THE POSSIBILITY OF RELIGIOUS FREEDOM: NATURAL LAW IN ANCIENT GREEK, MEDIEVAL MUSLIM, AND EARLY CHRISTIAN SOURCES

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THE POSSIBILITY OF RELIGIOUS FREEDOM: NATURAL LAW IN PAGAN, MUSLIM
AND CHRISTIAN SOURCES

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ABSTRACT

This dissertation examines whether and how theories of unwritten and natural law can provide a better basis for religious freedom than prevailing concepts. I argue first that the fundamental problem of religious freedom is the perennial conflict of human and divine law. I then present theories of unwritten and natural law, including those present in Sophocles’ Antigone, Ibn Rushd’s Middle Commentary on Aristotle’s Rhetoric, and Tertullian’s various writings, arguing that expanding our notion of law to incorporate such theories can mediate the human and divine law and provide a rich foundation for religious liberty, even in modernity’s pluralism.
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Soli Deo Gloria.

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Introduction

This dissertation makes two claims: first, that religious freedom is a uniquely difficult human right to uphold because it requires the arbitration of two sets of law and obligation, human and divine. Secondly, it claims that expanding our conception of ‘law’ to incorporate human, divine and natural law provides the best basis for religious freedom, with implications for justice and other human rights more generally. This reinsertion of natural law into the prevailing concept of law provides the best alternative to existing options of confronting the challenges of religious freedom. These are, first, the Hobbesian option of subsuming religion under the law, and secondly, the secular option of removing religion from the reach of the law, as some contemporary theorists of religious freedom would have it. This introductory chapter defends these claims on a broad theoretical basis, setting the stage for the literature review and responses that follow in Chapter 1.

To pre-empt misunderstanding on this score, this is not a dissertation on how to eliminate the tension between religion and law or church and state; were it so, the Hobbesian option would be viable, however undesirable. Nor is it a defense of the value of religious liberty. I take for granted both the ineradicability of the tension between religion and law/politics as well as the desirability of some form of freedom of religious practice. Rather, this dissertation explains how and why religious freedom is increasingly complicated in late modernity, and what theoretical bases exist that are capable of underwriting a robust concept of religious liberty in the twenty-first century.
As a final prefatory remark, I borrow the descriptor “late-modern” from Stephen K. White. White describes our era as one in which neither the comforts of moral foundations that modernity originally offered, nor the “unmitigated liberation from modern commitments” that postmodernism promises, are tenable as theoretical and ethical starting points. Rather, he offers what he terms a “late-modern ethos,” which he describes as follows:

An individual with such an ethos will take seriously many of the insights that animate postmodernists; but whichever of these insights she is moved to embrace, she also knows they do not offer any truth that is capable of automatically trumping the foundationalist’s convictions. Alternatively, my late-modern individual might be committed to some variant of theism; but if she is, she must also admit that there can be other ways of spiritually animating one’s life that cannot summarily be dismissed as nihilistic.

In other words, we live in an age that is skeptical of modernity’s confident rationalism yet resists the postmodernist rejection of discernible truth wholesale. It is within such a framework that this project is situated. Modernity’s claims to eradicate the tension between knowledge and faith by subsuming all knowledge under the umbrella of science (whether social or natural), which is also fundamentally the Hobbesian approach, has been tested and found wanting. (I discuss these points in ensuing chapters.) At the same time, it is false to claim that postmodernism is the only alternative to a strong modern rationalism; knowledge, even truth, is still ascertainable.

The relative certainty that modernity and its concomitant rationalism purported to offer is, I suggest, paralleled by a sole reliance on either divine law or human law. Either approach purports to remove ambiguity from what are usually deeply complex and often quite oblique moral questions. This sort of moral certainty is typically neither epistemologically or politically

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1 Stephen K. White, *The Ethos of a Late-Modern Citizen* (Cambridge, MA: Harvard University Press, 2009), 3. Charles Taylor describes late modernity in strikingly similar terms as White. For Taylor, the late modern era is one in which faith, even for the staunchest believer, is one human possibility among others. I may find it inconceivable that I would abandon my faith, but there are others, including possibly some very close to me, whose way of living I cannot in all honesty just dismiss as depraved, or blind, or unworthy, who have no faith (at least not in God, or the transcendent). Belief in God is no longer axiomatic. There are alternatives. (Charles Taylor, *A Secular Age* [Cambridge, MA: Harvard University Press, 2007], 3)
tenable in our late-modern era. A return to natural law, which lies somewhere between the
heaven of divine law and the earth of human law, is perhaps not only our best but our only option
for retaining some of the comfort, the structure and the guidance of law in an era in which
certainty is elusive but unbounded freedom is frightening.

I. Religious Freedom: A Perennial Challenge

In recent years, much ink has been spilled over the difficulties of protecting religious
freedom. Winnifred Sullivan has declared the task “impossible” because human law cannot
comprehend the experiential nuances of religion.² Brian Leiter similarly finds the protection of
religion troublesome; he joins a growing cohort of theorists calling for the removal of “religious
freedom” in favor of the purportedly neutral “freedom of conscience.”³ Martha Nussbaum has
suggested avoiding the controversies of religion by shifting our eyes from the import of religion
to the necessity of equality as the basis for liberty of conscience.⁴

Each of these authors, however, sidesteps rather than confronts the heart of the problem
of religious freedom. By its nature, the problem of religious freedom is not one that can be
solved by an asymptotic increase in either equality or neutrality. In fact, it cannot be solved by
the human law alone, for it is fundamentally a problem of competing realms of obligation and
authority: the realm of human law and the realm of divine law. The resultant tension,
furthermore, is not epiphenomenal; it replicates itself throughout the history of political society.
Pope Gelasius wrote of this tension in his “Two Swords” letter to Emperor Anastasius in the fifth
century CE: “There are two powers, august Emperor, by which this world is chiefly ruled,

⁴ See Nussbaum, Martha C., Liberty of Conscience: In Defense of America’s Tradition of Religious Equality. (New
namely, the sacred authority of the priests and the royal power.”⁵ That is, political power and religious authority are two distinct entities, even as they overlap in jurisdiction (i.e., “this world”). There is no immediate reason to assume that these two authorities will fit harmoniously with each other, for the king (or state) and God are by no means bound to agree on matters. If and when conflict occurs, one is in some way forced to choose between her religion and her political authority—the very scenario a legal right to religious freedom is intended to prevent.

This problem, this nearly inevitable conflict, is thus essential to the very nature of religious freedom itself, rather than an accidental conflict of happenstance. For it is by practicing religion freely that a religious body or person deciphers or imagines the divine law to conflict with the human law in the first place. Taking this logic a step further, we see that religious freedom can undermine itself: if I believe in and act upon a faith that denies the value of religious freedom, by practicing my religion freely I repudiate the very system that gives rise to my political freedom to do so. My obedience to one of the “swords” thus denies the potency of the other.

However much jurisdiction political and divine authorities share, and regardless of the particular political settlement between the two, these two powers are directed at different spheres: the state looks to peace and material well-being in the “City of Man,” to borrow from Augustine,⁶ whereas religion looks to the well-being of the soul and, usually, the hereafter. So the two spheres cannot be collapsed into one entity, regardless of institutional overlap. Even

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⁵ See Pope Gelasius’ letter to Emperor Anastasius, trans. J.H. Robinson, www.fordham.edu/halsall/source/gelasius1.asp. I should clarify that I am not proposing here the political superiority of the sacred authority, as did Pope Gelasius. Rather, I invoke the two swords doctrine merely to illustrate the timeless nature of the tension between religion and state; the letter was written in 494 CE.

⁶ Though this concept corresponds quite neatly to the Augustinian division between the City of God and City of Man, I do not mean to adopt a fully Western or Christian division of God and Caesar here, for such a clear conceptual division exists neither in all cultures nor all religions. Thus I do not need mean to say that they are or always must be such distinct divisions; in fact, to some extent it is the unrestrained quest to divide the two spheres that stands at the core of the problem I identify. Rather, I mean to point out that the moral and practical justificatory bases for human law and divine law are distinct, and at least sometimes, conflicting.
when political and religious authorities are embodied in one institution, the divine-human authority tension persists. For instance, the medieval Christian Church and state, thought often to be fused, represented discreet, though overlapping, authorities. According to Russell Hittinger, the king represented Christ’s rule on earth—pedes in terra—and the religious authority represented Christ’s rule in heaven—caput in caelo. Islam, also thought to collapse the distinction between political and religious power, has nevertheless always permitted and regulated the presence of religious minorities within its political boundaries, introducing the same challenge of competing religious and political authorities. Modern Islamic states affirm secular constitutions that endorse international law, yet mix human law with shari’a, creating potentially conflicting bases of authority. The result is that one is neither fully free to obey religion, for she is constrained by political society, nor is she fully free to obey the state in all matters. Simply put, conscience and religion sometimes bind the citizen in manners contradictory to human law.

Though this is a perennial phenomenon, the resultant challenge to religious freedom is especially acute in the late modern era because of its emphasis on democracy and human rights, as well as increasing pluralism and globalization, which I discuss below (see “Democratic Complications, Democratic Solutions,” p.11). Liberal democracy requires the protection of human rights, including the right of the citizen to choose and practice her faith freely. Without a doubt, these are laudable aspirations worth our best efforts at advancing. But if religion sets up a competing moral authority to political authority, then it is naïve to believe that religious liberty is an unproblematic freedom. For if, as mentioned above, one is free to choose her religion, then

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8 That is, in that the state, however much it overlapped with the Muslim religion, only claimed political, not religious, jurisdiction over the ahl al-dhimma, or protected religious minorities.
she is free to choose a religion the tenets of which contradict the governing political authority, or
even which undermine the very liberal democracy and human rights that gave rise to this
freedom in the first place. Liberalism and democracy themselves, then, cannot resolve the
tension. In this light, the conflict between human and divine authority is a radical one, and we are
tempted to conclude with Sullivan that religious freedom is indeed impossible.

A) Epistemological Divergence: Hobbes and Higher Knowledge

These competing human and divine authorities are different all the way down, building
on knowledge obtained in different manners. The “sword” of divine authority, which Pope
Gelasius believed himself to hold, claims knowledge that is based ultimately not on empirical
observation but on revelation, faith and tradition. It is concerned both with this world as well as
the hereafter. The sword of political power, on the other hand, is based on sensory, empirical
knowledge. This sword is concerned with the safety and wellbeing of citizens in this world. It
may or may not take a stand on moral or religious matters, but if it does so, it is not for the
metaphysical wellbeing of their souls in the afterlife but for temporal peace, stability and other
political, this-worldly goals.

Hobbes famously dealt with the problem of the two swords in Leviathan by subsuming
religion under the power of the state—i.e., by effectively denying one sword its might. His
religion-state schema is effectively its own political theory that would require volumes to address
with any level of completeness. For present purposes I focus on his epistemic commitments at
the opening of Leviathan: Chapter 1 of Part I is entitled “Of Sense” and discusses the purportedly
empirical nature of all knowledge. By claiming that all thoughts originate in sensory perceptions
of external objects, Hobbes discarded the age-old Aristotelian notion regarding knowledge,
namely, that what one senses or understands is but an aspect of a larger whole object, which
contains also unseen, unheard, unintelligible aspects. This empirical epistemology forms the basis of the state’s justification for power. Part III, on the other hand, entitled “Of a Christian Commonwealth,” begins by stating that the “Word of God delivered by Prophets is the main principle of Christian Politics.” Knowledge concerning God and Christianity, far from having a basis in empirical knowledge or sensory perception, is revealed directly to us through the prophets, according to Hobbes. Such knowledge relies on faith that the Word of God is indeed from God, not to mention an existing faith that God exists and that His prophets are indeed sent by Him. Religious knowledge, then, is different from all other forms of knowledge, and the difference is a radical one.

Hobbes recognized that this epistemological divergence is the core problem of church and state; that is, one ‘sword’ is based on empirical knowledge and the other on divine revelation. But for political authority to function effectively, to Hobbes, one power must be subsumed by the other—in his case, church by state. He thus solved the problem of competing human and divine authorities in a wholly illiberal way by eschewing the freedom of citizens to choose and practice religion freely, or even to acknowledge a competing moral authority to that of the state. Transforming all knowledge into empirical knowledge, he at once undermined the church’s voice in the public sphere and made necessary an all-powerful Leviathan in order to tame religion’s potentially disruptive authority among the citizens.

B) The Dilemma of Religious Freedom

Hobbes’ approach does more or less resolve the tension between church and state that lies at the heart of challenges to religious freedom; indeed, it all but eliminates this tension by

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10 Hobbes, *Leviathan*, 245, quoting the marginal summary of section 1, chapter xxxii, part III.
collapsing the competing authorities into one all-powerful state. It does not, however, solve the problem of religious freedom, for it discards a fundamental aspect of religious freedom—that of choosing and practicing one’s religion—in favor of stability and security. What Hobbes contributes to the present discussion is thus not a solution to our dilemma; rather, he demonstrates the reason why religious freedom is a perennial problem. In short, free exercise of religion requires that the spheres of human and divine law be kept distinct to some degree, each retaining its proper authority, but as Hobbes observed, society does not easily accept competing realms of authority. If religion is left as a free and autonomous power, it invariably poses a threat to the authority of the state; this is why his Leviathan had to subsume the Church of England. Alternatively, if the state is given ultimate power over religion, as with the Leviathan, it stands as a constant, even if subtle, threat to religious freedom. The dilemma thus becomes clear: either the state/human law stands above the church/divine law, which makes religious freedom precarious at best, or religious freedom is guaranteed but citizens recognize competing authorities as sovereign—some the state, some this religion, some that, some none at all.

Of course, both horns of this dilemma are undesirable. Just as the Hobbesian option buys political order at the price of religious freedom, the other horn, that of placing religion outside of the reach of human law, opts for religious freedom at the price of political order. In other words, to set religion outside of the reach of human law—or even above it—creates a separate system of obligation or law, and this undermines the rule of human law and thereby democracy itself. Yet to place religion and divine law under human law is to deny the very premise of religion, viz., that there is something higher than the temporal realm to which we owe allegiance. Still, one cannot serve two masters; one law must be the higher law.

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11 Numerous contemporary examples in Islam come to mind as well; Egypt’s relationship with Al-Azhar, one of the most influential Islamic institution in the world, as well as Saudi Arabia’s exported religious curriculum and Qatar’s state-sponsored mosques, are but a few.
The formal settlement to this dilemma in the modern West has favored human law; it places religious liberty in the hands of state-appointed judges and thus concedes the higher jurisdiction of human law as it concerns human behavior (i.e., the free exercise of religion). As I discuss at length in the following chapter, Sullivan takes issue with this settlement in an important way. Her primary critique is that it eventually requires judges to “theologize from the bench,” to borrow loosely from her terms; i.e., judges are required at some level to determine what constitutes acceptable and religious practice, which is a diluted—albeit often strongly diluted—form of the Hobbesian settlement. My own evaluation of the Western settlement is less pessimistic than Sullivan’s, but as I explain below, late modernity’s combined impulses of pluralism and globalization makes it less tenable than it might have been in the past.

Some theorists have responded to the dilemma of religious freedom by proposing to discard religious freedom altogether. Speech and assembly should be protected, some argue, but not religion qua religion. This receives greater attention in the following chapter, but the most critical objection is that religion cannot be reduced to mere speech, assembly or even conscience; it is and always has entailed both communal and metaphysical aspects that these lack. In the end, then, this purported solution only pushes the problem one step back—it exalts human law, indeed, all of human affairs, over the divine and religious realm, and ends as a modern mutation of the Leviathan’s authority over religion.

Though less popular, there are those today who would prefer to exalt divine law over human law. This is or has been a common settlement in contemporary Islamic societies, as well as historically in the West. Many if not most Islamic countries enshrine shari’ a in their constitutions, though the extent to which it is followed in practice is debatable. Still, with increased scrutiny on religion in international affairs, there are those who call for a heightened

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12 See especially Leiter, *Why Tolerate Religion?*, discussed at length in the following chapter.
role of religion and divine law in relation to human law. In the (regrettably named) *The Fall and Rise of the Islamic State*, Noah Feldman writes of a hypothetical return to shari'a-based Islamic societies that would place divine law as their highest authority. These societies would nevertheless be democratic, which he sees as feasible so long as shari'a is interpreted by a truly independent body of scholars who would serve as a check on political power. Feldman is echoing the aspirations of many Muslims throughout the world, but in a parallel sense, also of those Christians who long to ensconce the Ten Commandments in human law or in other ways find legal expression for their belief that the divine law is the higher law and ought to be recognized in political society as such.¹³

As it concerns religious freedom, the problems posed by tipping the scales in favor of divine law are not quite so obvious as they may seem. While common worries of, say, intolerance toward religious minorities or radical interpretations of religious law are by no means unfounded, there is no immediate reason why a society that favors divine over human law must be any less just than its converse. Presumably, the content and interpretation of either kind of law will have more to say on this score than will the particular arrangement, for both human and divine laws can either tyrannize or promote freedom. The problem, rather, is that this approach effectively collapses human and divine law, in a way that its secular counterpart—i.e., human law over divine law—does not. For human law is open to human crafting, rewriting, adapting and nullification. It is always able, at least in theory, to take divine law into account if those crafting the human law so decide. Divine law, on the other hand, does not take human law into account. Though it is interpreted and reinterpreted by humans, once divine law is revealed,

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nullification or amendment is impossible by human initiative. Thus, if superior, the divine law’s superiority is absolute.\textsuperscript{14}

In this sense, then, prioritizing divine over human law does necessarily pose a threat to religious freedom, not to mention democratic society more generally. The notion of religious freedom is a human one, laudably sought after as a fundamental human right but by no means guaranteed in all religions or divine laws. If divine law is exalted as the higher law, and if that divine law restricts the freedom of religion—or other freedoms—there is no other legal recourse. This is a crucial point, and to some extent it is Hobbes’ point: one cannot serve both God and state equally. If human law is higher, religion is not free to be religion. If divine law is higher, we have no immediate reason to believe that religious freedom will be granted to all.

\textbf{II. Democratic Solutions, Democratic Complications}

The rejoinder to this rather pessimistic analysis is that religious freedom lies somewhere between the extremes of either human or divine law as the supreme law. The state is neither wholly free to coopt religion or deny its sphere of authority, but neither is religion, nor the religious person, wholly unaccountable to political authority. On such premises has American religious freedom been adjudicated, and not without success. Whether through the “compelling interest” test\textsuperscript{15} or the “generally applicable law” standard,\textsuperscript{16} judges have found fairly reliable

\textsuperscript{14} William Galston has articulated a parallel distinction to what I have portrayed as that between the operative modes of human and divine law. His concerns secular versus religious reasons in the public square: “While the gap between faith and reason is not as wide as many assume, revelation presumes an experience potentially available to all, but not actually received by all. By contrast, secular moral doctrines rest their claims on shared experience and uncontroversial canons of reasoning. Debates among (say) utilitarians, Kantians, perfectionists, particularists, and pluralists are conducted on common ground and are potentially resolvable in a way that disagreements between Christians and Jews are not.” William Galston, \textit{Liberal Pluralism} (Cambridge, UK: Cambridge University Press, 2002), 45.


ways to discern what can and cannot count as protected religious practice in the United States. The current two-tiered test of whether a state restriction on religion both pursues a legitimate government interest and uses the least restrictive means to do so is indeed a promising one, and there is no reason to assume that other polities might not have their own similar paths.

