IS NATURAL LAW A PUBLIC GOOD?

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I. INTRODUCTION

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[1] These may be the most powerful words in the political or legal history of the United States; they are not merely a justification for the independence of a nation, but also a statement of the principles upon which our nation was founded. At the time these words were written, and perhaps as well today, it was of great importance that they derived their authority not from any positive or earthly law, but from a deep-seated belief in natural law.

What is natural law? Though much ink has been spilled on the topic of natural law, definitions are not always consistent. In order to proceed, an acceptable definition must be found, in order to build a stable framework of thought. One excellent definition describes natural law as law:

Which so necessarily agrees with the nature and state of man, that without observing its maxims, the peace and happiness of society can never be preserved . . . [K]nowledge of [natural laws] may be attained merely by the light of reason, from the facts of their essential agreeableness with the constitution of human nature.[2]

It is upon this definition in mind that this article will proceed and upon which my arguments will be based. But even such a definition as this fails to shed light on the endurance of natural law as a jurisprudential theory with real world implications.

Another pressing question is: why natural law? What is it about natural law that is so appealing that learned men and women cling so closely to it? Justice Holmes was of the opinion that the appeal of natural law came from mankind's "demand for the superlative" and that "this demand is at the bottom of the philosopher's effort to prove that truth is absolute and of the jurist's search for criteria of universal validity which he collects under the head of natural law."[3] Holmes himself was certainly skeptical of the idea of natural law, finding that those who believed in its existence to be "in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[4]

When we consider the concept of natural law from Holmes'

1 THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

2 Borden v. State, 11 Ark. 519, 527 (Ark. 1850); *see also* STEVEN H. GIFIS, BARRON'S LAW DICTIONARY 336 (5th ed. 2003).

3 Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40 (1918).

4 *Id*. at 41.

perspective, it is easy to view the moral aspects of natural law in a distinctly Western light. It has been argued that law in the United States is a completely Eurocentric institution.[5] Natural law, couched as it is in Judeo-Christian moral terminology, is particularly guilty of Eurocentrism. Many basic precepts of natural law are little more than socioeconomic truths, assigned moral weight by ancient philosophers, adopted into modern moral codes via religious scholars, and accepted much as Holmes has described. Because of this, to say that natural laws are superior to all other forms of law is essentially to declare the superiority of Western thought above all else. This necessarily entails avoidable racial and cultural conflicts within society.

If this is true, it is only natural to ask: is this pro-Western, Eurocentric view of natural law actually beneficial to society today? If not, can society benefit more by dropping the veneer of moral superiority and accept that, as basic socioeconomic principles devoid of moral qualities, the basic concepts of natural law can benefit the world more completely? The purpose of this article is to examine, and hopefully answer these questions. Put another way, this article seeks to answer the question, is natural law a public good?[6] I argue that as socioeconomic theories applicable to all members of society, many rules founded in natural law are of immense value; but rules based on natural law for morality's sake are not public goods.

In Section II it discusses the origins of natural law as a concept. This section begins with the Greek philosopher Aristotle, considered the founder of natural law theory. It continues with the thought of Marcus Tullius Cicero, Roman lawyer, statesman, philosopher, and undisputed master of Latin prose, who took Greek thought and made it accessible to Rome in a whole new manner. From Cicero it is easy to see where early Christians, especially the Apostle Paul and St. Augustine, adopted the idea that God had written on their hearts, thus making the natural law part of the human condition rather than a mere human invention.

Section III looks at natural law from the perspective of St. Thomas Aquinas, who broke the law in to four different categories, each of which claims a different origin. Next it discusses the natural law as it was viewed by Sir William Blackstone, who would ultimately be responsible, through his writings, for transferring the concept of natural law to the English colonies, including the United States. Finally, Section III discusses the relationship between Aquinas's and Blackstone's views on natural law and morality and questions whether it is acceptable to call something moral or "natural" merely because it complies with notions of

5 *See* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997).

6 A public good is a good or service that is characterized by non-rivalry and non-excludability, CAMPBELL MCCONNELL & STANLEY BRUE, MICROECONOMICS, Gg-16 (17th ed. 2008).

the superiority of western thought.

Finally, Section IV discusses two relevant scenarios in which the theory of natural law is tested. Selected for what seems to be their near universality in the world, the precepts of natural law tested are: the prohibition on killing and the right to property. Each scenario follows a similar pattern: a brief description of the point of natural law, followed by a real-world example disputing the natural law claims, and finally an assessment of the practical effects of each of the points of natural law in the real world.

II. A HISTORY OF NATURAL LAW

In order to provide a useful framework for understanding the thought of Aquinas and Blackstone, it is worthwhile to delve briefly into the ideological history of natural law. Beginning with the Greek philosopher Aristotle, considered the founder of natural law theory, it is easy to see the adoption of their beliefs by the great Roman lawyer, statesman, and philosopher Marcus Tullius Cicero. From Cicero it is possible to trace the idea of natural law into early Christian thought through the Apostle Paul and St. Augustine, and from there directly to the thought of Aquinas and Blackstone. By illuminating natural laws past, I hope to shed light on some of its flaws as well.

A. Aristotle

Aristotle was a student of the great philosopher Plato, spent time as a tutor to Alexander the Great, and later wrote on nearly every category of knowledge that existed in the ancient Greek world. Unsurprisingly, some scholars consider Aristotle to be the founder of natural law theory.[7] Other scholars question whether this assertion is accurate and have attributed it to the influence of Thomas Aquinas on later translations of Aristotle's works. What is certain is that his writings have had a large impact on the development of natural law theory.

In his highly influential Nicomachean Ethics, Aristotle differentiated between the two types of political justice: natural justice and legal justice.[8] He wrote, "Of political justice part is natural, part legal-natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent."[9] Though not an overt

7 *See* Max Salomon Shellens, *Aristotle on Natural Law*, 4 NAT. L. F. 72 (1959).
8 ARISTOTLE, NICOMACHEAN ETHICS, 124 (David Ross trans., Oxford World Classics 1998).
9 *Id*.

statement, this section proves a basis for the idea of separating natural law and positive law. This separation has proved to be a fundamental issue of natural law.

