterly good simply and for its own sake as good. But this knowledge it the first hint of our freedom.[1134] It is what demonstrates that we are "human" while even the most complex and amazing of the other animal creatures on Earth are not "human."

Scripture reveals to us that the root of this lack is not part of our created human "nature" yet stems from the deepest historical roots of our humanity. The "Fall" is a fall away from law, a dissolution of the bond of the law of love. We possess a distant memory of this law but our memory dims. Christ reveals to us what the law of love truly means, how it instantiates our true humanity, and how it can be lived out in the world. The *Logos* of the universe united to human nature and born as a human infant, with us in every way, even in the solidarity of death, is the Word of love. Christ's resurrection realizes the power of love. The Resurrection demonstrates that love conquers death. Resurrection is the eschatological power through which the politics of death become transformed by the law of love.[1135] *Love* is the relation between theology and science, between law and justice, between the earthly city and the New Jerusalem.   This is the vision of the prophet Micah, who concludes our reflection on the ends of the law:

> In the last days
> the mountain of the LORD's temple will be established
>   as the highest of the mountains;
> it will be exalted above the hills,
>   and peoples will stream to it.
> Many nations will come and say,
> "Come, let us go up to the mountain of the LORD,
>   to the temple of the God of Jacob.
> He will teach us his ways,
>   so that we may walk in his paths."
> The law will go out from Zion,
>   the word of the LORD from Jerusalem.
> He will judge between many peoples

[1133] On law and human uniqueness, see Chapter 3.

[1134] Cf. John Calvin, *Institutes of the Christian Religion* (trans. Henry Beveridge, Edinburgh: Calvin Translation Society 1845), Book One, Chapter 1.1: "Our wisdom, in so far as it ought to be deemed true and solid Wisdom, consists almost entirely of two parts: the knowledge of God and of ourselves.".

[1135] This is the heart of O'Donovan's argument *in Resurrection and Moral Order*.

and will settle disputes for strong nations far and wide.
They will beat their swords into plowshares
   and their spears into pruning hooks.
Nation will not take up sword against nation,
   nor will they train for war anymore.
Everyone will sit under their own vine
   and under their own fig tree,
and no one will make them afraid,
   for the LORD Almighty has spoken.
All the nations may walk
   in the name of their gods,
but we will walk in the name of the LORD
   our God for ever and ever.[1136]

[1136] Micah 3:9 – 4:5

Conclusion

In this Dissertation I have argued that "law" is a constituent element of the human soul. The capacity to formulate positive law is unique to humans among all the creatures of the Earth. Some other creatures can construct fascinating systems of social discipline, but none can formulate codes or institutions of positive law. The human capacity for lawmaking is different in kind from any similar capacity in other animals – or at least, it is so different in degree that it is essentially different in kind.

The paleoanthropological record suggests that this kind of cultural capacity did not arise before the very recent cultural explosion among anatomically modern humans, and the historical record suggests that positive law developed at the dawn of systems of writing in the ancient near east. The Bible's second creation narrative in Genesis 2 in this sense is consistent with the paleoanthropological and historical evidence: it was to Adam, and not to the other animals, that God gave the primal command not to eat from the tree of the knowledge of good and evil. The historical beginning of positive law therefore marks the historical beginning of humanity and identifies the elusive "historical Adam."

I have not argued, however, that this framework represents a "literalist" or "concordist" reading of the Bible and modern science. The genetic, paleanthropological, and archeological evidence demonstrate that anatomically modern humans evolved over millions of years from a common ancestor shared with modern great apes, that there were numerous "human" species that went extinct over those ages, and that modern humans emerged from a population pool, not from a single pair of genetic progenitors in the recent past. This evolutionary process included the brains and other neurophysical components of our creaturely being, which means that our minds and emotions cannot be separated from our deep evolutionary past.