This legal approach is a feasible, even perhaps admirable, one, and that a high level of religious freedom has endured in America’s increasingly pluralized society testifies to its flexibility and practicality. I wonder, however, how long such an approach can endure as both pluralism and globalization increase. Humans, by nature political animals, require the cooperation of fellow citizens; cooperation, in its turn, needs some set of shared values. But as Plato pointed out, as democracies move toward greater and greater levels of freedom and equality, they tend to increase in what we might today refer to as moral pluralism, including religious pluralism. Speaking of the citizens of a democratic regime, Socrates asked, “In the first place, then, aren’t they free? And isn’t the city full of freedom and free speech? And isn’t there license in it to do whatever one wants?…It is probably the fairest of the regimes…just like a many-colored cloak decorated in all hues…” (Rep. 557bc). The democratic urge to throw off the strictures of what were once shared moral codes is readily observable in our own era, for these moral codes are part and parcel of “the experience of limitation, which the delinked man of the democratic age feverishly desires to overcome, in religion and in everything else.” This is not always a bad impulse; throwing off the moral code that upheld slavery and then segregation, to give but one example, is a deeply humanizing move. But the urge for increased freedom does not always distinguish between those mores that have preserved a society and those that have

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corroded it or done violence to it, and as shared moral codes break down in the name of freedom—or sometimes, in Plato’s terms, “license…to do whatever one wants”—the cooperation that upheld a democracy becomes increasingly difficult.

This democratic impulse is today held in tandem with a globalizing impulse, in which the values of the world’s societies—again, including and as influenced by religion—are no longer the province of distant peoples alone. Thanks to commerce, technology, international political institutions and a new era of war and security crises, the business of one nation becomes the business of many nations. The combined result of these two impulses, the democratizing one and the globalizing one, is both a smaller set of shared mores and a larger set of issues requiring cooperation. Thus, while modernity pays lip service to exactly the kind of pluralism Plato described, we simultaneously see a need for social conformity, both to hold ourselves together as intact nations and to set limits on an increasingly intrusive world.

The effect on religious freedom of these democratizing and globalizing trends is substantial. Because of the need for increased cooperation—or even the need to replace the lost cooperation that used to feed on mores no longer shared by its citizens—the state increases in size and power to effect the required cooperation. Religious freedom thus faces challenges hitherto unknown: a greater need for more cooperation among more people with more varied values and religions governed by more powerful states with an ever-increasing ability to regulate the lives and choices of citizens. It is worth recalling that after the democratic regime, Plato believed, came a tyrannical regime: “And they [i.e., democratic citizens] end up, as you well know, by paying no attention to the laws, written or unwritten, in order that they may avoid having any master at all….this is the beginning, so fair and heady, from which tyranny in my opinion naturally grows” (563de). To Plato, the greed for ever-increasing freedom that he

19 This is, in essence, Alexis de Tocqueville’s prediction for democratic societies in *Democracy in America*. 
believed to be endemic to democracy ultimately destroys the very freedom that is essential to its maintenance (562bc), because citizens lose the ability to rule themselves (562e-563b). Into this vacuum, then, “the people…set up some one man as their special leader and…foster him and make him grow great” (565c).

Plato’s warning illustrates my concern for the endurance of a strictly human legal approach to religious freedom. For even as the variety and pluralism of a democracy appear for a time as nothing but “the fairest of regimes,” at the same time the shared religious, cultural and jurisdictional parameters that may have existed prior to increased pluralism dissolve. With fewer shared unwritten laws—i.e., mores and religious or cultural beliefs and practices—the human law takes on a greater role in effecting social cooperation. With this increase in human law’s role, those who adhere to divine law sense an increased encroachment on their ability to live according to religion or conscience; in other words, the confrontation between human law and divine law grows.

Thus, negotiating religious freedom through the human law alone is actually less likely to endure as democracy continues on its march and pluralization continues. Yet to remove the law from the picture entirely—i.e., reducing our “attention to the laws, written or unwritten”—is to invite tyranny. Notably, this could just as easily be tyranny based in religion as tyranny based

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20 It is plausible that this approach has worked well in American history in part due to both a greater degree of homogeneity, both culturally and religiously, and to a relatively smaller involvement of the federal government in the aspects of everyday life. As the former has decreased and the latter increased, arenas of conflict have proliferated. The recent uproar over the Health and Human Services’ mandated contraceptive coverage is a prime example of this trend.

21 One is tempted to see this scenario play itself out in recent American politics. On the one hand, the rapid acceptance of gay marriage testifies to the increase in accepted ways of life, which Plato predicted in a democracy. On the other hand, social and religious conservatives, most notably the Tea Party, are increasingly resistant to the role of human law in their lives, which they see as inimical to their values, especially religious values. The political stalemates between left and right often even reflect the epistemological divisions between human and divine law; arguments based on observations of the effects of gay marriage (e.g., “it doesn’t harm anyone”) pitted against arguments based on divine revelation (“God says homosexuality is wrong,” etc.).

22 Hittinger expresses this well: “Anyone who sets up an opposition between law and freedom, and then takes the side of freedom, not only underestimates the need for law but also misrepresents the nature of freedom.”
in human law, but as Hobbes knew, at some point, either human or divine law must bow to the other.

**Religious Freedom as a Special Human Right: The Inadequacy of Liberalism**

If democratic regimes are unlikely to provide a basis for maintaining religious liberty, what about liberalism itself, or the liberal human rights regime that has arisen in the past century? Here, too, I argue that neither liberalism’s theoretical basis, nor that of human rights as they have evolved within liberalism, is strong enough to overcome the perennial tension between human and divine law. For of all of the human rights, it is religious freedom that makes clear the necessity of recourse to natural laws of justice, as it is this particular right that so uniquely and clearly joins the empirically-based human law and the metaphysically-based divine law. Yet liberalism typically aims to avoid religious speculation; it aims to remain, in Rawls’ famous words, “political, not metaphysical.”

This is not the place to discuss in great depth the merits of liberalism. My critique is not against liberalism as such but rather against liberalism’s claim to provide a neutral basis for religious freedom. The liberal conception of religious freedom rests fundamentally on the idea that all humans have a natural right to free choice of religion and free exercise thereof. But this means that a person may very well choose a system of belief that rejects liberalism and choice entirely, thus undermining the very freedom she is enjoying. For example, she may freely choose a religion that forbids exit, or perhaps one that demands strict censoring of speech. In other words, she has chosen a religion that rejects the system that gave rise to her freedom to choose a religion in the first place.

Many will object to my characterization of liberal religious freedom by asserting that such a choice on the part of our religious believer above need not restrict the choices of others; in
other words, an exercise of an individual right that restricts that individual’s freedom does not necessarily pose a threat to freedoms of others. William Galston has written persuasively about the merits of “value pluralism,” understood to refer to a form of liberalism that, while it rejects relativism and considers some goods to be basic and non-negotiable, defends a “range of legitimate diversity” in which a “zone of individual liberty, and also of deliberative and democratic decision making” can thrive. In value-pluralism theory, it is “not obvious…that civil society organizations within liberal democracies must be organized along liberal democratic lines;” in other words, liberal democracies can and indeed should make room for illiberal groups if they are truly to be considered pluralistic. On first glance, then, it would appear that the religious believer above, who has freely chosen to limit her freedoms by virtue of the religious community she has joined, fits perfectly well within a liberal democratic society.

As Galston eventually admits, however, “in practice, ways of life reflecting different orderings of value cannot always exist in the same social space.” Indeed, a self-governing liberal polity will choose its priorities, and those with differing “orderings of value” may find themselves required to conform. When these values are religious values, it is not clear that Galston’s value pluralism has the resources to uphold the religious freedom that any such liberal society would, in theory, endorse. In such cases, he writes, “the structure of particular contexts of decision (sic)…necessarily limits the ability of some individuals to pursue ways of life that are fully defensible in theory.” In other words, the maintenance of liberal democratic life requires the sacrifice of some defensible ways of life. Even if those defensible ways of life are

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24 Id., 16.
25 Id., 59.
26 Id.
religiously-based, it would appear that they must bend to the liberal society’s will.27 Here again, globalization makes a difference: the “same social space” that Galston mentions now has increasingly permeable boundaries; one is a member of one “social space” geographically but his multinational employer is governed in a different space and his online presence brings him into rapidly evolving, undefinable spaces.

It would seem, then, that liberalism cannot have it both ways. If it aims for neutrality towards any given way of life, then it cannot limit “the ability of some individuals to pursue ways of life” that they freely choose, for this is not neutral. If, on the other hand, it chooses to prioritize some “orderings of value” over others, it opens itself to either force or fracture; again, as Galston admits, not all systems of values can coexist peaceably in a given space, so outliers must either be made to conform or find ways to exit.

Of course, few liberals claim absolute neutrality towards any and all ways of life; most, like Galston, concede that liberalism may and must exclude some values and ways of life. This is perhaps an inevitable concession, for if the law and human rights rest on agreement and choice, it has no grounds on which it can insist that someone alter her choice of religion (or other “way of life”), unless it offers insight into what those choices and agreements ought to be directed to.28 Thus, we must conclude that the supposedly neutral liberalism that underwrites the contemporary human rights regime reflects some specified values—but what? According to William Schultz,

27 The French law prohibiting conspicuous religious symbols – popularly known as the “headscarf ban” would seem an apt illustration of this principle. While one senses that Galston would reject the rationale behind the ban because of his resistance to government coercion, I cannot find that value pluralism provides a firm argument against it, precisely because it (i.e., value pluralism) refuses to create “a comprehensive hierarchy or ordering among goods” (6). This is an admirable trait, but it ultimately serves to reduce religion to yet another preference among many in society, which removes religious practice out of the protected realm of human rights and places it in the realm of negotiable, even disposable, desiderata.

28 One might object that liberalism does provide an object—even a telos—in equality and freedom. Freedom we can dispense with as an adequate principle for maintaining society, pace Plato above. Equality, likewise, is insufficient for the simple reason that it is both undefinable and, in the end, not fully realizable. To defend that statement obviously exceeds present purposes. Still, with regard to religious equality, it is clear that not every religion can be given perfectly equal priority in society, for at least some religions make truly contradictory claims.
former Executive Director of Amnesty International USA, today’s human rights norms “reflect either the views of those who are at the moment holding the power, or the principles that have managed to claim a consensus among enough people that the powerful dare not challenge them.”

In short, either power or popularity determines the content of human rights. This is a precarious basis by which to judge the merits of divine and human law.

I do not mean to suggest that there is an easy alternative to liberal human rights, nor to imply that contemporary human rights theory and practice has not made great strides in bettering the lives of millions of people. I mean rather to say that liberalism is not in itself an adequate theoretical basis for these human rights, least of all religious freedom, because it rests on human consensus or coercion. This, in fact, is precisely Winnifred Sullivan’s contention, and on this score, I agree. Overall, it is my objection that liberal conceptions of law, in which law is understood exclusively as a derivative of human consensus, ultimately render the legal right to religious freedom impotent, for liberalism has neither competence nor authority to declare what does or does not constitute good or true or right religion. This is because its resources, as Hobbes made clear in the opening of Leviathan, are empirical ones, which cannot on their own deal with the supernatural realm religion claims for itself. Religion, however, involves faith about ultimate meanings, metaphysical truths, supernatural deities and the like; it also, often, presupposes divine revelation. Again quoting Hobbes, “no man can infallibly know by natural reason that another has had a supernatural revelation of God’s will, but only a belief…”

Furthermore, as mentioned above, to religious people a positivist system of law defies the order on which is premised the

30 Hobbes, Leviathan, 86.
very notion of religion by placing the temporal, human realm of state above the eternal realm of God or religion. Something is needed to mediate these two worlds.

III. Natural Law as Mediating Law

The above notwithstanding, I argue that religious freedom, as a human right, is not impossible, but it does require a reworking of our operative understanding of law. Rather than follow the prevailing norms of law as a human, positive entity, I am proposing a return to an understanding of law that takes “law” to include human, divine, and natural or unwritten aspects. This is not a new concept; traditions of unwritten and natural law have informed legal theory for centuries, but they largely fell out of fashion in modernity in favor of a human-centric, or positivist, conception of law. I argue that a more robust theory of law that takes into account not only human, but also divine and, critically, natural law, would make room for a more solid understanding of religious freedom, as well as other human rights.

Clarifying Terms: Natural Law and Natural Right

Before going any further, it is necessary to specify what I mean by “natural” or “unwritten” law. By “natural law,” I do not intend any particular thinker’s version thereof; indeed, the scope of this project precludes doing so. Yet for an operative—if minimalist—

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31 It is important but tangential that I am referring specifically to religion, which, if it is what it claims to be, is divine in origin, rather than ideology, which is human in origin. This distinction also supports the need for religious freedom over and above (though by no means replacing) freedom of conscience. One may object to this point that it is by no means clear that religion does indeed exist in the manner in which most religious people conceive of it, viz., in which a divine or supernatural order does exist and, in some manner, govern worldly affairs. I won’t attempt to settle that question, but my point is that if we are to grant freedom of religion, it cannot be premised upon the assumption that what religious people conceive of as religion is false.

32 This should not be taken to imply that there are not better and worse versions of natural law and natural law theory. Rather, I mean to say that that the argument of this dissertation does not extend to that question; it simply aims to convince the reader that our modern understanding of law stands in need of some version of natural law if it is to avoid the conflicts between human and divine law that pose such challenges to religious freedom. Once this is established, each legal community would, presumably, look within its own legal traditions for theories of natural and unwritten law. This diversity is necessary because of the link between natural and divine law – if God is the author
definition of the term we might borrow from Strauss: “One may…call the rules circumscribing the general character of the good life ‘the natural law.’” He likewise defines the good life as “the perfection of man’s nature. It is the life according to nature.” Furthermore, to Strauss, the common objection that there are multiple—and even conflicting—systems of natural and unwritten law need not trouble our thesis, at least at this level:

However much the comprehensive visions which animate the various societies may differ, they are all visions of the same—of the whole. Therefore, they do not merely differ from, but contradict, one another. This very fact forces man to realize that each of those visions, taken by itself, is merely an opinion about the whole or an inadequate articulation of the fundamental awareness of the whole and thus points beyond itself toward an adequate articulation.

Natural law, as only a part of such comprehensive visions, is necessarily an incomplete formulation of what is just. Each society, culture and religion will perceive varied elements of it, and likely no one will get it completely right. Robert Sokolowski has written helpfully on this point as well, noting that confusion arises from the mistaken tendency to view natural law as a uniform set of laws and rules. When we think of natural law as “a kind of codex, a set of imperatives that could be formulated in a purely theoretic, systematic exercise, identifiable and arguable apart from any moral tradition,” he writes, we immediately perceive that there could be no such universal set of theoretical rules that can simply be applied to any situation whatsoever. Rather, he suggests, natural law is “the ontological priority of ends over purposes,” a definition of nature, and therefore of natural law, then the Christian version of natural law will likely not be suited to Islamic cultures, and vice versa.

34 Id., 125.
35 It should be pointed out, however, that Strauss’ argument here doesn’t quite work. That there are conflicting comprehensive visions does not require us to hold that each of them is inadequate. It is a logical possibility that one of those visions is true and the others either false or only partially true. We assume, however, for the purposes of this dissertation that no one society has managed to formulate a perfectly true comprehensive vision of justice, which therefore makes it rational to examine various traditions of natural and unwritten law reasoning rather than one sole version.
he attributes to Francis Slade. 37 This latter definition is for all intents and purposes synonymous with that of Strauss above if we take the “end” of human life to be the good life and prioritize the good life of man over particular purposes of any given man.

Secondly, it should be noted that this argument could just as easily concern natural right. In several respects, the distinction between natural right and natural law is of monumental importance, and I do not mean to disregard this. Still, for present purposes, in which I am merely attempting to reinsert into the concept of “law” some sense of legality or justice that exists by nature, it matters little whether we refer to it as ‘right’ or ‘law.’ One may object that indeed, this matters a great deal, for something can be ‘right’ by nature without qualifying as a law per se. Such objections usually follow either a Lockean line—loosely, that there is no law without a lawgiver—or a Thomist one, in which one of the defining characteristics of law is that it is promulgated. 38 Alternatively, one may object that the term “natural law” was co-opted by Thomas in a misunderstanding of Aristotle, who spoke only of natural justice, not natural law.

All such objections these can ultimately be collapsed into one, however: for something to be a law, it must be articulated as such by a legitimate authority. In other words, it is not enough simply to describe what is just; the ruler must command it. But this objection itself assumes a rather specific understanding of “law” as, in essence, positive law—whether posited by God or by man, and it is this vision of law that the entire idea of natural law ought to complicate. For even as most Thomists understand natural law, it is indeed promulgated—but it is promulgated in nature itself, not written down.

38 See John Locke, “The Reasonableness of Christianity” and Thomas Aquinas, Summa Theologica I-II.q.90.a.4.co, respectively.
A parallel with natural science is useful here, for when we speak of a “law of gravity,” we do not require a specific lawgiver or command. True, it was not understood as a law prior to Newton’s articulation, but this does not call into question the assumed truth of the physical law of gravity. So too natural law—whether it is articulated authoritatively by a person or merely ‘promulgated’ in nature and human nature matters little for whether it is true. Another way to put this is that we can know things that have not been fully articulated, just as humans presumably knew that objects fall prior to Newton’s formulation of the law of gravity. And if this natural law, or right, or justice is indeed true, i.e., if there is a “life according to nature” that is synonymous with “the rules circumscribing the general character of the good life,” as Strauss posits, then in crafting human law, we would do well to take it into account. This is my modest claim.

IV. Natural Law and Religious Freedom: A Proposal

Why, though, does natural law serve us particularly well when it comes to religious freedom? This dissertation argues that adjudicating claims of religious freedom requires us to address the conflict of divine and human law; I draw this point especially from Antigone. Divine law and human law are fundamentally different entities, with divergent epistemologies and overlapping but distinct jurisdictions. How, then, can their conflicts be settled, unless there be an intermediary body of law or justice that is valid in both divine and human realms? I suggest that natural law can be just such an intermediary.

To take seriously what I am proposing, then, would mean that human legislators would craft human law not as mere positive law based only on consensus or human command, but also taking into account the natural law. Such law, it is posited, comports with divine law, having been created by God. This thus imbues or infuses the human law with a divine justice that at
once protects the realm of human legislating—there need be no endorsement of a specific sectarian law or religion—as well as the consciences of religious people, who are protected from the overreach of an encroaching state, because the Leviathan must be held accountable to natural justice.