Aristotle revisited the idea of natural law in another monumental work, Rhetoric.[10] In this work he took a more familiar approach to natural law writing:

Universal law is the law of Nature. For there really is, as every one to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other. It is this that Sophocles' Antigone clearly means when she says that the burial of Polyneices was a just act in spite of the prohibition: she means that it was just by nature.

Not of to-day or yesterday it is, but lives eternal: none can date its birth.

And so Empedocles, when he bids us kill no living creature, says that doing this is not just for some people while unjust for others,

Nay, but, an all-embracing law, through the realms of the sky unbroken it stretcheth, and over the earth's immensity.[11]

Here Aristotle touches on the idea that natural law is universal for all humans, and that that which is just is universally just, while that which is unjust is universally unjust. This idea that natural law is universal would come to be a central tenant of the natural law theory developed by later scholars.

Aristotle's words, whatever he meant by them, were highly influential on later legal theorists. St. Thomas Aquinas himself frequently referred to Aristotle simply as "the Philosopher" and cited him heavily in his own work.[12] It is because of this that Aristotle's influence has stretched across centuries to continue to inform natural law theory.

B. Cicero

The Roman statesman, lawyer, and orator Marcus Tullius Cicero is more well known for his Latin prose than for his philosophy, yet it is from Cicero that many later natural law scholars drew in their works, sometimes echoing his words without ever acknowledging their source. In the introduction to his translation of The Laws, the late classicist Niall Rudd identified five fundamental beliefs upon which Cicero based his views of natural law.[13] First was the belief that the universe is run by a

10 Aristotle, *Rhetoric*, in 2 ARISTOTLE 617 (Mortimer J. Adler ed., U. of Chicago Press 1952).

11 *Id*.

12 *See infra* Section III(A).

13 CICERO, THE REPUBLIC & THE LAWS, xxvii-xxviii (Niall Rudd trans., Oxford World Books 1998)

divine, higher power.[14] Furthermore, Cicero believed that God created humans for a distinct purpose, since man was the only species capable of reason.[15] Because humans are capable of reason, Cicero believed that humans are capable of right reasons and "since that is law, we men must also be thought of as partners with the gods in law."[16]

Second among Cicero's beliefs was the unique relationship of Man to God. This belief stemmed from the belief that humans shared with God the ability to reason.[17] Moreover, Cicero believed that humans had a shared lineage with God due to the human mind being implanted by God.[18] For this reason, humans enjoyed a special role above all other species, especially considering that humans alone were capable of reason.[19]

Third, Cicero believed that communities were necessary for humans to realize their potential. Though open to the idea that humans come together and form societies for their own protection and the fulfillment of their needs, Cicero instead favored Aristotle's argument that humans are "political animals" and that people instead come together out of an innate need to form communities.[20] The creation of communities is significant because of the necessity of having laws in order for a community to flourish.

Fourth, Cicero believed that Man is a distinct species. He believed that humans are all essentially alike, going so far as to write that, "[n]ow there is no single thing that is so similar to, so like, anything else as all of us are like one another."[21] We are, therefore, necessarily all subject to the same natural laws. This is a particularly important belief of Cicero's because, as Aquinas would later build upon, the special status of humans was essential for our understanding of the natural law.

Finally, Cicero believed that the law is based on nature, not on opinion. Here Cicero writes that what he calls "'justice' springs from nature"[22] with "nature" being the human condition. Cicero distinguished between natural laws and the laws of nations, writing that it is foolish to believe that "everything decreed by the institutions or laws of a particular country is just";[23] an assertion seemingly alluding to the passage from Aristotle's Nicomachean Ethics describing Antigone's justification for burying Polyneices. Because of this belief, Cicero created the foundation

14 *Id*. at 104.
15 *Id*. at 104-05.
16 *Id*. at 105.
17 *Id*.
18 *Id*.
19 *Id*.
20 *Id*. at 19.
21 *Id*. at 107.
22 *Id*. at 108.
23 *Id*. at 111.

for the idea that only those laws in accordance with nature are "just."

C. Christianity (Romans 2:14-15)

In early Christianity, there are apparent echoes of the Ciceronian view of Natural Law. Most notably, in the Apostle Paul's Epistle to the Romans, we find Paul using familiar language as he writes:

When Gentiles, who do not possess the law, do instinctively what the law requires, these, though not having the law, are a law to themselves. They show that what the law requires is written on their hearts, to which their own conscience also bears witness; and their conflicting thoughts will accuse or perhaps excuse them.[24]

Similar to Cicero we once again see the idea of the law "written on the hearts" of people. This Ciceronian view that the law, in its true form, exists in the hearts of men, distinct from the positive law of nations, or the revealed law of God.

Whether or not it was the intent of Paul to adhere to or echo such a Ciceronian view,[25] this view of the natural law would endure among future Christian writers. Many of these later thinkers, including St. Augustine, St. Ambrose, and St. Hilary of Poitiers, would interpret Paul's words in a manner consistent with Ciceronian thought. Foremost amongst those later writers was an Italian Dominican Friar now known as St. Thomas Aquinas.

III. AQUINAS AND BLACKSTONE

A. St. Thomas Aquinas

One of the most influential medieval Christian scholars, Thomas Aquinas greatest work, the Summa Theologica, was and has been viewed as the foundation of much of Christian belief. In the Summa, Aquinas discussed the existence of four species of law: eternal law, natural law, divine law, and human law. Of the four of these, his exposition on natural law would become the most enduring and influential.

Eternal Law

The first type of law discussed by Aquinas was what he termed

[24] *Romans* 2:14-15.