The juxtaposition of these two themes – "law" as a source of the "historical Adam" and the reality of our deep evolutionary past – seems jarring if not Quixotic. Indeed, I have traced a theme in contemporary Western jurisprudence that seeks identify "law" with neuroscience, called "neurolaw." Some neurolaw scholars argue that "law," like everything else we think of as "mind" or "consciousness," is merely an epiphenomenon of brain processes shaped by evolution. This

trend, I have argued, reflects the efforts of legal positivists who, since the nineteenth century, have sought to elide concepts of transcendence from jurisprudence and to render positive law as a kind of quantifiable science. If the neurolawyers are right, the Adam I think I have found in the law is just another ghost in the machine.

But legal positivism, I have suggested, is itself part of a deeper flow of the intellectual currents of modernity, which have at their headwaters a number of assumed and usually unexamined metaphysical claims. In the first Chapter of this Dissertation, I explored the question of method in "theology and science," and argued for a method that refuses to bracket such metaphysical questions. I claimed, in fact, that the metaphysical assumptions of basic Christian orthodoxy – that the Triune God revealed in the incarnate Christ is the transcendent creator of the cosmos – make better sense of the phenomena of human persons, including both our deep evolutionary history and our remarkably recent capacity for cultural institutions such as positive law than materialist explanations.

The doctrine of the Trinity, I have argued, is the proper foundation for a robust concept of both the natural law and the Divine command. In our efforts to formulate what we mean by the claim that God is Triune, we see that the Divine *hypostases* are delimited by love, which flows from their mutual indwelling in the one Divine *ousia*. The order of God's being is an order of love, and from this order flows the order of creation, which is nevertheless as given not a necessary order, but a contingent order defined in its particulars by God' free, gracious decision to create. As God's free, contingent act of creation participates in His eternal, unchanging being, so God's contingent, historical commands to the human creatures prepared to hear them participate in God's eternal law of love. As God's act of creation was not a moment "in time" but rather encompassed and encompasses the generation *of* time, so God's creation of Adam is not a definable moment in the paleoanthropological or genetic record but rather is the generation of a new kind of being in relationship to God through the reception of the Divine command embodying the law of love.

The record of human history, though it includes love, is not in its essence a record of love. I have agreed with Foucault, Agamben, Oliver Wendell Holmes, Jr., and others, that historical human

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law is instituted by originary violence, a violence we can see, apparently, even in the remains of our Neadnderthal cousins. But "law" that is really "violence" is not "law." The neurolawyers can offer stories that account for violence, including forms of violence called "altruism," but they cannot account for "law."

It is here, I have argued, that robust Christology is required. The *true* Adam, the Adam we *can* identify in recorded history, is Christ. Christ fulfilled the law of love through his incarnation, life and atoning death on the cross, and Christ inaugurated his reign under the law of love through his resurrection. Only in Christ can we know that the first Adam, the Adam lost to us in the complex history of human evolution, truly existed, because we can know the second Adam who brings humanity to its completion.

Finally, I have outlined some ways in which my Trinitarian / Christological metaphysic of law and anthropology relates to the present time – that is, to political theology. Christ arose, and Christ ascended, and Christ established his Church through the sending of the Holy Spirit – but Christ has not yet returned. How then, today, in this earthly city, should we think about the nature and purposes of positive law? I have drawn historical sources as well as a diverse group of contemporary political theologians, including John Milbank, Graham Ward, Stanley Hauerwas, Jean Porter, Robert Spaemann, Christos Yannaras and Oliver O'Dovonan, to suggest that our thinking about law and human persons in the present must not obscure the ideals of the heavenly city in favor of an apologetic program dictated by modernity. However we work out the innumerable thorny questions of application for law and policy in a desperately fractured world, the task for Christian theologians is to demonstrate how particularly *Christian* narrative of creation, fall and redemption illuminates the nature and purposes of human persons and cultures. In reductive neurolaw we see the end of the law, that is, the dissolution of "law" as any kind of thing. In Christian theology, I have argued, we see the true end of the law, that is, the culmination of the powers and potentialities of creation, including those of human persons, in the embrace of God's eternal perichoretic love.

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