We can be a bit more specific by borrowing from Thomas Aquinas. Traditionally, in Thomist natural law theory, the written law is understood as a determination (determinatio) of the unwritten law. These determinationes are either (1) sanctions in the positive law of what is already sanctioned by the natural law (e.g., that one ought not to steal or murder), (2) specifications of what natural law leaves indeterminate (e.g., one ought not to steal, but what is the penalty for stealing?), or (3) methods for additional legislation, enforcement or adjudication (of positive law, all of which, again, will be determinationes of unwritten law). In all of these cases, “positive law…makes (moral) norms of practical reason determinate in the political community.”39

It is, crucially, not necessary that legislators themselves acknowledge a divine law; it is enough to recognize natural law, for to those who accept a divine creator, that creator is the author of nature and natural law as well; for those who do not, they need only accept “what we can’t not know,” as a contemporary author has described natural law.40 This permits natural law to work within conditions of pluralism.

39 Hittinger, First Grace, 51.
40 See J. Budziszewski, What We Can’t Not Know (San Francisco: Ignatius Press, 2011). I admit that for those who accept natural law but reject the existence of a higher authority than nature (such as divine law), it is difficult to explain how the natural law would have normative, rather than descriptive, standing. But this is a fundamental problem of law, and removing natural law from the picture only exacerbates the problem. For instance, legal positivists, from Austin to Hart, claim that the law is law because it reflects the norms of a given society; it has been posited and accepted as such. This is fine as far as it goes, but it does not explain from whence comes that first norm that says that the law is to be obeyed. Thinkers from Hobbes to Rousseau to Rawls have attempted to provide explanations for this fundamental principle of the authority of law, but the very variety and incoherence of these explanations merely demonstrates the point I am arguing, viz., that without a higher-than-human authority, the obligation to obey law, whether human or natural, is remarkably difficult to explain. (This does not, however, mean
V. Conclusion

A return to traditions of natural and unwritten law will not resolve entirely the tension between the two swords of human and divine authority, and it will please no one fully, but it is my argument that this is our best option for justice both for religious and secular citizens. Traditions of unwritten laws of justice are robust, accessible by natural reason, and exist across cultures and times. I selected the particular sources for this dissertation out of a desire to represent traditions of unwritten law in varied contexts—pagan Greek (*Antigone*), medieval Muslim under Muslim rule (Ibn Rushd) and early Christian under Roman imperial rule (Tertullian)—in order to prescind from the notion that attention to natural or unwritten law will give rise to identical legal systems everywhere.

Thus, this need not—and indeed should not—be considered a cosmopolitan or otherwise universalist project, except in one aspect. Traditions of unwritten and natural law invoke reason and experience rather than revelation as their primary tools. They thereby remain accessible to all citizens regardless of creed without denuding religion of its metaphysical, even mystical, aspects. In other words, they can respond to the need for a public reason without reducing it to a strictly secularist one that requires religious citizens to translate their concepts into non-religious ones.

Proposing the revival of these legal traditions is ambitious. Since Hobbes, at least, modern political and legal theory has resisted the metaphysical components that natural law embraces or assumes. Nevertheless, I argue that this path is our only option if we are to retain a meaningful understanding of religious freedom. If Strauss is right that “it is impossible to grasp that merely asserting “God” as the source of obligation doesn’t create problems at least as difficult. I merely mean to say that for those who accept a divine sovereignty over human and natural life, the question of “why obey” is less troublesome.) Natural law, however, if it exists, has the advantage over human law that “one ought to respect nature” is a more plausible proposition on which to base law than “one ought to respect human X’s will because she happens to be in power.”
the distinctive character of human things as such without...some understanding of the divine or natural things, "41 then we will only understand human rights and human law if we take into account the natural and divine laws as well.

41 Strauss, *Natural Right and History*, 122.
Chapter 1: The Possibility of Religious Freedom: Where Are We Today?

I. Secular Religious Freedom: Three Approaches

As the title suggests, this dissertation is in part a response to Winnifred Sullivan’s 2005 book *The Impossibility of Religious Freedom*. Sullivan rejects the legal protection of religious freedom as unworkable because, in her judgment, the law is incompetent to deal with the metaphysical and experiential nuances of religion. On this point, I agree. Human law, as I argued in the previous chapter, is based on a fundamentally different epistemology and is directed at a different sphere of activity than is divine law or religion. Still, however ill-equipped to do so, the exigencies of political life require that state be given some authority concerning religion, for it is clear that not all actions justified in the name of religion can be sustained or tolerated within the confines of society. The logical end of this necessity is the Hobbesian assertion of state authority over religion. In other words, the human law, based as it is on secular reason, must make judgment calls about what constitutes acceptable religion.

This task, however, which requires interpretation of religious texts, practices and rituals, is one which most religious people understand to be the task of a religious authority or community itself; as such, the Leviathan’s assertion of power over religion is a problem for the free exercise of religion. As I argued in the introduction, this problem, while perhaps especially acute in Western late modernity, is unique neither to the West nor to the modern era; it is rather a perennial problem resulting from the metaphysical, mystical and spiritual aspects of religion and divine law operating in the same sphere as the physical, practical and tangible nature of human life and law.

Just as Hobbes subsumed religion under the state, the late modern approach has followed suit by ascribing to human law alone the status of real “law.” This implicitly places the civil
authority (the holder of human law) over divine law and religion, and Sullivan is right to identify this as a threat to religious freedom. That she is nevertheless wrong to call a thicker version of religious freedom ‘impossible’ is the ultimate argument of this dissertation. Sullivan’s diagnosis of liberal religious freedom is apt; where I part ways with her is at a more fundamental point, in her operative understanding of law. Ultimately, I argue that traditions of unwritten and natural law can mediate human law and divine law, such that the concept of law becomes one in which human law, undergirded by consensus and force, exists in tandem with divine law, with natural law mediating the two. This, I argue below, allows a wider arena of the free exercise of religion but prevents the pendulum from swinging towards the supremacy of divine law, which is equally capable of undermining human rights.

A) Winnifred Sullivan: Religious Freedom as Impossible

Though it is her book that has received the most attention, Sullivan’s rationale for claiming that religious freedom is legally impossible is nowhere clearer than in her self-described address to American liberals in the aftermath of the 2014 US Supreme Court decision of Burwell v. Hobby Lobby. The decision of this case states that closely-held companies objecting on grounds of conscience to the provision of certain contraceptives need not provide such health services in their insurance policies, pursuant to the Religious Freedom Restoration Act.\textsuperscript{42} To Sullivan, this decision illustrates perfectly her thesis in The Impossibility of Religious Freedom, namely, that the judgment of what constitutes acceptable religious practice vis-à-vis religious freedom laws is one that can be made on no principled grounds. In her words:

\begin{quote}
The need to delimit what counts as protected religion is a need that is, of course, inherent in any legal regime that purports to protect all sincere religious persons, while insisting on the legal system’s right to deny that protection to those it deems uncivilized, or
\end{quote}

\textsuperscript{42} 1993 law, henceforth referred to as RFRA, as amended by the 2000 Religious Land Use and Institutionalized Persons Act.
insufficiently liberal, whether they be polygamist Mormons, Native American peyote users, or conservative Christians with a gendered theology and politics. Such distinctions cannot be made on any principled basis.\textsuperscript{43}

In other words, the parameters of religious freedom (understood here as the free exercise of religious belief) are necessarily arbitrary and unprincipled because there is no fair and rational way to judge the metaphysical claims of a religion or religious person. Because to Sullivan the law is nothing more than a human construct, there is simply no legal way to deal with the metaphysical or religious aspects of civil life. As such, distinctions between and among various metaphysical and religious claims cannot, perforce, be principled, for human law lacks the resources to discern any such principles.

As a slight aside, one is left wondering why Sullivan does not bother considering the harm principle as a basis on which to decide which religious claims are granted protection. Similarly, she disregards RFRA’s standard of allowing all religious practice except that which there is a compelling state interest to regulate, which then must be regulated by the least restrictive means. Whatever their shortcomings, these are at least intelligible standards by which to adjudicate claims of religious freedom, such that it can hardly be said that there are no principles by which to distinguish acceptable from unacceptable practices.

It would seem, rather, that any legal interference in one’s religious practices is unacceptable to Sullivan. In the 2001 Florida case described in her book (\textit{Warner v. City of Boca Raton}), for instance, the plaintiffs were required to remove cemetery memorials beyond a certain size for their loved ones that were, while religiously inspired, not considered by the court to be required practices in their respective religions. While it is disputable whether the regulation was necessary, it hardly seems that the decision was entirely unprincipled—the plaintiffs selected this

cemetery for their loved ones’ burials, which entailed a contract between them and the cemetery, the regulations of which were made available at the time of plot purchase. Furthermore, the plaintiffs’ religions—Orthodoxy, Catholicism, Judaism and Protestant Christianity—were by no means without intelligible teachings and traditions, even if the individual consciences of the plaintiffs could not be so clearly discussed. The regulations and even the court’s decision are certainly disputable, but Sullivan’s claim that this sort of decision must necessarily lack a principled basis strikes the reader as exaggerated.

These objections to Sullivan’s particular rationale aside, however, her larger point—namely, that the alleged irrationality or unprincipled nature of religious belief and divine law inevitably clash with the state and human law—remains an unsolved problem. For when human law is extracted from its relationship with natural and divine law, even such legal concepts as “harm” and “compelling interest” become highly contestable terms, concepts that take on different meanings depending on whether or not one admits of the metaphysical aspects of life that religion presumes.

Given these difficulties, Sullivan’s prescription is to give up on the concept of religious freedom altogether. She asks, “What would be lost if law focused not on the special case of religion but on the accommodation of difference generally?” Her answer: Not much. To Sullivan, religion as an entity or composite set of beliefs, practices, rituals et cetera, should not be singled out for protection. Instead, it can—and indeed should—be parceled into its constituent parts such that religions would be protected de facto, but not de jure. “Without an explicit protection for religion, guarantees of freedom of speech, of the press, and of association would
continue to protect most of those institutions, including religious ones, usually thought necessary for a free democratic society.”

I term this type of approach a “secular approach” to religious freedom; it is marked by the removal of religion itself from the law, leaving legal space to judge only conscience, speech, assembly and other civil rights. “Secular” is to some extent a misnomer, for the term is generally taken to imply the lack of religion overall, whereas the concept of secularity in fact arose in the medieval period, at which point it was more of a gesture on the part of the Catholic Church of “sending the State (i.e., the Emperor or the Kings) back to its own this worldly…task.” In other words, a “secular approach” can simply imply a clear separation between religion and politics, with each occupying its own sphere. This is the sense in which I intend it.

**B) Brian Leiter: Religious Freedom as Unnecessary**

Brian Leiter’s secular approach to religious freedom echoes Sullivan’s in calling for the end of ‘religious’ freedom, though he proposes in its place protections for conscience more than speech, assembly, and press. In *Why Tolerate Religion?* Leiter asks whether the difference between religious and non-religious beliefs and practices is substantial enough to warrant special legal protection for the former. His conclusion is strikingly similar to Sullivan’s above: “there is no principled reason for legal or constitutional regimes to single out religion for protection.”

To arrive at this point, Leiter first identifies what he takes to be the defining features of religion: it produces categorical demands on action; it does not “ultimately answer to evidence and reasons;” it includes a “metaphysics of ultimate reality;” and it produces “existential

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44 Sullivan, *Impossibility*, 149.
consolation.” But these traits, he claims, do not make religion special—these things could be said about any number of other types of beliefs. There are, however, both epistemic and utilitarian justifications for allowing the liberty of conscience. Citing John Stuart Mill’s “epistemic libertarianism,” Leiter grants (begrudgingly) that there may be occasions in which we should tolerate beliefs that are held despite their incompatibility with the “standards of evidence and reasons that have been vindicated a posteriori since the scientific revolution.” It is not clear on what grounds Leiter concedes this point, however, for ultimately holds that “religious belief…really is marked by its insulation from the only epistemically relevant considerations.” In other words, there can be no relevant epistemic standards by which we determine which anti-scientific beliefs might be acceptable and which are not, so why should conscientiously held irrational beliefs ever be tolerated? His only answer appears to be the Rawlsian, deontological one, namely, that individuals in the original position would agree that we should have this liberty. This is tangential to the point at hand, however; what matters is that people hold many such unjustified beliefs, and though we may have to put up with such beliefs, it is unclear to Leiter why we should single out from among them religious beliefs for special legal protections.


Noah Feldman’s approach, though in many respects quite distinct from those of both Leiter and Sullivan, draws out the tendency of all three writers—and, indeed, of secular approaches to religious freedom in general—to define the freedom of religion as, at its core, a

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47 Leiter, Why Tolerate, 34, 47, 52.
48 Leiter, Why Tolerate, 56.
49 Leiter, Why Tolerate, 57.
50 Leiter, Why Tolerate, 57.
51 Leiter, Why Tolerate, 55.
52 Leiter, Why Tolerate, 67.
freedom of the individual conscience alone. Unlike Leiter, Feldman does not discount religion as a distinct object of protection, and unlike Sullivan, he marks a strict boundary between what counts as a religiously motivated act and what does not. In “The Intellectual Origins of the Establishment Clause,” Feldman argues that the underlying conception of religious liberty among the Framers of the American Constitution was a Lockean one of the liberty of conscience. This was, he insists, the unifying understanding of liberty of conscience; it is a “fallacy” to hold that there were “distinctive conceptions,” i.e., non-Lockean understandings, of religious liberty current among the founders.53 To Feldman, this Lockean freedom of conscience is in many respects more akin to freedom from religion rather than freedom to practice one’s religion: “To the eighteenth-century mind, liberty of conscience meant that the individual must not be coerced into performing religious actions or subscribing to religious beliefs that he believed were sinful in the eyes of God and that could therefore endanger his salvation.”54 The protection of conscience “could not practically have been drawn to preserve everyone’s liberty of conscience in all things. It protects liberty of conscience, it would appear, only in the sphere of government action that relates specifically to religion.”55 In other words, the individual’s conscience is to be protected from coercion by religion, but not, evidently, “from government actions that on their face have nothing to do with religion,” in which category Feldman includes “funding war or abortion.”56 In such matters, to Feldman, the conscience may be violated.

This is a somewhat bizarre schema for the protection of conscience, entailing at least two problems: first, it means that while an individual may be protected by the state from religion if her conscience goes against its requirements, she may not be protected from the state should her...

54 Id., 424-5, emphasis added.
55 Id., 424, emphasis original.
56 Id.
conscience object to its actions. The exception to the latter rule is when the state’s laws pertain in a very clear and direct way to religion *qua* religion, which would presumably mean actual acts of worship, liturgy, prayer and the like—i.e., “freedom of worship” rather than “freedom of religion.” The state’s tentacles, in such a schema, may reach into all but these religious sanctuaries; religion’s reach, however, extends no further than its own institutional boundaries, however Feldman conceives of these. Ultimately, then, a citizen must submit his conscience to the state over and above his religion. This is an innovative idea of the liberty of conscience, to say the least.

The second, related problem with Feldman’s formulation of freedom of conscience is that protecting only those acts on the part of the individual that “relate specifically to religion”—whatever those may be, for Feldman does not offer a clear means of determining whether an act is *specifically* related to religion—not only disregards the institutional, communal or otherwise social aspects of religious life, it also falls apart when one attempts to determine whether an individual’s acts are, properly speaking, religiously motivated. Take, for example, a Catholic and a Sunni Muslim, each of whom objects to abortion. Because the official magisterial stance of the Catholic Church forbids support for abortion—to the degree that one can be denied reception of the sacraments for endorsing it—it would seem that the Catholic’s objection to abortion *does* relate directly to his religion, Feldman’s objection notwithstanding. For the pro-life Sunni, on the other hand, whose views of the origins and nature of life may flow from her Muslim beliefs but who lacks an authoritative document or religious leader to declare that abortion is impermissible, it seems that Feldman would consider her stance not to be directly related to religion. Both individuals, then, object on religious grounds to the same thing, but they cannot receive equal protection of conscience on account of the structure of their particular religions.
Feldman’s understanding of the liberty of conscience presumably aims to delineate with clarity the lines of protected acts of conscience—those pertaining directly to religion—and unprotected acts of conscience. As the above demonstrates, though, this may be more difficult than he allows. Furthermore, he fails to acknowledge the religiosity undergirding the very Lockean freedom of conscience that he sees as operative in the American context. As A Letter Concerning Toleration makes clear, Locke intended no tolerance for the atheist or the Muslim. To Locke, there are and must be criteria beyond the individual conscience by which the conscience’s claims must be measured. But what are these standards? At the very least, Locke required that the conscience be formed by or answer to a deity, for he had no place for atheism. He also went further than this and eliminated at least the Muslim deity. Contra Feldman, then, conscience alone was not enough for Locke, it had to answer to something greater than itself.

Feldman implicitly acknowledges this underlying religiosity to the liberty of conscience, even as he insists the primacy of an essentially secular concept of “conscience.” Citing the authority of James Madison, he writes that liberty of conscience is a “natural right,” and to violate this right is, in Madison’s words, “an offence against God, not against man.”57 If God is underwriting the freedom of conscience, and if violating natural rights is an offence against him, we admit that the mandate to respect liberty of conscience (indeed, all natural rights) comes from God, not from the conscience itself. We further admit that it is in some way undesirable or impermissible to offend God. But if religion concerns itself with these very matters—viz., with what offends God, and with how to please (or displease) him—then religion deserves a much greater place in the schema of conscience protection than simply those acts of conscience that are directly related to it. Acts such as abortion and war now seem relevant, assuming that Madison’s

57 Id., 384, quoting Madison’s Memorial and Remonstrance Against Religious Assessments par. 4.
God would care about such matters. In other words, if the law ought to worry about offending God by violating natural rights, must it also avoid offending God in other ways?

Feldman wants to divide the subjects of law into things religious, on the one hand (regarding which the state may not force one to violate his conscience) and, on the other hand, those things that “on their face have nothing to do with religion.” But by offering the Madisonian prohibition against “offence[s] against God” as credible grounds for law, this distinction breaks down. For is it not the purview of religions to discern, within their own traditions and communities, the nature of such offences? And may not these offences occur in any aspect of life, not simply those that concern religion itself?

II. Problems with Secular Religious Freedom

A) Individual or Group Religion? The Ecclesia/Persona Distinction

My objections to the secular approaches to religious freedom outlined above exist on two levels. First, although they aim to protect individual freedom of conscience, in reality they simply push the problem one step back. The state may indeed be incompetent to judge religion because, in Sullivan’s critique, it cannot comprehend in legal categories the nuances of religious experience. It is unclear, however, how this same human law is more competent to comprehend the dictates of conscience, or to judge the free speech of a person speaking in the name of his religion, which is evidently in comprehensible to the law.