[25] Given that his Epistle is dedicated to the Roman Christians, it may be that he intentionally echoed the words of Rome's greatest philosopher.

"eternal law." When faced with the question of whether there existed such a thing as an eternal law, Aquinas drew upon St. Augustine for his answer that, "No one with intelligence can perceive the law called supreme reason not to be immutable and eternal."[26] Furthermore, he viewed the law as simply "a dictate of practical reason by a ruler who governs a perfect community."[27] As God is the ruler of our universe, and is Himself eternal, God's law must then be eternal as well.[28]

Aquinas, in defending the concept of eternal law, draws an elegant comparison between a ruler and a simple craftsman, claiming that there preexists in every craftsman a plan for the things he creates, and so too in rulers there must be a plan for the things his subjects ought to do.[29] God, Aquinas argues, creates all things and is related to them like a craftsman.[30] Eternal law, it follows, "is simply the plan of divine wisdom that directs all the actions and movements of created things."[31]

In responding to the question of whether all laws are derived from the eternal law, Aquinas asserts that, because eternal law is the plan of a supreme ruler, all plans of subordinate rulers must be derived from the eternal law.[32] From this, he claims, it follows that all laws are derived from the eternal law, so long as they partake of right reason.[33] Even human laws, which are not imposed on things that humans cannot direct and therefore are unable to attain the eternal law, are still derived from the eternal law.[34]

Finally, Aquinas believed that everyone knew of the eternal law to varying degrees.[35] In his mind there were two ways through which we could have knowledge of the eternal law: first through knowledge of the eternal law in itself, and second, through the effects of eternal law.[36] The first kind of knowledge is possessed only by those who are blessed and see God in his essence.[37] The second kind of knowledge is open to all others, who can perceive the eternal law to a greater or lesser extent through its effects.[38]

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26 ST. THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 16 (Richard J. Regan trans., 2002).
27 *Id.*
28 *Id.*
29 *Id.* at 30.
30 *Id.*
31 *Id.* at 31.
32 *Id.* at 34.
33 *Id.*
34 *Id.*
35 *Id.* at 32.
36 *Id.*
37 *Id.*
38 *Id.*

Natural Law

According to Aquinas, "law, since it is a rule or measure, can belong to things in two ways: in one way to those who rule and measure; in a second way to those ruled and measured, since things are ruled or measured insofar as they partake of the rule or measure."[39] Aquinas believed that the eternal law rules and measures all things in accordance with the will of God.[40] He further argued that all creatures share in the eternal law, yet rational creatures, including humans, share in the eternal law in a higher way in which it is their natural inclination to act towards its natural end.[41] This participation in eternal law by rational creatures, Aquinas said, is called "natural law."[42]

Aquinas believed that there are several precepts of natural law, rather than a single overarching precept.[43] He believed that these "precepts of natural law are related to practical reason as the first principles of scientific demonstrations are related to theoretical reasons. For both the precepts of the natural law and the first principles of scientific demonstrations are self-evident principles."[44] Further, he explained that things can be self-evident in one of two ways: first, a thing may be self-evident "in one way as such," meaning that its predicate belong to the nature of its subject; second, a thing may be self-evident in relation to ourselves.[45]

While he believed that there were several precepts of natural law, he also believed that there was a priority regarding the things which fall within the understanding of all persons. Echoing the ideas of Plato, Aquinas argued that "good" is the first thing that falls within the understanding of practical reason.[46] Continuing his argument he wrote that because practical reason is ordered to action and every efficient cause acts for the sake of an end, which is the very nature of good, it follows that the first precept of natural law is to do and seek good.[47]

Further, because good has the nature of end, human reason understands that all of the things for which human beings have a natural inclination are good.[48] Based on this argument, Aquinas surmised that "the order of our natural inclinations ordains the precepts of natural

39 *Id*. at 18.
40 *Id*.
41 *Id*.
42 *Id*.
43 *Id*. at 42.
44 *Id*.
45 *Id*.
46 *Id*. at 43.
47 *Id*.
48 *Id*.

law."[49] To support his argument he offered three examples of how human inclination relates to the natural law. First, he argued that humans have an inclination for good by the nature they share with all substances, in particular this means the inclination towards self-preservation, which in turn means that to preserve human life belongs to the natural law.[50] Second, drawing on Aristotle, he argued that human beings have more particular inclinations because of the nature they share with other animals, meaning that things which nature has taught all animals "such as the sexual union of male and female, and the upbringing of children" belong to the natural law.[51] Finally, he argued that humans have inclinations for good by their rational nature, including the inclination to know truths about God and to live in society with other human beings, which means that things relating to this inclination such as shunning ignorance and refraining from offending those with who they live socially, belong to the natural law.[52]

Going further, Aquinas believed that the natural law is common to all people.[53] The reason for this is that the natural law governing first principles is common to all people in regards to the principles' rectitude and the knowledge of them.[54] It is only the understanding of these principles that varies.[55] Furthermore, the basic precepts of natural law cannot be excised from human understanding, though particular actions may be excised when human reason is clouded by emotions or desires.[56]

Human Law

Along with the eternal law and natural law, Aquinas acknowledged the existence of human law as well.[57] He argued that "human reason needs to advance from the precepts of natural law, as general and demonstrable first principles, to matters that are to be more particularly regulated. And we call such regulations devised by human reason human laws."[58] Quoting Cicero, Aquinas asserts that human law springs from natural law before becoming custom.[59]

While Aquinas thought that humans have a natural capacity for

49 *Id*.
50 *Id*.
51 *Id*.
52 *Id*.
53 *Id*. at 46.
54 *Id*.
55 *Id*.
56 *Id*. at 50.
57 *Id*. at 19.
58 *Id*.
59 *Id*.

virtue, they need training in order to attain it.[60] Humans, however, are not self-sufficient in regard to this training and for this reason Aquinas believed that force and fear were necessary to restrain them.[61] For that reason it was necessary to establish laws.[62]