Secondly, in reducing religious freedom to freedom of conscience alone, secular approaches to religious freedom disregard an essential aspect of what religion is. As such, they do not protect freedom of either religion or conscience, for the latter is often heavily informed by
the former.\textsuperscript{58} We are dealing not only with religious individuals but also with religions themselves. The traditional formulation for this distinction in the West is the joint set of \textit{libertas personae} (freedom of the person) and \textit{libertas ecclesiae} (freedom of the assembly/community/church/ʿumma, etc.). A life of religion, to many if not most religious people, is not coterminous with a life in accordance with one’s conscience. If religious liberty rests on a concept of religion that reduces religious beliefs and practices to beliefs and practices residing in the individual’s mind, that notion is reductive in a troubling way, for it assumes that there is no other authority than the state to which the conscience can legitimately be said to answer. Yet if it is fundamental to religion that there \textit{is} such a higher power, and it seems strange to deny this premise, then to declare any such power null and void is already, as it were, taking sides against religion—i.e., mandating a secularized religious freedom.\textsuperscript{59}

To unpack this point, we return to Leiter’s definition of religion, which requires that religion issue categorical demands on action. If we accept this, then we acknowledge that for religious people, religion is a two-way street between themselves and a larger community of believers, whether across space or time or both. In identifying with a religion, many, if not most, people are in fact seeking something at once both higher than themselves and—and this is the

\textsuperscript{58} One may respond—as, I believe, would Brian Leiter—that there need be no particular protection for religion or religious people. Again, this dissertation does not take up the \textit{desirability} of religious freedom; it takes this as a given in the modern world, as supported by international rights document after international rights document, not to mention nearly every constitution in the world. Rather, it addresses both the meaning of “religious freedom” as well as the means by which we aim to protect religion, namely, by ensconcing it in positive law as a human right.

\textsuperscript{59} It remains to be addressed whether a secularized sense of religious freedom—restricting faith and religious practice to the private sphere and denuding the public sphere of most religious influence—is the best or only possible version. Such would seem to be the Rawlsian consensus; religious pluralism admittedly poses serious challenges to unfettered free practice, since various religions’ practices inevitably conflict with each other and with any given regnant culture. Still, the project outlined below concerning unwritten and natural law approaches to the interaction of conscience, community and law is intended to provide an alternative to either a religious freedom that biases a specific religion or religious people in general, on the one hand, and a secularized religious freedom that permits free practice only within the confines of one’s own home or house of worship.
critical point—higher than the state, to which they want to bind their consciences.\textsuperscript{60} If this is the case, and if people are opting into or remaining in religions, which by definition attempt to bind the conscience with categorical demands for action, then the right to obey one’s conscience must not deny the possibility of some form of institutional\textsuperscript{61} authority over that conscience.

Cécile Laborde describes the inadequacy of the conscience-only approach. In an \textit{Immanent Frame} blog worth quoting at length, she asks

whether anything is lost in the re-description of freedom of religion as freedom of conscience. Assume I am a devout Muslim. I observe Ramadan, say my prayers every day, wear the hijab, give zakat, and send my children to Quranic school. Or assume I am a practicing Catholic. I observe Lent, try not to eat meat on Fridays, celebrate Easter, go to church every Sunday, have my children baptized and confirmed…Those rituals are meaning-giving and connected to believers’ sense of their moral integrity. Yet they are not duties of conscience…\textsuperscript{62}

While some Catholics and Muslims might disagree with Laborde’s assertion that observing Ramadan and attending mass are not in fact duties, the point is valid: not everything that is an important aspect of religion is a duty per se, whether of religion or conscience. But to conceive of religious freedom as essentially freedom of conscience alone reduces the question of what practices are acceptable to the question of duty alone, and this is to tell only half of the story. Religions almost always have an institutional or communal aspect that makes them, at least for some religious people, more than the sum of their parts. This is the core of the

\textsuperscript{60} It is also worth asking to what extent religion is in fact a choice; Slavika Jackelic’s work has called into question the role of choice in religious identity formation, using Central and Eastern European religious experience. See Slavika Jakelic, \textit{Collectivistic Religions: Religion, Choice, and Identity in Late Modernity}. (Farnham, Surrey, England; Burlington, VT: Ashgate, 2010).

\textsuperscript{61} I understand “institution” here very loosely. This is not to be understood to mean only such formal institutions as the Vatican or even a local mosque or synagogue in its internal structures. Rather, I have in mind a sociological understanding such as that of Jonathan Turner, who defined “institution” as “a complex of positions, roles, norms and values lodged in particular types of social structures and organising relatively stable patterns of human activity with respect to fundamental problems in producing life-sustaining resources, in reproducing individuals, and in sustaining viable societal structures within a given environment.” Authority in this context, then, may or may not be realized formally, but still involves the authority of a community of other believers.

personae/ecclesiae tension, and to conceive of either religious liberty or freedom of conscience without it is insufficient. This is hardly a new concept; both Magna Carta and the “Two Swords” doctrine mentioned in the previous chapter articulate a claim on behalf of the respective churches to their own seat of authority. As mentioned above, John Locke’s own conception of the liberty of conscience, though much more individualistic than that of Pope Gelasius, nevertheless assumed that the conscience was accountable to something, i.e., that the conscience must be free precisely because the state was not the highest authority.

Another way to frame the problem associated with equating freedom of religion and liberty of conscience is to say that, should we adopt this understanding of religious freedom, the state thereby is permitted to co-opt the role of defining both “conscience” and “religion.” As Feldman himself admits, even if one were to restrict government action “to matters that belong within the secular sphere,” it remains the case that “[r]eligion’ must still be defined; the liberty-conscience theory offers no escape from this inevitability.” In positing that the only relevant parties are the individual’s conscience and the state’s authority, the state actually takes a position on the nature of religious authority; it dismisses it as irrelevant to the case at hand. I propose, rather, that the relevant parties are (at least), first, the state, second, the individual conscience, and third, the transcendent ecclesia.

The ecclesial or corporate aspect of religions, however, carries with it implications beyond the power to bind the individual’s conscience. In addition to the ever-present tension between human law and divine law, or between the state and religion, then, there exists a tension within religion itself, one that resides between the freedom of the religious person and that of the religious ecclesia, and any robust conception of the freedom of religion must address both facets of the freedom of religion—without, crucially, attempting to arbitrate entirely between them.

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Nowhere is this seen more clearly than in controversies over proselytism.\textsuperscript{64} Is it the right of the individual to propagate his faith, or is it the right of the religious community to protect its people from outside influence? What if proselytism is intrinsic to a religious community’s beliefs and practices (Mormons, Jehovah’s Witnesses, Evangelical Christians, etc.)? Does this type of speech, offensive to the religious practices of many, become a fundamental right for the individual adherents?

Pakistan’s constitution provides another illustration of this inherent tension. It dictates that “subject to law, public order and morality”:

(a) every citizen shall have the right to profess, practice and propagate his religion; and
(b) every religious denomination and every sect thereof shall have the right to establish, maintain and manage its religious institutions.\textsuperscript{65}

Pakistan’s constitutional protections guarantee both the freedom of the individual (“citizen”) to practice his religion as he sees fit, and the authority of religious bodies (“denomination” and “sect”) to “manage” their religious institutions—which, importantly, incorporate the religiously affiliated individuals. On the theoretical level, these are, properly speaking, incompatible—either the individual practices his religion according to his conscience (\textit{libertas personae}), or his religious body has authority over him to “manage” its religious institutions (\textit{libertas ecclesiae}).

Furthermore, we see that in practice, freedoms tend to accumulate on one side of the \textit{persona/ecclesia} divide. Pakistan’s blasphemy laws forbid “wounding the religious feelings of any person,” an amorphous category of offense into which can easily fall the normal religious


beliefs and practices of a member of a differing faith. Likewise, defiling the name of the Prophet Mohammad is punishable by death, which in practice all but guarantees a chilling effect against all speech related to the Prophet. Of course, the rejoinder is that defiling the key figure of a religion, in itself, is hardly to be considered a right. But it is nevertheless the case that either proselytism or simply the religious expression of a non-Muslim almost automatically falls under this category inasmuch as such activity denies Mohammad’s status as Messenger of God. Thus the attempt to protect both the individual and the religion here strongly favor the corporate religion, with severe consequences for the individual, whether a dissident within the religion or an outsider.

But an imbalance on the side of a personal rather than corporate religious freedom falls short in several respects as well. Sullivan’s description of Judge Ryskamp’s “theologizing from the bench” captures the problem well, insofar as Ryskamp took it upon himself to judge individual religious person’s beliefs. Ryskamp, according to Sullivan, “tried to work out his own view of what religion is and what particular religious traditions demand of their adherents with respect to burial. You could also see him working, however, from within what is a basically Protestant understanding of authority. It is the individual who decides. And he does so by reading the Bible.” As Sullivan points out in her introduction, this is a familiar mode of reasoning about religious authority for most Americans. Yet it fails to take into account the

67 Id., §295-C.
70 Sullivan writes that “…the modern religio-political arrangement has been largely, although not exclusively, indebted, theologically and phenomenologically, to protestant (sic) reflection and culture. Particularly in its American manifestation…Religion—‘true’ religion some would say—on this modern protestant reading, came to be
development of many religions’ practices, doctrines and rituals, such that a freedom of religion in only this individualistic sense is a freedom that favors individualistic religions, to the detriment of many, if not most, of the world’s religions.

A particular dialogue between Judge Ryskamp and an Orthodox Jew expert witness illustrates the difficulty at hand:

_The Court_: I believe that you said that there’s nothing in the law that prohibits it but you’re referring to tradition, right? …About walking on a grave…

_The Witness_: Walking on a grave is a violation of Jewish law.

_The Court_: Jewish law. What Jewish law?

_The Witness_: The classic law code recounts that it is improper to walk on a grave site.

_The Court_: Well, let’s start with the Torah, there is nothing in the Torah—

_The Witness_: There is nothing in the Torah. The Torah does make mention of the fact that Jacob put up a monument for Rachel.

_The Court_: Does that create a precedent?

_The Witness_: It creates a custom.

_The Court_: He also had two wives, so you don’t recommend that as a custom?

_The Witness_: Absolutely not, your Honor, this is, of course—the gristmill of Jewish law is determining does (sic) the conduct of the patriarch rise to the level of something that we should imitate and when it does not.

And so on. The Court here is attempting to glean a clear, textually-based law concerning burial from the amorphous but nevertheless real tradition within Orthodox Judaism of what constitutes proper religious observance. The Witness, on the other hand, attempts to convey a sense of the obligation of certain acts as understood through the interpretation of not only texts but exemplars throughout the generations. This is a task that is not done in whole by any one individual but which requires the participation of an entire community, across space and time, to determine for itself what its religion is and entails.

understood as being private, voluntary, individual, textual, and believed. Public, coercive, communal, oral, and enacted religion, on the other hand, was seen to be ‘false.’” Sullivan, _Impossibility_, 7-8.
In the encyclical *Veritatis Splendor*, Pope John Paul II presents a Roman Catholic objection to collapsing the distinction between religion and conscience:

The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil. To the affirmation that one has a duty to follow one’s conscience is unduly added the affirmation that one’s moral judgment is true merely by the fact that it has its origin in the conscience. But in this way the inescapable claims of truth disappear, yielding their place to a criterion of sincerity, authenticity and “being at peace with oneself,” so much so that some have come to adopt a radically subjectivistic conception of moral judgment.⁷¹

Moral judgment, in other words, is partly a communal activity, or at least it ought to be, according to John Paul II, if it is to escape the charges of relativism. Denying the corporate/ecclesiae aspect of religious freedom thereby disregards both an essential part of religious life and an essential facet of conscience, for thus understood, the conscience is not formed by automatons in isolation but by humans in community. Furthermore, the ecclesia generally claims some sort of authority over the conscience, both in its formation and in the execution of its dictates. One can, of course, disregard these aspects of the role and formation of conscience, but to do so necessarily opens the door to a radically subjective view of conscience, in which, as the pope writes, only the sincerity or authenticity of conviction matters. But one may sincerely feel obliged by conscience to commit acts that are impermissible in civil society. It is clear, then, that something more than personal conviction alone is needed in order to justify protection of conscience.

**B) Religion and Truth-Seeking**

Secular approaches to religious freedom, then, are inadequate because they reduce the freedom of religion, which includes both *libertas personae* and *libertas ecclesiae*, to the freedom

⁷¹ Pope John Paul II, *Veritatis Splendor*, paragraph 32. 
of the conscience of the individual. This not only cuts out the role and freedom of the religious
body or community, it also reduces religious conviction to anything held by the conscience,
regardless of whether it deals with religious claims or not and regardless of whether it is just or
ture. I argue below that this is a problem, and it even may be the problem at the root of Sullivan’s
complaint, viz., that we have no way of agreeing on what counts as a religious claim and
therefore no way of establishing what is eligible for legal protection.

Sullivan’s book portrays the evident futility of arriving, through objective judicial
principles, at a definition of authentic or valid religious practice. She arrives at this conclusion in
part because, pace secular approaches to religious freedom in general, she does not connect
Burwell cases, Sullivan writes:

Religion…specializes in fiction. It is not just the corporation that has fictional legal
personality. So does the church…religious freedom is all about protecting artificial
identities. The church is an imagined artificial entity; so are gods and demons. The
church is the body of Christ in orthodox Christian theology; like the sovereign, it is the
quintessential legal fiction, as we learn from Ernst H. Kantorowicz in The King’s Two
Bodies.⁷²

While few would deny that there is at least some human role in forming the contours and
practices of religions, Sullivan assumes that religion is only a human construct—this much is
clear from her striking claim that gods are imagined entities. In doing so, she denies the
fundamental premise of many, if not most, of the world’s religions, which believe themselves to
be the recipients of divine knowledge or revelation as well. She does not even consider the
possibility that there is truth to the religious claims that either God or demons are indeed real, nor
does she take seriously Christianity’s core belief in the mystical presence of Christ’s body in the
body of the Church. (On the other hand, she does take seriously the work of a single scholar,

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Ernst Kantorowicz, who is assumed to have overriding insight into the rather substantial metaphysical claims of historical Christianity.) Sullivan closes the article with a call “for us to work on creating new fictions together, political, legal, and religious”—betraying again a conviction that religious claims are and always have been nothing but fictions. Neither the obviously fictitious nature of religious claims nor the obviously objective nature of scholarly claims is anywhere justified.

We need not discount the role that humans play in crafting various aspects of religions to hold that religion is and has always been defined in relation to something more than human. This definition may indeed be false; it is entirely possible that all religions have always gotten it wrong and there is no such higher being or realm. Nevertheless, if religion is anything at all, surely it is a thing that deals in questions of ultimate reality. To assume that religion is nothing but a human construct stacks the cards in favor of secularism, which, paradoxically, hardly gets us any closer to Sullivan’s goal of neutrality and equality.

Secular approaches to religious freedom, then, tend to conceive of religion as an immanent entity alone, whereas religions and religious people usually understand themselves to be engaged in some sort of truth-seeking about a transcendent reality. Which understanding of religion should religious freedom protect?

I argue that the answer to this question must be the latter version. If Sullivan is right and all religion is wholly constructed by humans, then it is no different from an ideology, an association, or some combination of the two. On this reading, religious freedom is impossible because it is unintelligible: religion as such does not exist; it is an overlapping category with ideology, speech, association or some combination thereof. In other words, Sullivan is effectively denying the existence of something in order to claim that we cannot protect it. Again,
I do leave open the possibility that Sullivan is right—all religion everywhere may very well be nothing but a human construction. Nevertheless, this is a wholly unfalsifiable proposition, and to eliminate legal protection for religion *qua* religion (not *qua* speech and assembly) on its basis is massively presumptuous.

If, on the other hand, religion is the conforming of one’s will to “whatever greater than human source of meaning there might be,” then religious freedom is indeed an intelligible concept—it is the freedom to ascertain the truth about the nature and will of that greater-than-human source of meaning, and to act upon that knowledge or belief. I argue that this ought to be the operative understanding of “religion” behind “religious freedom” because this pursuit of ultimate truths about the nature of the world and life beyond is both a personal and communal good; to defend this statement is to defend the virtue of living in reality rather than non-reality, however flawed the processes of discerning reality and truth.74

Sullivan’s stated goal in promoting her particular secular approach to religious freedom is increased equality and “radical normative pluralism.” In her calculation, “[f]orsaking religious freedom as a legally enforced right might enable greater equality among persons and greater clarity and self-determination for religious individuals and communities.” She takes for granted rather than defends the desirability of greater equality of all viewpoints rather than the embrace of a particular tradition or set of traditions, as well as the desirability of “self-determination” of religious identity—both biases that pervade the late modern era of democratic thinking, but ones

74 This point requires some unpacking. I do not mean to suggest that Sullivan et al. advocate, directly, any sort of squashing of the pursuit of truth; indeed, advocates of secular approaches to religious freedom usually seem to take their tasks to be the protection of this pursuit of truth for all people equally, religious or not. I mean rather to point out that truth is not wholly a subjective, nor therefore individualist, concept; the working out of what the truths are about ultimate reality has throughout history been conducted in communities, often religious ones. As such, these religions do merit special protection as such and not merely as individual conscience or speech.
76 Id.
that are by no means without pitfalls. For one thing, it is not clear that all points of view should be considered as equals; Sullivan tacitly admits as much even by advocating pluralism. Should radically exclusivist religions that seek to destroy pluralism, or religions that discriminate based on gender or social standing, be granted equal status? If not, what are the criteria for exclusion in a radically pluralist society? What if a particular political community chooses to embrace its religious tradition and identity? Is this inherently wrong because it does not equally embrace religions that have little to no history or cultural linkages within its communal life? These questions, which admit of no easy answer, cannot be sidestepped merely by asserting the importance of equality and self-determination.

Secondly, that religion is or even can always be an arena of self-determination is questionable. Sullivan would decouple religious freedom from the law in part because doing so “might also force religious groups to fend for themselves politically, economically, and philosophically,”77 which is presumably desirable because it would, again, encourage self-determination among religious individuals and groups. At the same time, though, she criticizes Judge Ryskamp’s “protestant” bias, in which “Religious authority was located…in the individual, not in the religious community.”78 She points out, rightly, that most of the world has historically, and perhaps still does, practice religion in a “[p]ublic, coercive, communal, oral, and enacted”79 and that “[t]o be religious is, in some sense, to be obedient to a rule outside of oneself and one’s government.”80 Thus, Sullivan seems to want to have her cake and eat it, too: even as she seeks “greater equality among persons and greater clarity and self-determination for religious individuals and communities,” she objects to Judge Ryskamp’s assumption of an individualistic,

77 Id.
78 Id., 6.
79 Id., 8.
80 Id., 156.
self-determining style of religion because it excludes those religions that are not at all egalitarian or individualistic.

Put another way, Sullivan’s objection to religious freedom as a legal concept is that it permits “legally defined orthodoxy”81 to reign as a standard of acceptable versus unacceptable religion. But is not her “radical normative pluralism” and “self-determination” merely another form of orthodoxy? Slavica Jakelic points to cases of what she terms “collectivistic religions” such as those found in central and eastern Europe, where Catholicism predominates, to complicate the common paradigm of individual choice as explaining the totality of religious practices. This analytic perspective that focuses on an individual’s belief or choice to believe “omits [contemporary religiosity’s] other component: the millions of people around the world who were ‘born into some religious group… They experience their religion as ascribed to them rather than chosen by them…”82 Religion may be an individual choice, but it is certainly also more than that for many people, and for yet others, it is a choice only as far as they are willing to risk social and economic alienation and even their physical safety. Sullivan’s deeply secular approach to religious freedom is, in some ways, an understandable one in a secular age, but she fails to consider that hers is one among many approaches, rather than the sole objective lens through which to examine religion, and there is no morally or theologically neutral reason to adopt this one over others. In the end, the equality that Sullivan seeks may be substantially more difficult to achieve than she allows.

81 Id., 7.
82 Jakelic, Collectivistic Religions, 1
III. Religious Religious Freedom

If the human law cannot provide a solution to religious freedom, some argue, perhaps religion can. In *Justice: Rights and Wrongs*, Nicholas Wolterstorff argues that human rights, properly understood, arise out of the Judeo-Christian religious traditions. He provides both a conceptual and historical account of what he terms “natural human rights,” which are those rights that are not conferred by God or any other entity and which inhere in human beings *qua* human beings. He determines that natural human rights—including religious liberty—can only arise only out of “a moral framework that, in its account of practical reason, takes cognizance…of the worth of persons”83 Importantly, for Wolterstorff, this worth is and must be bestowed by God’s love. He traces this framework from Hebrew Scriptures and the Christian Bible through Augustine, relying heavily on Augustine’s conception of God’s love. This love, he argues, is what bestows worth on humans, and that worth is what allows us to have inherent rights.

Grounding human rights and religious freedom in religion itself is not unique to Christianity (one recalls the 1990 Cairo Declaration on Human Rights in Islam, for instance) and my critique of the approach is a qualified one. Indeed, to a religious believer who takes his religion to provide truth about the world and human existence, it is difficult to see how he would *not* turn to his faith for an account of human dignity, rights and freedoms. On a political level, though, this approach is unlikely to stand up to modernity’s pluralism. Let us assume that Wolterstorff is philosophically correct about the origin of human rights, and let us further assume that, as Wolterstorff presumably would support, these Judeo-Christian human rights include the right to practice one’s religion freely, even if it is an erroneous or false religion. This works

philosophically—there is no reason that all humans who receive the protection of human rights would need to acknowledge the source of those rights—but it is tenuous politically. For if human rights exist because God—specifically, the Jewish or Christian God—bestows them on human beings, there would be enormous societal pressure to conform to Judaism or Christianity so as not to weaken the infrastructure of rights of that society. In other words, if it is Christianity that grounds religious freedom because it is from the Christian God that our rights come, then the degree to which that society fails to acknowledge the Christian God is the degree to which the human rights fabric of society is weakened. The same can be said for other religious foundations of human rights.

IV. Natural Law and Religious Freedom: Three Traditions

Sullivan illustrates the “impossibility” of religious freedom within human law, yet what she calls for is essentially another version of understanding of freedom that is based in human law—i.e., shifting the law away from “religion” and focusing exclusively on freedom of speech, assembly, and press. Leiter and Feldman, as well, consider only the role of human law when considering the conflicts of human and divine law that stand at the heart of challenges to religious freedom. These approaches are both insufficiently attentive to the corporate aspect of religious freedom and to the relationship between religion and the quest for truth to result in robust religious freedom protection. It seems that human law is incapable of providing a solution to the religious freedom conundrum. Likewise, as discussed above, religion and divine law cannot by themselves support a robust version of religious freedom in late modernity’s increasing pluralism. As I have argued thus far, given the inadequacies of other options, natural law may very well provide the best basis for religious freedom.
The following chapters of this dissertation, then, examine and advocate an alternative approach to the problem of religious freedom, one of integrating various natural and unwritten law traditions into our modern conception of law, especially as it concerns religious freedom. These traditions exist across time, cultures, and religions, and in many ways bridge the gap between positive human law and revealed divine law. Traditions of natural and unwritten law permit a robust religious freedom in a pluralized society better than secular approaches because they combine the secular advantage of access through human reason, as distinguished from law that must be revealed directly by God, yet they also resist both individualistic and communitarian extremes and thus comprehend both *libertas personae* and *libertas ecclesiae*.

Below I introduce three examples of unwritten or natural law. First, Sophocles’ Antigone invokes a higher law than the king’s when she insists on burying her traitorous brother. Secondly, Ibn Rushd writes of the inadequacy of the written law, pointing to the need for an “unwritten law” to obtain a fuller sense of justice. Finally, the early Church father Tertullian presented arguments to the pagan Roman empire for universal religious freedom—not just for freedom for their own religious partisans.

These particular selections were chosen for reasons explained below, but at present it is worth noting that they are intended to represent both the flexibility and perduring character of traditions of unwritten law. From pagan antiquity through early Christianity and medieval Islam, these traditions suggest an aspect of law that has largely been lost to modernity—an aspect that is not strictly human-created positive law, nor exclusively divinely transmitted law. They leave room for the discursive aspect of law and, while accessible to natural reason, also leave space for metaphysical speculation and belief.

**A) Greek: Antigone’s Divine, Human and Natural Laws**
Sophocles’ *Antigone* provides one of the earliest articulations of what has come to be known as “natural law.” Antigone’s claim of a right to bury her brother Polyneices is a claim to a right that predates—and outlasts—any legal claims of the state to her brother’s life or body. Polyneices died a traitor to the city, prompting King Creon to issue an edict that “none shall grace him with sepulture or lament, but leave him unburied, a corpse for birds and dogs to eat, a ghastly sight of shame” (228-231). Antigone insists on burying Polyneices nonetheless, and when their other sister Ismene expresses shock at her disregard for Creon’s edict, Antigone replies, “It’s not for him to keep me from my own” (49) — a bold assertion of the limits to human political power, given Polyneices’ crime.

*Antigone* sets the stage, as it were, for a project on the conflict of human and divine law; it also hints at the possibilities for unwritten law to mitigate such conflicts. Why does the king lack the right to prevent Antigone from burying her brother? According to Antigone,

> For me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind. Nor did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unfailing laws (*nomoi*). (450-55).

This speech suggests both that Antigone considers herself bound Zeus’ law, yet also intimates that this law is actually linked to a deeper sense of justice that transcends even Zeus and the gods. Antigone invokes the eternal nature of these traditions—they “live forever” and are “unshakable.” She also suggests, importantly, that there is a Justice that exists distinctly from the gods. While she does not use the term “natural,” it is nevertheless clear that whatever this Justice is, it is certainly not the human law’s justice, but nor is it synonymous with divine justice. It exists eternally, it cannot be overridden by a “mere mortal’s” edict, and no one knows its

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ultimate source. In short, it sounds a lot like a justice that exists naturally, or natural law.

Antigone’s natural law, however, is a pre-theoretical one; she does not provide a typology of law or specify the specific nature of this unwritten law, nor its exact relationship to divine and human laws. As such, although readers for millennia have sympathized with her, knowing somehow that she did indeed obey a higher law, the play only leaves us with a sense that a natural law exists, without guidance on what it says. Later medieval writers would fill in many of the gaps that Antigone left, providing richer theories on unwritten law. One such medieval writer was Ibn Rushd.

B) Ibn Rushd’s Medieval Islamic Natural Law

Ibn Rushd’s *Middle Commentary on Aristotle’s Rhetoric (Talkhis Kitab al-Khataba li Aristotalis)* joins various Mu‘tazilite thinkers’ works, the latter of which rely heavily on human reason to access metaphysical laws of ethics, morality and religion, to create a fairly robust, if today underappreciated, tradition of natural law reasoning in medieval Islam. But whether this is useful to the larger project, that of providing a basis for religious freedom in late modernity, depends largely on whether Ibn Rushd’s unwritten law corresponds to the natural justice that Aristotle saw in Antigone or to the universal right to religious freedom that Tertullian propounded. In other words, can disparate traditions of unwritten law do the same work across cultures and times? If so, these traditions hold a great deal of potential for informing our

85 All references to the Middle Commentary are from Averroës & Aouad, *Commentaire Moyen à la Rhétorique d’Aristote*, (Paris: Vrin, 2007). 3 Volumes (General Introduction, Edition & Translation, and Commentary on the Commentary, respectively.) Translations are mine, with gratitude to Nadia Oweidat for her assistance.
understanding of the right to religious freedom, and possibly that of human rights more broadly. If not, then the concept of natural law is not useful—the various thinkers are simply talking about different concepts while using similar terms.

In chapter three, I show that Ibn Rushd’s “unwritten law,” as discussed in his *Middle Commentary on Aristotle’s Rhetoric*, is indeed quite similar to what both Sophocles and Aristotle alluded to. His is an expansion on Aristotle’s idea of ‘natural justice,’ which itself relies upon Antigone’s invocation of a higher law than the king’s. But crucially, Ibn Rushd did so within his medieval Islamic context, situating the unwritten law within a metaphysical framework that incorporated the shari’a. Can this unwritten law be helpful for questions dealing with religious practices, which are often governed by written codes of their own? To put a finer point on the matter, is Ibn Rushd’s unwritten law compatible with Islam? What is its relationship to shari’a?

It may be objected that any sort of unwritten or natural law philosophy would necessarily run contrary to Islamic teachings about the origin and nature of law, which would be a problem if the goal is to invoke natural law in the practice of religious freedom. (That is, if we must contradict Islam in order to defend religious freedom for Muslims, we may have a problem with natural law serving as such a foundation.) For, unlike Aristotelian or Sophoclean justice, Islamic conceptions of justice are cannot take just any form. Shari’a, thought to be revealed by God himself, governs every aspect of Islamic life. As Charles Butterworth writes, “a Muslim political philosopher must temper his conclusions about the character of the good or the best political regime with what the Islamic community holds to be appropriate for Muslims.” The same could be said for the character of the good more broadly. 87

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87 Charles Butterworth, “Rhetoric and Islamic Political Philosophy,” *International Journal of Middle Eastern Studies* 3 (1972): 187. I acknowledge that the very same qualifications hold in the case of Christianity. A Christian philosopher is, by and large, not free to formulate simply any conception of justice she chooses, at least not while maintaining her philosophy as a Christian one. This is a point worthy of further attention, but for present purposes I
To understand the relationship of the unwritten or natural law to the shari’a, we have to address the nature of shari’a in the first place. Shari’a is neither entirely written nor entirely unwritten; its sources are the (written) Qur’an, the (written) sunna, (unwritten) analogy (qiyas; this concept is somewhat akin to precedent-building in Western legal traditions), and (unwritten) reason (‘aql). There is, then, a place to be carved out, however carefully, for an unwritten law, namely for guiding the creation of qiyās, and certainly as that to which ‘aql accedes. Through these and other means, I attempt to demonstrate that Ibn Rushd’s unwritten law is both compatible with the shari’a and is useful for mediating divine and human law.88

C) Universal Freedom of Religion: Tertullian’s Natural Law

From Ibn Rushd, I move backwards in time to Tertullian (ca. 160-220 CE) in order to illustrate the potential effectiveness of arguing with the natural law in the public sphere. Of the authors treated in this dissertation, Tertullian deals the least directly with the concept of unwritten law and the most directly with religious freedom itself—which is not to say that natural law does not pervade his writings as a necessary—theoretical support. Tertullian forged new paths in the advocacy of religious freedom, moving beyond mere tolerance for his own Christian religion to articulating a universal right of all people to freedom of religion.

Nevertheless, this very contribution relied upon an understanding of natural right that implies an

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88 An important qualification: Ibn Rushd views some religious offenses as so heinous that the unwritten law can provide no recourse. See MCR 1.14.3: “On the subject of similar injustices, I mean that those which attack houses of God or his friends there is neither pardon, nor long-suffering, nor tolerance, for pardon and long-suffering are not demanded by any interest, but inevitably, the judge must, in [the cases of] similar injustices, execute the punishment either to exact vengeance on the guilty party or [for the sake of] the public interest. This is why the jurists have said that whoever says of the Lawmaker—peace be upon him—that his clothing is soiled, must be killed.” Nevertheless, it is worth noting that Ibn Rushd is here taking pains to situate his system of unwritten law within an Islamic framework, allowing for the possibility of an authentically Islamic tradition of natural law. Furthermore—and importantly—he does so without invoking Qu’ranic authority or shari’a. That is, it is his natural reason that he relies upon for this conclusion; it is not a mere restatement of shari’a.
unwritten, natural law to which both he and his pagan imperial audience submitted. My primary objective in including Tertullian, then, is to illustrate the practical possibilities of deploying the concept of unwritten, natural law to the problem of religious freedom.

Though the texts included in this dissertation highlight Tertullian’s writings on religious freedom, he was also a natural law thinker. Tertullian distinguished between those true things which were known through sacred Scripture and those true things which were known “by nature”: “Now it is possible even on the basis of popular ideas to be knowledgeable in the things of God…to establish what is in accordance with the divine ordinance, not what is opposed to it. For some things are known even by nature…”89 The means by which these things are known was, according to Tertullian scholar Eric Osborn, the conscience. Osborn writes, “Conscience for Tertullian begins as such common knowledge which may be directed to moral and ethical issues and depends on natural law. It judges ethical matters, present and past, and guides concrete actions…[and] learns from nature…the difference between good and evil.”90

Tertullian, then, while an explicitly Christian writer, held firmly to the importance of natural law, which included for him certain universal truths. Importantly, one of these “things known by nature” was religious freedom—and a robust version of it. Tertullian was one of the first thinkers to apply the term “natural right” to religious freedom and likely also the first to speak of the term “religious freedom” (libertatem religionis); he wrote that “[i]t is a human law (humani iuris) and a natural right (naturalis potestatis) that one should worship whatever he intends (quod putaverit colere); the religious practice of one person neither harms nor helps

90 Eric Osborn, Tertullian: First Theologian of the West (Cambridge: Cambridge University Press, 1997), p.239. Osborn cites for these claims De resurrectione mortuorum 2.8 and 3.1, De Ieiunio 6.1, and De Testimonio Animae 5, inter alia.
another.” He understood the concept in a remarkably expansive sense for his time; to him, it included what we would today term freedom from coercion in matters of conscience: “See that you do not give a reason for impious religious practice by taking away religious liberty (libertatem religionis) and prohibiting choice (optione) in divine matters, so that I may not worship as I wish (velim), but am forced to worship what I do not wish.”

Tertullian heavily influenced another early Roman Church father, Lactantius, who lived a generation after Tertullian and continued Tertullian’s work, writing, “[t]here is nothing so voluntary as religion.”

Tertullian’s intellectual and political milieu, while in many senses starkly different from our own, was nevertheless ‘globalized’ through the hegemonic reach of the Roman Empire’s governance. Yet he not only broke new ground in the expansion of rights for early Christians, he also laid the groundwork for what would be ensconced, millennia later, in the Universal Declaration of Human Rights’ Article 18. His work is thus of heightened relevance for our own era of negotiating human rights and religious freedom. Nevertheless, almost no scholarly work yet exists to trace Tertullian’s influence on the development of religious freedom. This dissertation, then, will at once bring to light the works of an unduly neglected writer and also illustrate the practical potential for the use of natural law traditions in addressing contemporary challenges of religious freedom.

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V. Natural Law and Religious Freedom: A Way Forward

A) Why Natural Law?

The above thinkers illustrate the flexibility of natural and unwritten law in rather different traditions of reasoning about justice. I in no way intend to portray these traditions as a panacea to all of our problems of human rights and justice, not even to those pertaining to religious freedom. These will always prove contested and contestable, and utopian solutions to human rights problems are more wisely approached with suspicion than enthusiasm. Rather, I mean to show that these traditions provide rich resources for discerning a concept of justice that transcends both human and divine law. If my analysis of the current state of religious freedom is correct—i.e., if religious freedom is indeed “impossible,” or at least highly unlikely, by means of human, positivist legal protection only—then these resources could be invaluable in our deeply pluralized late modernity.

Why, though, should we resort to natural and unwritten law traditions to do this work? Modern political theory has offered various other foundations of human rights that also distance themselves from legal positivism, including consensus (Locke), sentiment (Rorty), public reason (Rawls) and discursive democracy (Habermas et al.) Why is natural law the superior path for grounding religious freedom? Modern political theory insists on a secular understanding of rights, whereas religious freedom—and indeed, all human rights—stand somewhere between secularism and religion. The secular understanding of human rights can do some, and sometimes very great, work, but only “so long as no one asks us why” a given right is a human right.94 Once we have to address the rationale behind human rights we invariably meander into the

metaphysical and religious realms, if for no other reason than that we begin to ask, “what is a human?” It is my belief, then, that we have reached a point at which purely secular approaches to religious freedom—in any of the above forms—can no longer support it in diverse societies that insist on asking “why?” questions about human rights.95 At the same time, allowing the pendulum to swing from a wholly human legal framework to a religious one tends either to impose a majority religious framework on a minority (or, in some cases, a minority religion on a majority) or to squash dissent within a given religion through state power. Religious freedom in its best form resides somewhere between these two extremes.

The central argument of this dissertation, then, is that if we are to avoid these two extremes, we must turn to natural and unwritten law traditions to mediate these apparently conflicting sides. These traditions invoke reason without either denuding it of its metaphysical, mysterious, even religious aspects, yet they also avoid simply duplicating revelation. They do not claim to provide us with everything that we need to know for either justice in the soul or justice in society, but they do insist that natural reason can take us part of the way there. They enrich our sense of justice from the joint paucities of either purely secular rationalism or the strictly positivist fideism of divine law revealed without any role for human participation. Natural law theories can thus tap into the common-sense morality of human beings as well as serve as a check against the rigidity of the human law’s sense of justice, just as the human law renders natural law operable by its explicit terms.

How can theories of natural law do this? As Robert Sokolowski reminds us, part of the task of natural law is to discern the natural, given ends of both humans and other things in the world. In doing so, it helps us mitigate our individual desires and purposes; in Sokolowski’s

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95 For similar conclusions about secular approaches to human rights, see William Connolly, Why I am Not A Secularist. (Minneapolis, MN: University of Minnesota Press, 1999);
words, this process of natural law reasoning forces us to “distinguish our purposes from the ends of things.” Failing to do so, i.e., insisting on pursuing only our own purposes, whether human or divine, rather than reconciling those purposes with the demands imposed on us by our own nature and the nature of other entities in the world, “would amount to a war of all against all. This is where the apotheosis of autonomy and choice leads.”

I make a similar point in the introductory chapter—viz., liberalism, with its emphasis on autonomy and choice, is unable to provide a basis for human rights because it does not give us guidance as to what the ends of our choices ought to be. Our options, Sokolowski points out, are to recognize the ends inherent in people and things and to adapt our purposes and actions to those ends—that is, to live by the natural law—or, on the other hand, to accept only our purposes and refuse to see ends. In such a case, the arbitration of conflicting purposes and desires is “the establishment of a will that is overwhelmingly powerful, the sovereign or Leviathan, who pacifies by decree and not by evidence, and for whom there are no ends or natures in things.” Both individual humans, with their varied purposes, desires and actions, and the ruler, with his power, must be held accountable to something outside of themselves. Natural law theories posit that that “something” is found in respecting the natural ends of things.

B) Objections to Natural Law: Hobbes and Natural Equity

Modernity has left behind natural law, some say, with good reason. It is entangled in metaphysics or has religious baggage, on the one hand, or it is riddled with ugly, Hobbesian law-of-nature connotations, on the other. I deny none of these charges outright, yet I maintain that a return to natural law is the best we can hope for when it comes to law and justice and human rights in a late-modern era. This claim unfolds itself throughout the course of this dissertation,

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97 Id.
but at present I would point out that the modern turn away from anything more-than-human has not proven entirely successful, with twentieth-century secular regimes proving just as bloody as the religious regimes that waged war in earlier centuries.