Aquinas believed that these human laws are binding so long as they are just, and they are just so long as they are in accordance with reason.[63] He continues by stating that the primary rule of reason is the natural law, and that therefore laws are just so long as they are in accordance with the natural law.[64] Conversely, human laws that are not in accordance with the natural law are a perversion and therefore not just.[65]

Divine Law

Aquinas believed that, in addition to the natural law and eternal law, human life needed divine law as well in order to provide direction.[66] He further attempted to articulate four reasons for the necessity of a divine law. First, he argued that law directs our acts to our ultimate end, and that as humans our ultimate end is eternal blessedness, which being outside our natural capacity, required the existence of a law superior to natural law or human law.[67] Second, he argued that because of the uncertainty of human judgment, different persons may judge differently about various human actions, resulting in contrary laws.[68] Third, human laws can only be directed towards sensibly perceptible external acts, but they fail to govern hidden internal movements, which hinders the ability to live righteously.[69] Finally, human laws cannot address all evil deeds because in attempting to eliminate all evils humans would also eliminate many good things; therefore divine law was needed to punish all sins.[70]

Influence

The Summa Theologica has, to this day, remained an influential text, especially upon religious scholars. A section of this work, known as the Treatise on Law, has been particularly influential on the development of

60 *Id*. at 52.
61 *Id*.
62 *Id*.
63 *Id*. at 54.
64 *Id*.
65 *Id*.
66 *Id*. at 21.
67 *Id*.
68 *Id*.
69 *Id*.
70 *Id*.

English, and later early American law. Aquinas was influential on the thought of jurists such as Sir Matthew Hale, whose writings would in turn influence the eminent jurist and scholar Sir William Blackstone.

B. Sir William Blackstone

Following the end of the medieval period, the idea of natural law remained and thrived during the following Age of Enlightenment period. Writers and jurists such as Hugo Grotius, Samuel von Pufendorf, Sir Matthew Hale, and John Locke were natural law advocates who would assert great influence on the founding of the United States. But where these thinkers provided support for many of the ideas upon which the founders claimed independence, the greatest influence upon the laws of the United States may well have been through the works of Sir William Blackstone.

Many of the Founding Fathers of the United States owed a great debt to Sir William Blackstone's monumental Commentaries as a foundation of their own legal education. It is only natural then that his ideas would also serve as a foundation for the laws of the United States after its independence from Great Britain. Among Blackstone's closely held beliefs was a belief in the existence of natural law closely in keeping with the beliefs of Aquinas and his predecessors.

For Blackstone, certain laws were dictated by God, and therefore necessary to our very existence.[71] As with his predecessors, Blackstone believed that man "must necessarily be subject to the laws of his creator, for he is entirely a dependent being . . . And consequently, as man depends upon his maker for every thing, it is necessary that he should in all points conform to his maker's will."[72] In conforming to God's will, man must adhere to certain precepts.[73] Fortunately, Blackstone believed, because of God's wisdom, fulling God's will required only that man live in accordance with his nature, which in turn demanded only that man "should pursue his own true and substantial happiness."[74] To Blackstone, this is the essence of ethics or the "law of nature."[75]

In order for man to understand this natural law, man must be made aware of it, but reason alone was not sufficient to divine the will of God.[76] Instead, like Aquinas before him, Blackstone believed that those precepts

71 "Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be." 1 WILLIAM BLACKSTONE, COMMENTARIES *38.

72 *Id*. at *39

73 *Id*. at *38–63

74 *Id*. (internal quotations omitted).

75 *Id*.

76 *Id*.

of natural law necessary for our existence would be revealed by God.[77] Furthermore, this revelation could only be found in the holy scriptures.[78] Upon examination, Blackstone was confident that these revealed precepts would show themselves to be a part of the natural law, as they tend to advance man's happiness.[79]

In summation of his views on the origins of law Blackstone wrote, "Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[80] By way of example, Blackstone considered that, as one of the basic precepts, "that we . . . should hurt nobody."[81] From the divine origin of this precept comes the true authority for a prohibition on murder; in other words, murder is wrong because God has decreed through natural law that ought not to hurt another person.[82] The simplicity of Blackstone's views, and their consistency with the thought of prior legal and ethical thinkers, makes for an appealing explanation of the origins of basic legal tenants which seem to be universal in application. Unlike many of his ideological predecessors, however, Blackstone's views, widely available in print to a highly literate society, would quickly gain acceptance and influence.[83]

Indeed, it is difficult to overstate the influence Blackstone's Commentaries had on the founding of the United States. Among the first colonists to order copies of the Commentaries were John Adams[84] and Thomas Marshall, father of future Chief Justice John Marshall.[85] Thomas Jefferson as well studied Blackstone, though he would later write that the great jurist's book, "although the most elegant and best digested in our catalogue, has been perverted more than all others, to the degeneracy of legal science."[86] Given Jefferson's animosity towards Blackstone it is perhaps not surprising that the founding father most greatly influenced by Blackstone may well have been Jefferson's arch-rival, Alexander Hamilton. Ron Chernow has found that even as a student at King's College (now Columbia University), Hamilton engaged in a thorough

77 *Id*.
78 *Id*.
79 *Id*.
80 *Id*.
81 *Id*.
82 *Id*.
83 So popular was Blackstone's *Commentaries* that in Philadelphia alone orders for 1,400 copies were placed in advance of the Philadelphia publication. William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 7 (1995).
84 *Id*. citing CHARLES WARREN, A HISTORY OF THE AMERICAN BAR, 178 (1911).
85 JEAN E. SMITH, JOHN MARSHALL: DEFINER OF A NATION, 75 (1996).
86 WILLARD STERNE RANDALL, THOMAS JEFFERSON, 109 (1993) citing to John W. Davis, *Thomas Jefferson- Attorney-at-Law*, 38 Proceedings, Virginia State Bar Association 361, 368 (1926)

reading of Blackstone,[87] and later demonstrated his affinity for Blackstonian thought in his defense of Article III of the Constitution found in Federalist No. 78.[88]

Equally important is the influence of Blackstone upon the courts of the United States. We know Chief Justice Marshall studied Blackstone as a youth along with his father, and later again as a student of the law.[89] Justice Joseph Story referred to Blackstone's book as "that most elegant of commentaries."[90] Marshall, Story, and other early jurists would help introduce natural law principles into American jurisprudence, where it has waxed and waned in influence at various times.[91] Blackstone himself has endured and remained influential; he is cited regularly by American courts and legal scholars who seek a historical perspective on some aspect of law. Because of the continued influence of his works, Blackstone's belief in natural law continues to have some effect on the laws of the United States.