To the issue of Hobbesian natural law, however, it is worth asking whether Hobbes’ idea of the law of nature was quite so ugly as we might think. It is widely accepted that Hobbesian natural law is not an aspirational moral natural law; it is rather a self-interested law of nature that promotes security but nothing more. This is the law of nature that Hobbes discusses in the well-known Part I chapter 14 of *Leviathan*. His treatment of natural law in the context of civil law, however, receives less attention. In an extensive discussion of the nature of the laws of a commonwealth in Part II chapter 26, Hobbes provides a more expansive account of the laws of nature that calls into question whether his account of law is as positivist as is generally supposed.

Hobbes here distinguishes between the laws of nature and the civil law, the former of which “consist in equity, justice, gratitude, and other moral virtues…”\(^{98}\)—a description that exceeds the minimalist definition in Part I chapter 13. Importantly, though, the laws of nature only become law properly speaking through the establishment of the commonwealth.\(^{99}\) This is still quite in keeping with Hobbesian legal positivism, for law—even if it comes from the very nature of the world—does not exist outside of its authority. Noting that “all laws, written and unwritten, have need of interpretation,” Hobbes first makes the predictable move of pointing out that “self love or some other passion” will blind most men some of the time in interpreting the “unwritten laws of nature.”\(^{100}\) Such unwritten laws thus stand in “the greatest need of able interpreters,” which will of course fall into the hands of “the judge constituted by the sovereign authority;” indeed, the “interpretation of the law of nature is the sentence of the judge constituted

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\(^{99}\) Id.

\(^{100}\) Id., 180.
by sovereign authority.” His interpretation, Hobbes writes, is “authentic, not because it is his private sentence, but because he giveth it by authority of the sovereign...” Interpreting the Hobbesian law of nature, unlike the Scholastics’ natural law, “dependent not on the books of moral philosophy;” everything comes down to the question of authorization by the sovereign.

So far, this is classic Hobbes—law, whether civil or natural, is whatever the Sovereign declares it to be. The surprising turn comes in the following paragraphs in Hobbes’ discussion of equity. Here, noting that any judge may err “in a judgment of equity,” Hobbes declares that such erring judgments do not stand as authoritative: “No man’s error [i.e., in equity] becomes his own law, nor obliges him to persist in it.” It would seem that, the rest of Leviathan notwithstanding, Hobbes considers equity—or “natural equity,” as I discuss below—to be a necessary condition for the validity of law. He assumes that “the intention of the legislator is always supposed [i.e., assumed] to be equity,” but beyond this, Hobbes considers ‘natural equity’ to be an absolute standard against which judges may not rule: “…all the sentences of precedent judges that have ever been cannot all together make a law contrary to natural equity…” Natural equity, it seems, even more than the sovereign, limits the judge in his interpretation of the law.

What is this natural equity, to Hobbes? While he does not define it explicitly, Hobbes seems to mean by natural equity both a) the law of nature, and b) the dictates of reason as they concern justice. Consider the following passage:

Princes succeed one another; and one judge passeth, another cometh; nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass, for it is the eternal law of God. Therefore, all the sentences of precedent judges that have ever been cannot all together make a law contrary to natural equity, nor any examples of former judges can

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101 Id., 180-181.
102 Id., 180.
103 Id., 181.
104 Id., 183.
105 Id., 181.
warrant an unreasonable sentence, or discharge the present judge of the trouble of studying what is equity…from the principles of his own natural reason.\textsuperscript{106}

Three conclusions follow from Hobbes’ construction here. First, it is due to the immutability of the law of nature that judges are unable to make laws contrary to natural equity. That is, the law of nature binds the judges \textit{to equity}, or some measure of fairness. Secondly, in affixing “natural” to “equity,” Hobbes implies that some kind of justice exists by nature, and that whatever this natural equity is (and Hobbes goes on to give examples of natural inequity, i.e., cases in which “there is no place in the world where [such and such] can be an interpretation of a law of nature, or be made law…”\textsuperscript{107}), it can be overridden by no judge, no matter how authorized he is to pronounce judgments. Thirdly, the contours of equity are arrived at by applying “the principles…of natural reason.”

All of this flies in the face of conventional wisdom about Hobbesian justice, which is thought to be synonymous with whatever the sovereign authorizes. It should be stressed that I am not proposing to overthrow that wisdom if for no other reason than that Hobbes’ natural law is not the same as the idea of natural law that I employ in this dissertation. The point, rather, of this lengthy detour into Hobbesian natural law is to show that even Hobbes’ legal positivism did not, and perhaps could not, prevent recourse to the idea of a natural justice. Secondly, to the charge that natural law has religious undertones, Hobbes, certainly, had at least as much reason to fear religious partisanship as we do in the late modern period. Yet he nevertheless resorted to “natural equity,” which, I have argued, is functionally very similar to what I am calling natural law, as a limit on the sovereign’s ability to declare the law to be what it is. Looking at the contemporary world, in which both religious and secular despotisms seem especially powerful, it is worth

\textsuperscript{106} Id., emphasis added.
\textsuperscript{107} Id., 181-2.
considering whether this tool, which we have so long jettisoned from political theory, might be able to curb both forms of tyranny.

C) Objections to Natural Law, Part II: Religion and Natural Law

It is, I believe, a valid critique of natural law theories, at least as they have been employed since World War II, to call the religious person’s bluff. Natural law is not neutral territory; this is religious faith, and often Catholicism, in pseudo-philosophical garb. But of course, this critique is only valid if the claim is that natural or unwritten law is, in fact, neutral, or secular, or uncontroversial, etc. It is not, and I make no such claim in this proposal. Referring to the Catholic tradition of natural law, Hittinger writes that natural law can be understood only if one takes into account three foci—natural order in the world, order in one’s mind, and the ordinance of a divine lawgiver. That is, natural law is not law simply because reason perceives it in nature; it is law precisely because it is related to something higher. The same could be said of natural law in any other religious—or, and this is important, a non-religion-specific—setting. Even if we disagree on what or who that something higher is, unwritten law retains the force that it does because it is perceived to be (or really is, if these traditions are correct) somehow related, or at least in accordance with a Lawgiver.

Why does this not change my thesis, then? Am I not, after all, attempting to resolve a human rights dilemma without going all the way to the religious end of the secular-religious spectrum? The answer is, in large part, that it is a step in the right direction to admit that human law must answer to something higher than humans themselves. This really only leaves divine law and natural law, and at the risk of oversimplifying matters, natural law, rather than strictly divine law, seems a better candidate for late modernity. True, this pushes the fight up one level of law

rather than settling it definitively, but at least it allows humans the freedom to have that fight, both in society through freedom of speech and in their souls through a robust freedom of religion. Furthermore, as I hope I have made clear, I am proposing a general, not specific, natural law; i.e., what it means to reintroduce natural law into legal thought will look quite different in a traditionally Muslim, Christian, Hindu or secular society.

The other objection is that of the atheist. If the atheist believes there is no god, is it a violation of his conscience to base human law on a higher, unwritten or natural law? I’m afraid that there is no easy answer to this. One can either admit of at least the possibility of a higher law or deny its existence categorically; it is impossible epistemically to have it both ways. For law to take a formal atheist stance is at least as discriminatory as taking a formal religious stance; that much is clear. Is there a neutral territory? Not really, for the atheist and the religious person believe fundamentally contradictory things. But natural law need not go into religious specifics; in American terms, there need be no “establishment” of any religious belief or system. I argue that the practice of supporting written law with traditions of unwritten law—diverse as these traditions are—will ensure more just systems of law and politics, and there is no reason that the atheist whose conscience objects to some aspect of that law or politics would not find a home in such a system. The alternative is the path of the twentieth century, in which human law became solipsistic, answering to human forces alone, which often means answering to those humans who find themselves in power. There may perhaps be a case for retaining this course of action and continuing to disregard the older, more robust conceptions of law that included natural and unwritten law. But the history of the twentieth century—by far the bloodiest on record—has provided scant evidence for this.
VI. Conclusion

Where does this leave us? And where does it leave the natural law? Returning to Strauss and Sokolowski’s loose definitions of natural law, the natural law as it concerns man is expressed in the mode of living in accord with his natural end—an end, importantly, which he does not choose and to which he can choose or not to align his purposes. But as Sokolowski reminds us, these rules of life are not abstracted from particular moral or, we might add, religious traditions. Each society will need to do the best that it can in working out the proper ends of man, or if one prefers, the “general character of the good life,” as Strauss put it. Such moral reasoning at once elevates humans to an end that is given, an end that is, in some sense, outside of themselves, and also brings religion and freedom into a realm in accord with man’s flourishing, with the good life. It will necessarily vary community by community, as the perceptions of the ends of human life vary. But to admit this is a far cry from claiming that there are no such ends and, consequently, no such parameters of the good life that constitute the natural law.

This variety of conceptions of the good life and with it, variety of conceptions of religious freedom, exist uneasily in the highly interconnected, pluralistic environment that globalization has given us. If religious freedom is to survive as such, it is likely that one of two things will happen. Either we will see a gradually homogenized and enforced concept of “religion” at elite, global institutional levels, with penalties for those who do not adhere to it, or we will develop not one coherent understanding of religious freedom but rather splinter into many nuanced versions of this human right, versions determined at local, regional or state levels.

The former route, an elite-driven consensus on what religious freedom entails, only duplicates at a political level the problem that Sullivan pointed to in a legal setting, namely, the imposition of a particular understanding of religion and religious practice. The alternative, the
latter option of developing pluralized understandings of religious freedom, may be the more desirable one. Taking this path would mean gradually disentangling ourselves from the homogenizing aspirations of liberalism’s human rights regime, settling questions of human rights not at an abstract, universal level, but within more localized contexts—a sort of “rights of Englishmen” over “rights of man” approach. This leaves substantially more space to define such thorny terms as both “religion” and “freedom” in ways respectful to those who will live under the relevant laws and incorporate appropriate traditions of divine and natural/unwritten law. This will undoubtedly prove offensive to the modern, universalizing spirit. The question, however, is whether it is more desirable nonetheless. It is my argument, and to some extent wager, that it is.
Chapter 2: Antigone: The Tragedy of Human and Divine Law

Abstract
This chapter presents an interpretation of Antigone in which law is comprised of divine, natural and human forms. I argue that the play illustrates the hubris of both human law, as characterized by Creon, as well as a hubris of divine law, as characterized by Antigone, and that either form of hubris results in tragedy. To avoid tragedy and achieve justice, the law must be conceptualized as both human and divine and mediated by natural law. The prudential voices of Teiresias and Haemon suggest how this natural law of justice could inform both Creon’s and Antigone’s view of law and avert the tragedy with which the play, as it stands, necessarily ends.

I. Introduction: Why Antigone?

Sophocles’ Antigone is often considered the earliest articulation of the idea of natural law or natural rights. Antigone’s purported ‘right’ to bury her brother Polynices amounts to a claim of a higher law than that of the king, one that predates—and trumps—any legal claims on the part of the political community to her brother’s life or body. Polynices died a traitor to the city, prompting King Creon to issue an edict to “leave him unburied, leave his corpse disgraced, a dinner for the birds and for the dogs” (205-206). When Antigone insists on burying Polynices nonetheless, Creon summons her and demands an account, which prompts Antigone to assert the primacy of divine law and justice:

For me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind. Nor did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unfailing laws (nomoi). (450-55).

109 Though Antigone claims a “natural right” to bury her brother, it is important to acknowledge that the modern understanding of “right” was likely unknown in ancient Greece. Insofar as it argues for the existence of natural rights, this chapter takes an indirect approach, arguing that if there is indeed a higher law, natural law, or even naturally known eradicable divine law, the right to obey it follows from that law’s existence.
This excerpt of the play has traditionally lended itself to a humanist interpretation of the triumph of conscience over law: in disobeying Creon’s unjust law, Antigone follows the guiding light of her conscience and thus the higher law. Goethe’s interpretation, for instance, rendered Antigone a quasi-divine character whose superior morality was contrasted with Creon’s baseness. Goethe described Antigone as one of the “few eminently gifted minds” that “manifested their divine nature…won the love of man, and powerfully attracted them to reverence and emulation.”

Her moral purity and nobility, while always present, were not visible until contrasted with Creon’s “odious” character. Antigone is a pure heroine who rightly obeyed conscience over law; Creon is pure villain.

Contrary to this interpretation of the play, I argue that the play does not paint Antigone as an idealized heroine, nor does it illustrate a natural right to obey one’s conscience. Rather, the play presents a conflict of two legitimate forms of law—human law, as represented by Creon, and divine law, as represented by Antigone—then points to a natural justice that might have served to mediate the conflict and avoid the tragic ending. Unlike Goethe and other humanists, then, who see Antigone’s manifestation of the divine nature as an uncomplicated good, I argue that Antigone’s purist view of law as divine law actually contributed to the tragedy, just as Creon’s overwrought devotion to the human law proved his, and Antigone’s, undoing. Creon, in this light, is not in the play only to set into greater relief Antigone’s justice; rather, he portrays the legitimate force of human law in an excessive form, just as Antigone represents a myopic focus on the divine law.

My central claim, then, is that Antigone supports a reading in which tragedy occurs when human and divine law are considered the sole forms of law, and that an unwritten law of nature

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111 Johann Wolfgang Von Goethe, and Johann Peter Eckermann (trans. John Oxenford), Conversations with Eckermann (1823-1832) (San Francisco: North Point Press, 1984), 149.
112 Id., 149.
or natural justice can mediate these forms of law and help achieve an integrated form of justice. In light of this schema of law, the play provides insight into how to proceed when divine law and human law conflict—the very conflict, as I argued in this dissertation’s introduction, that stands at the heart of religious liberty. Thus Antigone can, after all, provide us with resources for navigating the right religious freedom, even if quite differently from the natural-rights interpretation of Antigone would have us think.

In this light, there are two reasons for including Antigone in this dissertation, one immediately applicable to the issues at hand in the dissertation, one more deeply theoretical. The immediate reason is that the play provides an excellent counterpart to the Warner case discussed in Chapter One as well as a means by which to distill the principles at work in problems of religious freedom. Both cases concern a conflict between burial regulations and the claims of relatives of the deceased. In Warner, it was human (civil, municipal) law that had the final say in how the deceased were memorialized; in Antigone, the protagonist followed the dictates of divine law above those of human law. As I discuss below, in both cases the human laws that are in conflict with the divine laws are seemingly just ones—just as Boca Raton’s cemetery regulations were moderate, Creon’s command, in the context of the ancient polis, would have been considered more or less proportionate to the crime of treason. (We must keep

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114 See Sullivan, Impossibility, 177, Appendix A, which lists the cemetery’s regulations concerning memorials, monuments and markers. The regulations cover the expected issues—limited liability, payment of services, etc.—as well as procedures for approval of memorials, which were subject to the Cemetery Manager. The troublesome stipulation was the restriction against all “above ground memorials and monuments” outside of Section A in the cemetery. Despite this regulation, however, Sullivan reports that the longstanding practice of loved ones of those buried in Section B was to construct small shrines to their loved ones.
115 On this see Seth Benardete, Sacred Transgressions: A Reading of Sophocles’ Antigone (South Bend, IN: St. Augustine’s Press, 1999), 3: “There cannot be anything painful or disgraceful in Creon’s decrees, since Zeus failed to inflict no evil that could possibly arise from Oedipus, and Antigone has seen every disgrace and pain there could be as already among the evils that are Ismene’s and her own.” See also Hester: “…from the point of view of political justice, Creon’s edict was not intended to be distinguishable from his correct course of action – in effect, it was his correct course of action, and the audience would have viewed it as such…” (“Sophocles the Unphilosophical,” 21).
in mind that Polynices, due to his role in the siege of the Seven Against Thebes, was understandably, though perhaps not entirely justly, considered a traitor to the city.\textsuperscript{116} Similarities and parallels between the two cases can be overstated, but the salient point is that there exists in both cases a conflict between the legitimate dictates of a human law and a divine law (or religious practice, in some cases) that led family members to disobey the human law, setting the stage for us to examine the nature and meaning of religious freedom.

The second reason for including \textit{Antigone} has to do with the play’s above-mentioned humanist interpretation as an early exemplar of natural rights theory. That is, I initially intended to test the humanist case for a natural right to religious freedom or freedom of conscience within the play, for if such a natural right exists, it seems likely that it would find early expression in this play. In my estimation, however, the play does not support the humanist reading of a natural right to freedom of conscience, for Antigone champions not rights but law, not nature but the gods, and not individual conscience but duties to member and the gods.

To unpack that statement, first, the play is about law more than rights, at least directly. As Brian Tierney writes, “Sophocles’ Antigone did not assert a God-given right; she found herself bound by an inexorable law.”\textsuperscript{117} The concept of right, \textit{dike}, did exist in Sophocles’ time, but this carried the meaning of what \textit{is} right, not the modern conception of natural or human rights. Secondly, Antigone invoked \textit{divine} law, not natural rights, in refusing to obey the human law. Sophocles was not a modern and, in my view, he was not interested in the rights of man. Rather, he wrote about two forces that were—and are—current in political, social and ethical life:

\textsuperscript{116} It is not possible to treat the \textit{Seven Against Thebes} in such a limited space, but it is usually taken for granted that Polynices was the traitor Creon imagined him to be. In a longer work on the topic, however, it might be worth asking whether Polynices, who was denied the rulership promised him by Eteocles in their accord following Oedipus’ death, was in fact such a traitor. This is not especially important for the case at hand, however, as it seems to be the intent of Sophocles that the edict is taken as a matter of course and its justice \textit{qua} edict is not questioned; it is in its application to Polynices’ sister that justice enters the picture.

conflict between the city’s law and the will of the gods. Thus, we cannot see in Antigone a modern rights-bearing individual who defends the primacy of conscience over law. Rather, when we take Antigone at her word, it becomes clear that she felt her obligation to lie with the gods, not with nature or humanity.

Finally, while Antigone did obey her conscience, her conscience was bound to the will of the gods and her duty to her family. To equate Antigone’s loyalty to her conscience with modern notions of the freedom of conscience isn’t quite right, for the “inexorable law” which Tierney refers to is that of the gods, not of Antigone. Antigone herself may or may not agree with the divine law’s justice, but she is (or perceives herself to be) bound by it nonetheless. The triumph of the freedom of conscience is thus an anachronistic insertion of modern individual rights into a text that in fact deals much more with forms of law and competing obligations of nation, gods and family.

All of this is of much more than interpretive consequence; what is at stake is more than literary criticism. Just as humanists mistook a duty to divine law for a right of conscience, modern political theorists and commentators mistakenly interpret calls for freedom of religion—the right to obey one’s god and religious authority—as synonymous with the right to obey one’s own convictions tout court. This results in understandably muddled discourse over where one “individual’s” rights end and another “individual’s” rights begin, for if the source of obligation is located ultimately in the individual’s convictions, competing interests and beliefs result in competing rights. Furthermore, to go down this path is, as I argued in the previous chapter, to beg the religious question of whether religion ultimately reduces to individual belief or whether religion itself claims a “sword” of authority, in Gelasius’ words.
While all of this may be bad news for the humanist thesis, it renders *Antigone* more, not less, interesting to the overall project of understanding the right to religious freedom. Conflicts of divine and human law are precisely what necessitate religious freedom; put differently, without such a conflict, one need not invoke religious freedom. And the play depicts the divine-human law conflict *par excellence*—a direct conflict not merely of convention or attitudes, but of divine law that directly contradicts a human law. However, as I argue below, while Antigone rhetorically relied much more on the gods and on familial loyalty, her speeches betray a pre-theoretical understanding of natural justice. In the end, then, the play does shed light on what might be termed a natural right to religious freedom. But not in the straightforward way that the humanist reading envisions. Rather, the play suggests that natural justice or law can mediate the conflict of divine law and human law, giving rise to a right to obey the divine law, rightly understood.

**II. Antigone: A Clash of Two Laws**

Without rehearsing here the complete storyline of the play, it is worth recalling the basic plot of *Antigone* so as to set the stage for the play’s clash of laws. The play is the earliest of the three extant Sophoclean plays of the Oedipus cycle, the others being *Oedipus the King* and *Oedipus at Colonus*. *Antigone* begins in the aftermath of the war against Thebes occasioned by Oedipus’ son Polynices’ fight against his brother Eteocles over the succession to the rule of Thebes, known as the Seven Against Thebes (recounted in Aeschylus’ play of the same title). Jocasta’s brother Creon then assumes the throne and punishes Polynices by decreeing that anyone who attempts to bury him will be killed. Antigone, the daughter of Oedipus and Jocasta’s incestuous marriage, against the counsel of her sister Ismene, refuses to obey the edict, is caught and condemned to death. The townspeople take her side and the blind priest Teiresias and
Creon’s son Haemon, also Antigone’s betrothed, argue for clemency, but Creon is unmoved, and Antigone is sent to die in a cave. Haemon commits suicide in protest and grief, and Creon’s wife Eurydice follows suit out of sorrow at her son’s death and anger at Creon (1305).

In the following analysis, I detail two forms of hubris present in the play: Creon’s hubris of human law, and Antigone’s hubristic disregard for the concerns of human law in favor of the will of the gods. Still, Antigone, indisputably the heroine of the story, provides a hint as to what might have resolved this clash in her references to a form of justice that is distinct from the law of the gods yet transcends the human law. I argue that this is natural justice, or natural law. The figures of Teiresias and, to some extent, Haemon, who are the voices of prudence in this play, represent this path not taken, the path that acknowledges the validity of both human and divine law, yet brings some measure of reconciliation to the clash.

This interpretation recognizes in Antigone an implied normative ordering of these discreet forms of human, divine and natural law. It neither wholly embraces the path of Creon, 118 These three forms of law are, of course, taken from Aquinas’ four-part division of law, in which the eternal law stands as the source of all law, indeed, it is effectively “the Divine Reason’s conception of things” (Summa Theologica I-II, q.90.a.1.co). I am not, in this dissertation, examining the nature of the eternal law or the Divine Reason. I assume the reader to share my belief in some semblance of right and wrong in the universe, and it is in the working out of the implications of that belief or observation that the project lies.

Below the eternal law, then, are the forms of law of interest to my project: the natural, divine, and human laws. These are not competing sources of law; rather, they are of the same substance of the eternal law but revealed in different ways and consequently contain different precepts, though not contradictory ones. Aquinas’ description is that each of these forms of law is a “participation” in the eternal law. For example, the natural law contains those precepts of the eternal law that can be known through natural reason. (Aquinas describes the natural law as that which a person has through its “share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law,” ST I-II.q.91.a.2.co). Thus, one may know by nature or by natural law that it is wrong to take another’s property. However, what constitutes “property” will be left for the human law to discern, and this will vary from place to place. See ST I-II.q.95.a.4.c: “But those things which are derived from the law of nature by way of particular determination, belong to the civil [i.e., human] law, according as each state decides on what is best for itself.” Human law, then, is comprised of “particular determinations, devised by human reason” (ST I-II.q.91.a.3.co) of the natural law, assuming that the required characteristics of law (an ordinance of reason made for the common good by him who has charge of the community, and promulgated—see I-II.q.90.a.4.co.) are met.

Divine law, on the other hand, is particular to Christianity, for Aquinas—it was necessary to reveal a divine law (e.g., the 10 Commandments) because humans are not competent to judge all moral matters on their own (see ST I-II.q.91.a.4.co).
inasmuch as he represents the priority of human law and immanence, nor makes Antigone an uncomplicated heroine of transcendence and divine law. Rather, it chastises the hubris of human law when it fails to take into account divine law or natural law. At the same time, however, it asks that the divine law admit of some relationship with natural law, such that human law and divine law are not left without a common denominator or mediator. In other words, it is through natural law that divine law can interact with human law in a manner accessible to both Creons and Antigones. The upshot of this for religious freedom is that when one finds a clash of human and divine law, she need not rest her claim simply on divine voluntarism, as Antigone effectively did in pitting the will of the gods against the will of the king and admitting of no other evidence of the injustice of Creon’s edict. Rather, one can employ natural law alongside divine law and human law, as Teiresias’ and Haemon’s characters attempted to do, thus permitting a point of entry for both the political-legal and religious aspects of her claim.

By this token, if we return briefly to the Warner case of the first chapter, the question is reframed and the stakes are changed. No longer do we wonder only which side will ‘win’—i.e., the city of Boca Raton (King Creon) or the lamenting family members (Antigone)—as we might if we perceive all law and politics as inevitably and irreparably in conflict. Instead, the question is whether the law, as measured by the ensemble of divine, natural and human forms of law, is a just law in the first place. How does one go about answering this question? Returning to Antigone, below I analyze the various elements of the theory of law I see in the play, ultimately

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I borrow from Aquinas’ schema throughout this chapter in order to differentiate the different forms or modes of law. However, I do not mean to assume agreement with the overall Thomistic thesis. Rather, I assume that the reader differentiates between the sense of the term “law” used in such expressions as “canon law” or “shari’a law” (both forms of divine law), that is used in “cheating on taxes is an offense against federal law,” and various expressions of “law of nature” that occur throughout the history of political philosophy. Whether these overlap entirely with Aquinas’ understanding of the forms of law is an open question.
suggesting that it is the natural or unwritten law that can guide our understanding of justice when human and divine law come into conflict.

A) Hubris’ Two Faces

Warnings against hubris, which appear throughout Antigone, caution those who see only one aspect of the law, whether human or divine, to think twice. Just after Antigone and Ismene’s opening dialogue, the Chorus inveighs against “the boasts of a proud tongue,” which are the hatred of Zeus (127). The chorus is directly concerned with Polynices’ treachery in the Seven Against Thebes, denouncing “[h]e who had stood…gaping about our seven gates, with that circle of blood-thirsting spears: gone, without our blood in his jaws…” (118–20). The Chorus then tells what comes of such daring: “[Zeus] struck with hurling fire him who rushed for the high wall’s top, hoping to yell out ‘victory.’” Again, the direct reproach is aimed at Polynices, but its context and placement—immediately following Antigone’s announcement that she will defy Creon’s orders—suggests that the Chorus is warning her not to follow in her proud brother’s footsteps.

The Chorus’ warning hints at the nature of the conflict in the play, for it is the god Zeus who opposes the human Polynices’ hubris. But the primary human-divine conflict in the play takes place between Creon and Antigone, for it is Creon’s pride, not Polynices’, that is the focal point of the story Sophocles tells in this play. Antigone’s plea to obey “gods below” rings hollow to Creon, who cannot comprehend law as anything other than what he commands. Sophocles repeatedly brings characters to Creon to implore him to recognize the folly of his insistence on executing his decree against his own niece. This is perhaps nowhere clearer than in the dialogue with Haemon, in which Creon refuses to submit to the wise counsel of his son largely out of pride at the prospect that he should “rule by other mind than mine” (736). The overarching theme
of the dialogue is Creon’s hubris, which leads him to shame Haemon for his attempt to counsel his father out of his stubborn insistence on Antigone’s punishment.

The Haemon-Creon dialogue begins with Creon presenting his son with two options in response to his treatment of Antigone: either Haemon is “maddened against [his] father” or he is “friends [with Creon], whatever [Creon] may do” (633-4). The stark options Creon offers his son implies that he cannot conceive of a friendship that includes disagreement or anger: if Haemon is angry with his father for condemning his bride-to-be, there is no friendship between them. Here we begin to see the voluntarist aspects of Creon’s philosophy of law: what he wills is all that counts in the matter of justice; disagreement with him is the same as enmity. Justice exists only in the ruler’s will or dictate.

Haemon’s reply at first seems to affirm his loyalty to, and even agreement with, Creon: “My father, I am yours. You keep me straight with your good judgment, which I shall ever follow” (635-6). Emboldened, Creon deepens the divide between his two options for Haemon: not only must Haemon choose between loyalty to his father the king and siding with Antigone, but to Creon, the latter option must mean that Haemon is overcome by a lust for her that misleads his mind (648). That there might be justice independent of Creon’s will or mind that would unite Haemon with Antigone is not considered. Even truth, in this speech, is self-referential: “I shall not now proclaim myself a liar/but kill her” (657-8). That is, Creon claims that he will avoid being a liar by following through on his word to punish Antigone. Truth is the fulfillment of his own word.

Likewise, right and wrong are concepts defined by the command of the king. Creon states that the ruler’s command must be obeyed “when it is right, and even when it’s not” (667). This is voluntarism at its finest. Obedience to a command that lacks righteousness is still better than the
alternative: “There is no greater wrong than disobedience” (672). Disobedience leads to disorder in the city, which will spread itself abroad (659-60), and “this ruins cities, this tears down our homes, this breaks the battlefront in panic-rout” (673-4). Creon’s approach to law takes political order—brought about by human law only—as both necessary and sufficient, a shortsightedness that betrays not only a misunderstanding of political order but also a great deal of hubris. Haemon rightly senses that it is this hubris that is at issue and, we see below, responds accordingly. To Creon, then, because disorder, anarchy, and insubordination are the ultimate evils to be avoided, disobedience to “the man the state has put in place” (666) is the greatest wrong.

Note here that to Creon it is the state, not the gods, that has put Creon in place. Earlier the chorus had referred to Creon’s appointment as having come about “by the gods’ new fate” (158). Creon, on the other hand, seems happily dismissive of the role of the gods in his rulership. Note also that the ills to be avoided—disorder in the city and breaking of the battlefront—concern the body and not the soul. This is important, for it is a characteristic shortcoming on Creon’s part that will be mirrored by Antigone’s exclusive concern with the soul and the gods.

Creon’s paean to kingly rule and obedience finished, Haemon now gingerly begins to correct his father’s mistaken belief in his support, announcing that he must side with the town and Antigone. Haemon’s speech is bookended by appeals to “good sense” (683, 724), but one detects as well a theme of humility, briefly in himself and then at length in an appeal for Creon to adopt the virtue. Haemon claims that he cannot argue with Creon’s remarks because he “couldn’t find the words” to do so; nevertheless, “someone else might bring some further light” (687). His argument, then, comes not from a claim of his own higher knowledge, but rather from the good sense that comes from the gods (683). Such good sense, according to Haemon, should lead Creon
to bend his will and change his mind—there is no shame, he insists, in “learning more…from others when they speak good sense” (710, 724).

Haemon implores Creon to relent in language that recalls Creon’s own words at two separate instances in the play. First, Haemon compares Creon’s unbending will to trees that will not yield to the storm torrents. Such trees, he points out, “perish root and branch” (715). This language is reminiscent of Creon’s words to Antigone: “These rigid spirits [i.e., such as Antigone’s] are the first to fall. The strongest iron, hardened in the fire, most often ends in scraps and shatterings” (474-6). Both Antigone and Creon, of course, would perish “root and branch,” with Creon’s son and wife dying prematurely, and Antigone’s life ending unmarried and childless. As the forgoing suggests, this may be due to the two characters’ hubris: Creon’s devotion to his own man-made law and Antigone’s refusal to appeal to prudence. Importantly, there is a third option available to Antigone, which is to reason with the Council, a possibility H.S. Harris discusses (see below).

Haemon’s second attempt to use Creon’s words against him is a ship metaphor—“And so the ship that will not slacken sail, the ropes drawn tight, unyielding, overturns. She ends the voyage with her keel on top.” (716-7). Here he recalls the language Creon used for the fatherland in his inaugural speech to the council: “[I]t’s she, the land, who saves us, sailing straight, and only so we can have friends at all” (188-9). Taken together, then, the fatherland makes political life (“friends”) possible, yet an unyielding spirit in her governance will overturn it. Still, Creon stands firm in his judgment, failing to recognize the very hubris, the “unyielding rope,” that will be his own downfall.

It is worth asking what it is that Haemon considers to be the substance of the “good sense” that opens and closes his appeal. Seth Benardete points out that it is not Haemon’s own
good sense and wisdom that fills his speech; rather, it is replete with appeals to public opinion. He relates sympathetically the town people’s whispers that Antigone is “unjustly doomed, if ever woman was, to die in shame for glorious action done” (693-4). Still, it is clear that Haemon has some sense of a higher law of justice that extends beyond mere public opinion. He eventually declares his father’s conclusions unjust himself (743), despite the threat that implies for his own well-being. He also refers to Creon’s judgment as “opinion” (706), which subtly suggests the need for reason, if Creon is to reach a true opinion about what is just.

More important, however, is Haemon’s implicit belief in the unity of justice. Creon claims that he is acting justly because he is respecting his office—he is promulgating a decree and sticking to it. But to Haemon, Creon “doesn’t respect it, [because he is] trampling down the gods’ due” (745). In other words, justice is more than simply acting out of proper authority; it must respect “the gods’ due,” or, in Antigone’s words, “that Justice who lives with the gods below” (450). This Justice, moreover, is beneficial for Creon, Antigone, Haemon, and the gods; it is not mere partisan interest. When Creon attempts to dismiss Haemon as merely acting as a mouthpiece for Antigone—“Your whole long argument is but for her”—Haemon adds “And you, and me, and for the gods below” (748-9). In other words, there is not one justice for Antigone and another for Creon; there is one, unified justice. Relatedly, in Haemon’s view—which if followed, we must bear in mind, would have avoided a tragic ending—the king’s justice (human law) and the divine justice (the gods’ due/Justice who lives with the gods below) do not, in the end, conflict. There may be the appearance of a conflict, but this is because the human law needs to bend to fit “the gods’ unwritten and un failing laws” (455).

In this light, we might see Haemon’s appeal to the townspeople’s opinions as a type of intervention in the hubris of Creon’s determination to follow human law at any cost. This “good

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119 See Benardete, Sacred Transgressions, 87.
“sense” is in fact a hallmark of natural law reasoning; knowing that something simply is just or unjust by nature is a first step toward identifying the precepts of natural law. But when Haemon invokes the citizens’ response to Antigone’s condemnation, Creon rejects their input: “Is the town to tell me how I ought to rule?” (734). His pride leads him to refuse Haemon’s advice wholesale, requiring no further consideration than his advanced age for certainty in his rightness: “At my age I’m to school my mind by his/This boy instructor is my master, then?” (728-9). In Haemon’s “good sense” Creon can see only treachery: “Your whole long argument is but for her [i.e., Antigone]” (748).

Later in the play, the king’s counselor and prophet, the blind Teiresias, serves as another voice of reason to Creon’s hubris. On entering the Creon’s presence, Teiresias states that there are “two of us looking through one pair of eyes. This is the way of walking for the blind” (989-990). He is referring literally to the physical eyes of his boy attendant, who led him into the room, but in fact it is the “eyes” of Teresias’ moral vision through which blind Creon must come to truly see. Teiresias advises Creon to “yield to the dead” (1029) and allow Antigone to bury Polynices. Whereas Haemon’s appeal to Creon was on the part of the people, Teiresias’ counsel derives from the apparent impending wrath of the gods, who have made their displeasure known by choking the altars of the city, rendering them useless for sacrifice (1017). Teiresias charges that Creon has “confused the upper and lower worlds” (1068). This is true in the straightforward sense that Teiresias points out—Creon has left the dead Polynices above ground and banished the living Antigone to an effective tomb. But given Antigone’s and Haemon’s, as well as Teiresias’, allegations against Creon’s edict (that it defies the Justice that lives below, that it is an unjust deprivation of the gods’ due, and that it is more indicative of stubbornness and stupidity than of good ruling), we may just as easily take it to mean that Creon’s ruling confuses the

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120 See Benardete, Sacred Transgressions, 127.
priority of the law of man with that of the law of the gods. Or, to put it differently, it has
confused positive, uttered edict of man’s justice with the unwritten law of the gods’ justice.

Still, with Haemon’s and Teiresias’ appeals to prudence in the background, it is the
hubris of both Antigone and Creon that form the focal point of the play. Creon’s hubris comes
through in a particularly telling way in his dialogue with Antigone. Antigone refuses to disobey
“the gods’ unwritten and unfailing laws” on account of “fear of any man’s proud spirit” (455,
457). This refers, of course, to Creon’s proud spirit, as his is the only man threatening her. But
her choice of words is significant, because it is Creon’s pride that she opposes to the gods’
unwritten law, not, as we might expect, Creon’s edict, power, or will. For if the play is cast in its
classic law-versus-conscience interpretation, Antigone would have to oppose the king’s law, or
at least his office—but not his pride. Yet to her, the opposition is between the gods’ laws and the
king’s proud spirit. Even more interestingly, Antigone professes to know that she “must
die…even without your [Creon’s] edict” (460-1). That is, the tragedy would have come about
simply by means of the opposition of Creon’s pride to the law of the gods. Hubris, it would
seem, is enough to indict.

But we must ask whether Antigone, who opposed the king’s pride, was not herself guilty
of pride. Below I argue that, contrary to Benardete’s understanding of Antigone as the “living
embodiment of the law,” Antigone’s grasp of the law, while deeper than Creon’s, still insisted on
choosing sides—the divine law opposed the human law, and she chose the former. But she did so
with her own version of hubris by refusing to listen to counsel or employ reasoned persuasion.121

121 It is my own interpretation of the play, though one I am not sure that Sophocles necessarily intended, that this
course of reasoned persuasion and listening to counsel would have been the best one. In the opening lines of The
Republic, Plato charts three possible paths for, effectively, getting what one wants from someone: first, the person
submits peacefully, secondly, forcible means, or the “third choice” of persuasion. (See 327b, in which Polemarchus
addresses Socrates and Glaucon: “Well, you are going to have to choose between staying here peacefully or fighting
us if you choose to get away.” Socrates: “How about a third choice in which we persuade you that you ought to let
us go?” Polemarchus: “But could you persuade us if we don’t listen?”) Ismene chose the path of least resistance.
To Benardete, Antigone is the lived exemplar of the gods’ unwritten laws: The “purity of her devotion…is due to the law,” he writes, and the very “law Antigone obeys shines through Antigone.”\textsuperscript{122} Not only does it shine through her, but Antigone is identified with the law itself: “Antigone is nothing but the law and nothing but her nature.”\textsuperscript{123} This intensity with which she follows the law makes her “the living embodiment of the law [such that] no violation of it could be unknown to her.”\textsuperscript{124} Antigone’s unity with the law is contrasted with Creon, who “is in speech as passionate as Antigone when it comes to the law: but the laws he obeys do not shine through him, for he simply is not up to the degree of intensity needed to bring about such a transparency.”\textsuperscript{125}

This raises a question concerning the nature of the law: Does Antigone, pace Benardete, represent the highest understanding of law as \textit{Law}, i.e., not simply one law among many but an idealized, unified, even universal, \textit{Law}? In this view, there is one \textit{Law} that rules the world, and human law participates in it to various degrees. Creon’s law fell short of this \textit{Law} because he was “not up to the degree of intensity” which Antigone possessed and that allowed her to see more transparently the truths the \textit{Law} attempts to communicate. This version of Antigone makes her something of a mystical seer, in which she comes to represent the embodiment of what we (“staying here peacefully”), and we as readers at once neither fully approve of her choice nor fully blame her. Antigone chose to fight, but importantly, so did Creon. What Plato is suggesting, though, is the inadequacy of both of these paths; the third choice of persuasion is the correct one. But this passage also raises a tremendously important question, even for the play: could Antigone have persuaded Creon if he would not listen? Or would she, like Socrates, nevertheless have been forced to choose her own death? I am not sure that the play lends itself obviously to one interpretation over the other—i.e., that Creon would have relented if Antigone had only attempted the path of persuasion, on the one hand, or that no matter how reasonable she might have been, Creon would have stubbornly stayed his course—but given that Socrates follows the above dialogue with ten books of attempted persuasion, it seems clear that one ought to try.