IV. NATURAL LAW IN THE REAL WORLD

A. Prohibitions on Murder

The purpose of this section is to provide insight into two precepts of natural law: the prohibition on murder and the ownership of property. I attempt to do this by discussing the attitudes of both Aquinas and Blackstone towards each of these precepts, then countering them by providing an example from a non-Western culture whose views do not align with the natural law view. Finally, each subsection attempts to look at the practical application of the law in relation to each of these precepts.

Thou Shalt Not Murder

One of the most well-known of the Ten Commandments is the prohibition on murder.[92] Earlier translations often stated this commandment as "Thou shalt not kill." Such a prohibition on murder is nearly universal in Western society, as well as amongst the societies

87 RON CHERNOW, ALEXANDER HAMILTON 52 (2004).

88 *See* THE FEDERALIST No. 78 (Alexander Hamilton).

89 Smith, *supra* note 85, at 75.

90 Bader, *supra* note 83, at 9.

91 By way of example, on such early Supreme Court which espoused natural law principles is *Van Horne's Lessee v. Dorrance*, 2 U.S. 304, 310 (1795) ("the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."

92 *Exodus* 20:13, *Deuteronomy* 5:17.

dominated by the Abrahamic faiths.

Aquinas, whose treatise on law laid the foundation for early Catholic Law, viewed the preservation of human life as consistent with attempting to achieve the end of good. He distinguished, however, between the lawfulness of killing a sinner, and the lawfulness of killing an innocent.[93] It was his view that killing sinners is acceptable because it is beneficial to society, whereas it is never acceptable to kill an innocent.[94] Because of his influence, these views would be passed on to future Christian legal scholars and incorporated into the law in various forms.

For Blackstone as well, it was a violation to do harm to another person.[95] Further, he believed that it was impossible to commit the act of murder without violating natural law.[96] This prohibition on murder, based on God's law, was considered universal. But while both Aquinas and Blackstone strongly believed that the natural law forbade murder, it is also true that non-westerners may not adhere to such a belief.

Feasting with the Akaramas

In 1955, Fulbright fellowship recipient Tobias Schneebaum traveled to Peru.[97] Towards the end of his time there, he heard about the Akaramas tribe and determined to visit them.[98] The Akaramas, a pseudonym Schneebaum uses for a tribe known as the Harakmbut, live in the Madre de Dios region of Peru, near the border with Brazil, and it took several days of traveling through jungle to reach them.[99]

During his time with the Akaramas, Schneebaum would accompany his hosts on hunting trips in to the heart of the jungle. During one such trip, his life changed forever. He describes in detail how, upon arriving near a village the hunting party of twenty-three men engaged in a spiritual ritual to prepare themselves for action.[100] They then proceeded to break off into two groups and descended upon the village where "arrows in front of my eyes were used as spears, and axes split into skulls."[101] Schneebaum, describes in detail the activities that followed this slaughter: ritual song and dance, the cooking of human flesh, and finally the author and several of his hosts eat the heart of one of their victims.[102]

93 Aquinas, *supra* note 26, at 168.
94 *Id*.
95 1 WILLIAM BLACKSTONE, COMMENTARIES *38–63.
96 4 WILLIAM BLACKSTONE, COMMENTARIES *176.
97 *See* TOBIAS SCHNEEBAUM, KEEP THE RIVER ON YOUR RIGHT (1969).
98 *Id*. at 3–15.
99 *Id*. at 64–65.
100 *Id*. at 101-02.
101 *Id*. at 103.
102 *Id*. at 104-107.

What can we make of this? It is, of course, appalling to think of engaging in such activities in our society. These actions would constitute murder at the very least and would be widely condemned as evil. For the Akaramas however, it appears to be an almost, if not completely, spiritual undertaking. At the time, they had little idea of the Western concept of God, and therefore little idea of the Western concept of natural law.

Furthermore, can we condemn their actions as being not in accordance with the natural law? Their actions have spiritual significance, no less valid than any other act of worship. Similarly, they live as a society in a small group, in a region of dense jungle. They are not dependent on trade and social relations in the same way that Western culture has been. For that reason, it ought not seem surprising that their values, traditions, and acts of faith may differ from those of us in a Western tradition.

Analysis

It is easy to say that in the United States our laws regarding murder are just, as well as in accordance with natural law. Not only do we prohibit murder, in many states it is an act punishable by death. We do this because our society believes, in large part due to having a Eurocentric, Judeo-Christian values system, that to murder others is a vile act.

The Akaramas, however, have a different values system. For them, there is a spiritual significance in the killing and consuming of others outside of their social group. We may find these actions reprehensible because they offend our values but does that mean that the Akaramas values are inferior to ours? Can we say that they have chosen to ignore the natural law, or that perhaps the natural law has not been revealed to them? These questions are difficult to answer because they require moral judgments and not fact-based judgments. More importantly, these questions raise the issue of whether natural law tends to exclude the values of other cultures.

B. Property Rights

Right to Own Property

The right to own property is, along with the rights to life and liberty, a fundamental principle of the American ideology. It is a particular darling of conservatives and libertarians, and remains a fiercely defended idea. Similar to the prohibition on murder, it has its origins in natural law.

Aquinas believed property to be what he considered an external good.[103] Further, he believed that God had granted humans dominion over external things.[104] Because of this, human possession of property is in accordance with nature.[105] From this we can extrapolate that ownership of property is in accordance with natural law because it is in man's nature to exercise dominion over external things.

Blackstone as well believed that the ownership of property has its origin in natural law.[106] He went so far as to declare that ownership of property is "the third absolute right, inherent in every Englishmen."[107] As one of these inherent rights it was "sacred and inviolable."[108] Along with John Locke, this view of private property has led to the nearly sacrosanct nature of private property in American society. As is often the case, what is so valuable to one culture may not be as valuable to another.

Standing Rock Reservation

The longest running conflict in American history may well be the conflict between the United States government and the various Native American tribes. As the government pursued the idea of Manifest Destiny, it waged a violent campaign against the tribes, seizing their property to give to white homesteaders and eventually settling many of the survivors on small reservations which were often placed in inhospitable locales. One of those reservations is the Standing Rock Reservation.

Standing Rock Reservation occupies parts of North Dakota and South Dakota and is home to several tribes of Lakota and Dakota Sioux. The Missouri River flows nearby providing drinking water to the reservation. In close proximity are sacred tribal burial grounds.

In the last few years the intended construction of the Dakota Access Pipeline through the Standing Rock Reservation has become an issue of national concern. Originally the pipeline was planned to cross the Missouri River just north of Bismarck, North Dakota.[109] Plans were changed, however, when complaints were made that the pipeline would threaten the main water supply of Bismarck.[110] Instead the pipeline was rerouted to a location near Standing Rock, where it instead threatens the

103 Aquinas, *supra* note 26 at 131.
104 *Id*.
105 *Id*.
106 2 WILLIAM BLACKSTONE, COMMENTARIES *1.
107 *Id*. at *138.
108 *Id*. at *140.
109 Bill McKibben, *Why Dakota is the New Keystone*, N.Y. TIMES (Oct. 28, 2016), https://www.nytimes.com/2016/10/29/opinion/why-dakota-is-the-new-keystone.html.
110 *Id*.

reservation's only water source as well was the burial grounds held sacred by the Sioux tribes. These sacred burial grounds are tribal land, not land for private ownership and consumption.

Discussion

The right to own property has long been considered one of the fundamental rights of American citizens. Indeed, few things raise the ire of American's more than the idea that their property may be confiscated by the government. It is not surprising then that the government would pay attention to the citizens of Bismarck when they announce their concern that an oil pipeline might contaminate their drinking water or poison their property. But if this is true then it should be equally shocking that the government can could condone the move of such a pipeline to threaten the property of Standing Rock.

If property ownership is rooted in natural law, that is to say that owning property is in accordance with the will of God, how can we account for this baffling stance from the government? Can we really say that the existence of tribal lands is not in accordance with the will of God and therefore not a part of the natural law? Again, these questions raise the issue of whether natural law tends to exclude other cultures or belief systems.

V. IS NATURAL LAW A PUBLIC GOOD?

Having examined the ideological origins of natural law, the ideas and works of Aquinas and Blackstone, and several basic precepts of natural law we return to our fundamental question: is natural law a public good? As stated above, a public good is both non-rivalrous and non-excludable. Aquinas and Blackstone would both argue that the natural law is absolutely a public good, being written on the hearts of men by their creator. As it turns out, this may not be the case. Charles Pierce, the founder of Pragmatism, once wrote that "consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."[111] With that in mind, in order to determine whether natural law is a public good requires a look at the practical applications and consequences of laws consistent with natural law theories rather than just analyzing the ideas represented by those laws.

[111] Charles Sanders Pierce, PHILOSPHICAL WRITINGS OF PIERCE 31 (Dover 1955).

A. Non-Excludability

First, in order for something to be considered a public good, that good must be non-excludable. Non-excludability means the inability to keep non-payers from obtaining benefits from a certain good.[112] This is particularly true in the case of free-riders, for example a lighthouse may exist in order to help ships find their way to a particular port and is supported by port fees. At the same time, it is impossible to exclude any other passing ships from using the lighthouse as a reference point while passing.[113]

With that in mind, can we say that natural law is non-excludable? For this to be so, laws based in natural law would have to apply to all people, not merely those who subscribe to a particular worldview. Surely Aquinas would argue that the natural law exists within us all, having been written on our hearts by God. Blackstone, as well, would have believed that the natural law was applicable to all, regardless of their status or origin.

It is hard to argue that laws prohibiting murder exclude certain members of society from receiving their benefits. For example, if Bob from Cincinnati Ohio goes to Miami, Florida for a convention and is shot and killed during a robbery, the fact that he does not pay local taxes which support the police does not result in the decision not to find and prosecute his killer. This is unsurprising to most people, and few would argue that as a non-local Bob's death should not be investigated. But if the prohibition on murder is non-excludable it must apply to all people, so the question we must answer is: is the prohibition of murder applied equally?

The Southern Poverty Law Center (SPLC) regularly publishes a report on hate crimes in the United States and in 2012 it reported on the murder of several undocumented immigrants who were shot shortly after crossing the border into Arizona.[114] On April 8, 2012 a truck carrying undocumented immigrants was allegedly fired upon by what was described as a group of "four white men wearing camouflage" and two people were killed.[115] The murders were similar to the 2007 murders of four undocumented immigrants as well.[116] The SPLC report suggests that many members of law enforcement believe the killings may have been

112 McConnell & Brue, *supra* note 6 at G13.

113 See Ronald Coase, *The Lighthouse in Economics*, 17 J. L & ECON. 357 (1974).

114 Ryan Lentz, *Investigating Deaths of Undocumented Immigrants on the Border*, SPLC (Aug. 26, 2012), https://www.splcenter.org/fighting-hate/intelligence-report/2012/investigating-deaths-undocumented-immigrants-border.

115 *Id*.

116 *Id*.

the work of vigilantes.[117] At the same time the Border Patrol has opted to blame the weather and human smugglers for the majority of deaths in the Tucson area.[118] This region of Arizona saw an average of 207 deaths per year between 2004 and 2014.[119]

Consider as well the alarming escalation of gun violence in Chicago, which boasts one of the largest police forces in the country, while simultaneously owning one of the nation's worst murder clearance rates.[120] In 1991, Chicago police cleared about 80 percent of homicides, a rate which fell to just 26 percent by 2015.[121] The police blame this drop in clearance in part on a "no snitch" street code; in essence passing responsibility for their dismal performance on to the community.[122] This attitude is partly responsible for the fact that some of the communities seeing the highest drop in homicide clearances are predominantly black neighborhoods such as West Englewood.[123]

Even more troubling is the apparent selectivity of the police in pursuing certain cases. For example, a 2016 Washington Post article recounts the story of William Tristen Palmer, who was murdered in West Englewood. Members of the community were quick to identify a possible suspect, and the lead detective was actively following up every lead until she was reassigned.[124] At the time the article was published the murder was still unsolved.[125] By way of comparison, after Nykea Aldridge, cousin of NBA superstar Dwyane Wade, was gunned down while pushing a stroller, the police had two suspects in custody within two days.[126]

Clearly the situations in Arizona and Chicago are troubling for a host of moral reasons, but are they evidence that natural law fails at non-excludability? Looking at Arizona, one might argue that as undocumented immigrants the laws of Arizona do not apply since they are neither citizens nor tax payers. But were this the case then visitors like Bob from Cincinnati in our above hypothetical, as well as foreign tourists,

117 *Id*.

118 Rory Carroll, US Border Patrol Uses Desert as 'Weapon' to Kill Thousands of Migrants, Report Says, THE GUARDIAN (Dec. 7, 2016) https://www.theguardian.com/us-news/2016/dec/07/report-us-border-patrol-desert-weapon-immigrants-mexico.

119 Ryan Van Velzer, Arizona's Border Deaths Remain Highest in U.S., THE REPUBLIC (Aug. 8, 2014), https://www.azcentral.com/story/news/local/arizona/2014/08/08/arizona-undocumented-border-deaths-highest-in-the-country/13738253/.

120 Kimbriell Kelly et al, *As Killings Surge, Chicago Police Solve Fewer Homicides*, WASH. POST (Nov. 5, 2016), https://www.washingtonpost.com/investigations/as-killings-surge-chicago-police-solve-fewer-homicides/2016/11/05/55e5af84-8c0d-11e6-875e-2c1bfe943b66_story.html.

121 *Id*.

122 *Id*.

123 *Id*.

124 *Id*.

125 *Id*.

126 *Id*.

would travel at their peril. In the Chicago example, we see that even tax payers (in economic terms, we mean people who are paying for the service provided by law enforcement) are being excluded from protection via the prohibition on murder. Because our argument is based on the premise that the only way to grasp, and thus evaluate, a conception (i.e. that natural law is a public good) is based on the practical consequence consequences of that conception, we can only conclude that laws prohibiting murder may be facially applicable to everyone but in reality they exclude those who society has deemed undesirable.

But what about the right to ownership of real property? Our legal system grants the right to own real property, yet the benefits of laws protecting these rights are intentionally withheld from non-payers. For example, failure to pay taxes on real property may result in a lien on the property, or, in some circumstances, weaken the title holders defense to a challenge for adverse possession. We can justifiably say then, that excludability is intentionally built into the system of real property ownership.

B. Non-Rivalry

Along with non-excludability, in order for something to be considered a public good, that good must be non-rivalrous. Non-rivalry means that one person's benefit from a certain good does not reduce the benefit available to others.[127] So what does that mean for natural law?

Considering first laws prohibiting murder, we must consider the practical consequences of those laws. One of the realities on the prohibition of any activity, be it murder or theft or securities fraud, is that there are limited resources that can be allocated to enforcing that prohibition. In terms of a prohibition on murder this necessarily means that some murders will receive more attention than others. Looking to our Chicago example, we can see that in certain high-profile cases, manpower is allocated in a manner that results in quick results, while in less high-profile cases, such as the murder of William Tristen Palmer, resources may be stripped away even when the case is close to resolution.[128]

Some may argue that even though police resources are limited, the law still prohibits murder and that prohibition protects everyone equally. But that is not so, because, as previously stated, the practical consequences of laws are the only effective way to evaluate them. Allocating resources away from certain murders, for any reason, gives more access to the benefits of a prohibition on murder to some people,

[127] McConnell & Brue, *supra* note 6 at G13.
[128] Kelly et al., *supra* note 120.

and reduces those benefits to others. This ineluctable truth does not diminish the intent behind laws prohibiting murder, but practice, not intent, is the metric by which we are determining whether natural law is a public good.

Turning to real property, we can ask the same question: is it non-rivalrous? The answer here is relatively simple. Private ownership of real property by its very nature extinguishes rivalry for the property's use. The owner may decide to assign or sell rights to certain aspects of the property as they see fit, yet they retain the option of deciding to whom they will grant those rights.[129] Additionally, owners of real property have the ability to exclude others from their property as they see fit, so long as their reasoning does not violate any laws.

Although private ownership of real property excludes rivalry for individual parcels of real property, we cannot safely answer that the right to private ownership of real property is rivalrous. Exercising the right to private ownership of property does not, in practice, bar others from the right to own real property, although affordable real property may not be available in a given locale. However, non-rivalry alone does not raise laws protecting private property ownership to level of a public good.

C. Natural Law as a Eurocentric Concept: A Brief Criticism

Why does it matter whether or not natural law is a public good? Natural law ties in closely with morality and spiritual ideology. As we've seen, natural law principles have historically been articulated and developed most clearly by Christian theologians and legal scholars. There is nothing wrong with the ideas presented by these writers, but the implication of their ideas in a practical sense ought to raise some eyebrows.

Professor Kenneth Nunn has argued that law is a Eurocentric social construct which favors white ideologies.[130] Because of this "what has come to be known as 'the law' in Western societies is really a particular social construction that exhibits cultural attributes peculiar to European and European-derived societies."[131] Through this Eurocentric perspective the law determines which cultural practices are acceptable, and which cultural practices are beyond the bounds of propriety.[132]

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129 This assumes fee simple ownership and substantial or complete ownership over the attendant "bundle of rights" that come with real property.

130 See Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997).

131 *Id*. at 345-25.

132 *Id*. at 356. As Joseph Gussfield writes "[a]ffirmation through law and government acts expresses the public worth of one subculture's norms relative to those of others, demonstrating which cultures have legitimacy and public domination." Joseph Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviancy*, 56 CAL. L. REV. 54, 58 (1968).

Although modern natural law theory has ostensibly shed the notion of divine origins and instead "consists of those norms that are necessary to regulate the 'instincts and desires of human nature,'"[133] this language is similar to that used by Aquinas to describe natural law. As Professor Nunn has argued, law decides which cultural norms ought to be followed, and laws based on natural law ideology create a society based on Judeo-Christian cultural norms. Because of this, laws favor private ownership of real property, despite the fact that non-Western methods of dividing real property for use may be equally efficient.[134] This may be the reason that it was possible for the Dakota Access Pipeline to be moved from threatening the drinking water of the property owners of Bismarck, ND to instead threaten the resources of the Standing Rock Reservation.

Because natural law is really just an iteration of Professor Nunn's Eurocentric law, those laws based on or justified through a reference to natural law serve merely to say that the rights of the dominant social culture are superior to those of other cultures. For this reason, an oil pipeline threatening a predominantly white community can be rerouted through a poverty-stricken reservation or a homicide detective can be reassigned despite being on the verge of closing a case. This does not mean that there is no place for prohibitions on murder or the existence of private ownership of property, quite the opposite in fact, yet it does mean that there ought to be a better justification than natural law.

D. An Economic Explanation for Natural Law Precepts

We have only considered two precepts of natural law, but several others exist. If, however, a whole is the sum of its parts, then the fact that the two precepts we have discussed are not public goods means that natural law itself is not a public good. The fact that natural law is not a public good does not mean that these precepts are not valuable to our society, indeed their inclusion into positive law has been essential to the growth and success of society.

Positive laws serve the function of regulating social and economic activity within a community. This is done by assigning a price to those behaviors that society wants to either limit or encourage. For example, law regulates murder by assigning strict punishments for those who choose to engage in it. The price to commit a murder is either life in prison or, in some places, the death penalty. The high price society has placed on murder acts as a deterrent to those who consider death or life

133 Nunn, supra note 130 at 340, citing Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 435 (1987).

134 *See, e.g.*, ELINOR OSTROM, GOVERNING THE COMMONS (1990).

in prison too high a price.

But why place such a high price on murder? Simply put, society would struggle if it were lawful for individuals to kill other members of society with impunity. Crimes are not committed against individuals, but rather against society, though the direct victims are often individuals. Allowing murder to go unpunished would injure society because people could simply kill and take as they wish, which would in turn discourage people from making things of value; similarly, it would allow blood feuds to render neighborhoods unsafe for people who were unfortunate enough to live and work in the vicinity. Such a scenario is not conducive to a successful society.

The right to own private property however, is different. Private ownership of property is conducive to the growth and success of a society. There is a constantly expanding body of literature addressing private property rights and the argument in favor is a familiar one: private property facilitates the most efficient use of resources.[135] Put another way:

Whether a newly discovered cave belongs to the man who discovered it, the man on whose land the entrance to the cave is located, or the man who owns the surface under which the cave is situated is no doubt dependent on the law on property. But the law merely determines the person with whom it is necessary to make a contract to obtain the use of a cave. Whether the cave is used for storing bank records, as a natural gas reservoir, or for growing mushrooms depends, not on the law of property, but on whether the bank, the natural gas corporation, or the mushroom concern will pay the most in order to be able to use the cave.[136]

This argument ought to sound familiar to those acquainted with the Coase Theorem.[137] In practical application this argument is sound. Where natural law favors the dominant social culture, this economic justification allows parties to deal as equals in order to reach mutually beneficial agreements.

VI. CONCLUSION

As a source of law, natural law is Eurocentric and intolerant. It places the values of the dominant European-derived culture and morality above those of other cultures who may be present in society. In practice this means that laws which are ostensibly universal in scope tend to actually be applied in favor of members of the dominant culture group,

135 *See generally* R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1980).
136 R. H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 25 (1959)
137 *See* Coase, *supra* note 113.

to the detriment of minorities. Because of this, as a practical matter natural law cannot fairly be described as a common good.

The reason this matters is because our legal system is based on a foundational idea of "equal and impartial justice under the law."[138] When we make laws based on the cultural values of only part of a society, we set the value of that culture above all others. That is how it is possible for local police departments to allocate resources away from solving the murder of an African American on the south side of Chicago despite the fact there is a suspect and abundant evidence, or direct a dangerous oil pipeline towards tribal lands and away from a city.

If we desire laws to be equally applicable in practice as well as theory they must be based on the needs of society. When we use socio-economic justifications rather than moral or cultural justifications, it becomes more difficult to favor members of the dominant social culture over those minorities with different cultural values. When we say murder is wrong because it damages society as a whole, it becomes harder to justify the hundreds of unsolved murders in Chicago or the killings of undocumented immigrants. Natural law can do none of these things and so we can justifiably say that not only is it not a public good, it is also not a good justification for law.

138 Caldwell v. Texas, 137 U.S. 692, 697 (1891).