\textsuperscript{122} Benardete, \textit{Sacred Transgressions}, 20.
\textsuperscript{123} Id., 64.
\textsuperscript{124} Id., 55.
\textsuperscript{125} Id., 28.
might term the higher law. This is, in effect, the classic Hegelian interpretation, which I discuss below.

We must be careful with terminology here, however, for Antigone does not embody, as Benardete’s choice of words (along with Hegel’s commentary) seems to imply, a discreet higher law-entity; rather, she represents a higher understanding of the law—an understanding that encompasses divine, human and natural law. That it is not itself a different law must be the case because, first, in Benardete’s own account, Antigone is “the living embodiment of the law;” indeed, she “lives the law.”\(^\text{126}\) If it is a discreet, and thus competing, law that she embodies and lives and which shines through her, Benardete could not have painted such an obviously triumphant Antigone. He, and indeed the play, would have required some sort of arbitrating device to judge between the competing laws. That the play ends with Creon’s conversion would not suffice, for it also ends tragically, meaning that something is still amiss. Rather, it would seem that Benardete assumes that Antigone’s law is simply the higher, clearer, better-understood version of the one universal law.

Benardete’s picture of law more or less follows the Thomist division of law—a unified eternal law in which the divine, natural and human laws participate in various ways. This is not the typical understanding of law in ancient Greek thought, but it was not unknown, either.\(^\text{127}\) If this vision of law is the correct one, and if Benardete correctly considers Antigone to be the “living embodiment of the law,” then for whatever reason, Antigone’s participation in the natural law is such that she has a greater understanding of the divine law than both Creon and Ismene.\(^\text{128}\)

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\(^{126}\) Id., 57, 55 respectively.

\(^{127}\) See discussion p.102.

\(^{128}\) Ismene could be understood in different ways. Her begging forgiveness from “them beneath the earth” (65) indicates that perhaps she initially understood the divine law just as much but lacked courage to carry it out, courage which she later mustered in her plea to be killed as one who disobeyed Creon’s edict (545).
The alternative position to what I am attributing to Benardete could perhaps fit roughly into an Augustinian City of God, City of Man schema. In this version, Antigone does not represent the equilibrium, the higher aspect or perfect realization of a unified Law. Instead, there are discreet sources and bodies of law, divine and human, and Antigone is to divine law what Creon is to human law: guilty of a hubristic epistemological certainty of the law. In other words, Antigone’s devotion to the divine law is problematically one-sided, if not to the same degree then at least in the same way, as Creon’s devotion to human law.

Is this Augustinian reading correct? We can see that Antigone is wholly devoted to the law of the gods and is uninterested in either continuing to live in the city, as Ismene desires, nor in reconciling the two laws as, perhaps, Haemon attempts to do. Furthermore, she seems in some ways almost to mimic Creon’s attitude toward the law, except that in her case, it is the divine rather than human law to which she obstinately clings. To Creon, for instance, there is “no greater wrong than disobedience” (672)—the law is the law, and to disobey it, even as an “act of grace,” is still crime (514). Antigone, likewise, when she learns of Creon’s edict, does not deliberate on whether she will obey the human law rather than that of the gods and of “Justice who lives with the gods below” (451), nor does she attempt a sophisticated justification for avoiding civil disobedience while honoring the dead in some lesser way. She obeys the divine law, simply. She cannot conceive of dishonoring what the gods have honored, as Creon cannot, at least at first, conceive of undermining devotion to his human law.

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129 That Haemon might seek such reconciliation is suggested in his attempts to mitigate Creon’s decree while not wholly abolishing it. He denies finding fault with Creon’s speech concerning the importance of obeying the law (“I couldn’t find the words in which to claim that there was error in your late remarks, 685), but he finds that in the particular case of Antigone, her condemnation is unjust (693). He credits his view with both “good sense” (684) and accord with “the gods below” (749), indicating that Creon’s law and the gods’ law, while not in harmony in this case, need not be intrinsically at odds, if only Creon listens to wise counsel (724).
Antigone’s connection to the divine law enjoining burial transcends action alone; for her it is a question of identity. When Ismene declines to join her, Antigone responds “Be what you want to; but that man shall I bury” (71, emphasis added), indicating that the choice to “honor what the gods have honored” (77) is in some way constitutive of one’s identity. It is also the defining feature of friendship—Ismene’s refusal to participate in the burial cuts her off from Antigone’s love: “I cannot love a friend whose love’s mere words” (543). Likewise Creon repeatedly associates friendship with loyalty to the fatherland or law.\textsuperscript{130}

On this reading, if Creon is a sort of tyrant, Antigone is a purist who takes the gods’ law literally and absolutely. She sees Law only in light of its divine aspect, which preserves the man-god bond; she cannot see, as her sister does, the lower, yet crucial, human aspect of Law that preserves the city. Instead of the transparent vision of the law Benardete attributes to Antigone—and credits to her devotion—we have a figure who is blinded by her myopic understanding of law. She, as well as Creon, is a tragic figure because of her stubborn refusal to see the larger picture of justice, honing in only on the gods’ commands, or to listen to the wise/prudent counsel (Ismene for Antigone, Haemon for Creon).

I believe that both of these interpretations—what I am loosely describing as the Thomist and Augustinian schemas—are found in the play, but with different consequences attached to each of them: tragic, impossible conflict for the Augustinian schema and a potential reconciliation for the Thomist one. For though Antigone alluded to unwritten laws of justice in her initial speech before Creon, she betrayed faith only in—and rhetorically, ultimately relied only on—divine law as an autonomous form of law. She was not unaware of a greater justice—her references to the unknown origins of law and the “Justice that lives below” betray some

\textsuperscript{130} See, e.g., 182 (“And he who counts another greater friend than his own fatherland, I put him nowhere.”), 188 (“Nor could I count the enemy of the land friend to myself…”), and 634 (“Are you [Haemon] here, maddened against your father, or are we friends, whatever I may do?”).
inking to this effect—but because her philosophical world did not acknowledge any sort of mediating natural law, her ending was, necessarily, tragic.

Hegel’s reading of the play, which I discuss below, seems to adopt a similar view. The divine and human laws were tragically in conflict, and there was no resolution but to destroy both in the forms of Creon and Antigone. My own interpretation is more akin to a Thomist one, as I have characterized it; namely, there is an apparent conflict between divine and human laws, but when natural law is brought into the picture, a reconciliation is made possible through a richer concept of law.

III. Antigone’s Readers

My analysis above sees hubris not only in Creon’s insistence on articulated, man-made law, but also in Antigone herself, whose hubris takes the form of an overwrought devotion to the divine law. This reading rejects the classical humanist take on the play, in which (if a bit simplistically) Antigone was the heroine to Creon’s villain. But what Antigone is one of the most read and most commented-upon works in history, and it is an understatement to point out that the depth and breadth of literature exceeds the scope of this dissertation. The sources below were selected because of their pertinence to either religious implications of the play or, more commonly, the interpretive theme of a thesis and antithesis in the play. It is with Hegel, then, that we begin.

A) Hegel: Conflict to Achieve Right

At first blush, Hegel’s reading of Antigone seems to give rise to a similar conclusion as my own concerning the conflict of divine law and human law. His commentary on the play, while limited to a few pages in the Phenomenology of Spirit and subsequent comments in
Lectures on Aesthetics and Philosophy of Right, has spurred an ongoing tradition of Antigonean interpretation that, like my own, sees in Antigone a clash of divine and human law. Still, my central argument concerning natural law diverges importantly from the Hegelian interpretations. Below I underscore the similarities and points of divergence, focusing on the Phenomenology.

Hegel’s treatment of the play in the Phenomenology occurs in the context of a discussion on the ethical order, i.e., the order of law and right and wrong, and the family. To Hegel, the family is the “natural ethical community,” which is to say an intuited, “unconscious, still inner Notion [of the ethical order].” The family as a whole does not fully realize the ethical life, for its relations are mixed with natural affections, and a community can be “an ethical entity only so far as it is not the natural relationship of its members…for the ethical principle is intrinsically universal.” The ethical order is composed of universal principles, whereas the family is private and held together by natural bonds and affection rather than principle, on Hegel’s rendering.

The male and female natures within the family also determine the potential for ethical action: “…the feminine, in the form of the sister, has the highest intuitive awareness of what is ethical. She does not attain to consciousness of it, or to the objective existence of it…” Women, that is, have an intuitive grasp of the ethical life, even if they do not voice it in the explicit, universal ways in which human law is articulated. Women are associated with the internal family life, the divine law and the household gods. Because the family is governed by the divine law, an intuited family duty such as burial, which Hegel discusses explicitly, is

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132 Hegel, Phenomenology, VI.a.451, p.268.
133 Id., VI.a.457, p.274.
134 Id.
135 See id., VI.a.452, p.271: “The Family keeps away from the dead this dishonouring of him…and weds the blood-relation to the bosom of the earth, to the elemental imperishable individuality.”
understood to be obligatory under the divine law. Antigone, in this light, is following her Hegelian path perfectly by defending family and the gods her family worships.

Men, on the other hand, attain the “self-conscious power of universality” through their citizenship, their life that is out in the open, so to speak, as contrasted with the interior, concealed, unarticulated life of the woman.\textsuperscript{136} The public man Creon thus represents the human law, while the private woman Antigone is to Hegel a “guardian of the divine law,” which she knows intuitively.\textsuperscript{137} Given this public-private divide, there needs to be some figure that connects the concealed, ethical life of the woman with the universalized life of the man. To Hegel, it is through the sister-brother bond that this transcendence of the natural ethical order of family occurs; in other words, the brother-sister relationship breaks through the boundaries of female, private, intuited ethical life and gains access to the public, male realm of human law. While other relationships in the family are due in part to natural feelings or desire—the bonds between husband and wife and parents and children both draw on natural affection or desire\textsuperscript{138}—the sister-brother bond is freed from desire and can therefore become a truly ethical relationship. For according to Hegel, the brother is the figure “in whom the Spirit becomes an individuality which turns towards another sphere, and passes over into the consciousness of universality…he passes over from divine law, within whose sphere he lived, over to human law.”\textsuperscript{139} The brother thus serves as the sister’s link to the human law, for he comes from the same natural ethical order that is the family but passes into the public domain of the human law.

When this sister-brother bond is broken, as in the death of Polynices, the sister loses her link with the human law. Thus, the “loss of the brother is…irreparable to the sister and her duty

\textsuperscript{136} Id., VI.a.457, p.274-5.
\textsuperscript{137} Id., VI.a.459, p.275.
\textsuperscript{138} Id., VI.a.456, p.273.
\textsuperscript{139} Id., VI.a.458-9, p.275.
towards him is the highest.”

Having lost, in Polynices, her link to the human law, Antigone can effectively see nothing but the divine law and her duty to Polynices that proceeds from it; neither human law nor prudence can moderate her position: “Since it sees right only on one side and wrong on the other, that consciousness which belongs to the divine law sees in the other side only the violence of human caprice, while that which holds to human law sees in the other only the self-will and disobedience of the individual who insists on being his own authority.”

Antigone can only see in black and white: there is the gods’ law, and there is lawlessness.

The antithesis to Antigone is, of course, Creon. Creon interprets Antigone’s insistence on the divine law as nothing but “self-will and disobedience,” an assertive defiance of his right to enact and enforce human law. Whereas Antigone was the bearer of a concealed divine law that was expressed as “an inner feeling and the divine element” within her, Creon’s commands carry a “universal, public meaning.”

Man and woman, public and private, human and divine thus meet, and clash, in Creon and Antigone’s struggle.

Hegel’s schema of family and law, while it raises not a small number of feminist (and other) objections that exceed the scope of inquiry here, does describe Antigone’s act quite aptly: she was most directly governed by the law of the gods, but she also intuited the right (ethical) thing to do. Where I part ways with the Hegelian reading, however, is in the form of the synthesis. In the Hegelian framework, the clash of Antigone and Creon, of divine and human laws, was necessary, even inevitable. To resolve the clash, both thesis and antithesis, Creon and Antigone, must be destroyed: “Only in the downfall of both sides alike is absolute right

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140 Id., VI.a.457, p.275.
141 Id., VI.a.466, p.280.
142 Id., VI.a.457, p.274 and VI.a.466, p.280.
accomplished, and...omnipotent and righteous Destiny steps on the scene."\textsuperscript{143} According to Hegel, “each of the opposites in which the ethical substance exists contains the entire substance and all the moments of its content.”\textsuperscript{144} Antigone and Creon, the divine and human law, contain the seeds of each other, yet neither can express the fullness that their joint demise and resurrection into the synthesis would achieve.

With Hegel, I see in Antigone the antithesis to Creon and agree that neither character achieves right. However, I resist the Hegelian conclusion that the play resolves the thesis-antithesis struggle and achieves justice through the tragic ending. Instead, I leave the tragedy as a tragedy, arguing that the particular forms of hubris in Creon and Antigone led them to misunderstand the nature of law and thereby bring calamity on themselves and their city. To Hegel, this clash had to occur, because Antigone and Creon’s laws were fundamentally opposed and irreconcilable. This reading seems implausible, though, for by the end of the play, Creon has converted and regrets his foolish disregard for Teiresias’ counsel. The path of reconciliation between Creon and Antigone, human and divine laws, was offered and rejected. Whereas to Hegel, the tragedy is the clash of human and divine law, I argue that it is the hubris of Creon and, to a lesser extent, Antigone, that is at the heart of the play’s tragedy. Perhaps the clash was necessary, but as Haemon’s speech intimated, there is a larger, unified justice that could have comprehended both sides, but hubris blinded the characters from seeing it.

\textbf{B) Bonnie Honig: Political, Not Ethical, Agon}

While human laws may conflict with a higher law, perhaps even inevitably, this does not pose a \textit{theoretical} problem. As mentioned above, it is important for my argument that the human

\textsuperscript{143} Id., VI.a.472, p.285; see also Donald A. Hester, “Sophocles the Unphilosophical: A Study in the ‘Antigone’,” \textit{Mnemosyne} 24, no. 1 (1971), 16.
\textsuperscript{144} Id. VI.a.450, p.268.
laws in both *Antigone* and the *Warner* case were not obviously unjust or unreasonable laws. If the laws were fundamentally unjust, we might need to go no further than the Augustinian principle that “an unjust law is no law at all.” In other words, the injustice of one law can be said to negate its very legality, thereby obviating the dilemma. The challenge then becomes purely practical (which is not at all to say easy), i.e., practicing civil disobedience.

In both *Antigone* and *Warner*, however, the problem is a real one—a law that is legitimately and authoritatively aimed at the welfare of the city is in conflict with divine law. We cannot simply ignore the human law, then, but neither can we dispense with the problem by simply writing off divine law as, at best, a law subordinate to political law (a Rawlsian solution, perhaps), or, at worst, the remnants of a more irrational age. For even if we disregard the divinities—and even if we jettison religious freedom altogether—relying on the human law alone leaves us wanting for justice in both cases. Antigone, though innocent of treachery herself, finds herself punished by Polynices’ punishment, her beloved brother humiliated and shamed for eternity. The verdict in *Warner* ordering family members to alter their memorials to loved ones, likewise, leaves an unsatisfying impression that no reconciliation between religion and law was achieved; rather, one side had simply won over the other.

What are we to make of this? It seems that there are two potential—but opposed—lessons to draw from these conflicting commands of divine and written law. The first follows Winnifred Sullivan’s line of reasoning concerning the *Warner* case in the previous chapter: the demands of the law of the gods and those of Creon’s human law are bound to conflict, and we would do well to stop pretending otherwise. Religious freedom is ultimately impossible. If Creon’s dicta was not a fundamentally unjust one and, at the same time, Antigone’s need to bury her brother, itself
commanded by the gods, is in some way morally obligatory, then Sullivan is right and religion and state are bound to conflict in the endless agon of politics and law. This is not unrelated to the Hegelian interpretation in its necessity of conflict.

The second potential lesson, however, suggests a need for a natural law to mediate the human and divine laws, as they are perceived. In this case, we are to see in Antigone the hubris of exclusive reliance on either human law (Creon) or divine law (Antigone, for the most part), and are instead meant to integrate both with natural law. It is this latter approach that I favor, but first we turn to various readings of Antigone that tend toward the former, supporting Sullivan’s alleged impossibility of religious freedom.

Bonnie Honig’s analysis of Antigone situates law and politics in a sphere of inevitable conflict. To Honig, the humanist interpretations of Antigone fundamentally misunderstand not only the play, but tragedy as a genre. Antigone is not a figure of universality, whose obedience to a law that is higher than the state constitutes an act of obedience to an ethic that is higher than the written law. Indeed, to Honig, her import is not ethical at all but rather political. Honig recasts Antigone as a figure of agonistic politics, one whose final dirge “parodies, mimics, lampoons, and cites the stories, figures and speech of the powerful…” Her fight against

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145 At least, as Antigone understands it at 455 and as inferred from Teiresias’ interpretation of the gods’ reaction at 1000-1032.
146 I say “as they are perceived” because when natural law enters the picture and insists, as it does, that both human and divine law are in some way answerable to reason, perceptions of both forms of law often change. For instance, one may take her religion’s divine law to command inequality of women, but because this violates the natural law, she is forced to wrestle with interpretations of the divine law until reaching one that allows an integration of natural and divine law. Human law, too, is susceptible to altered perceptions under natural-law frameworks, but perception is less of an issue here because of the positive, explicit nature of most human law.
147 In Honig’s case, this universal law is a fairly minimalistic one, reduced to the common fact that “we humans are and always have been, or had, mothers who mourn our mortality”, here extending the familial relation beyond the literal one in the play. See Honig, “Antigone’s Two Laws,” 2.
148 Id., 22
power, including her eventual suicide, are acts of courage in the face of the “logocentric polis”—
defiance against the universalizing rationality that dominates the political sphere.\textsuperscript{149}

Honig’s interpretation is provocative to be sure, but we have to ask whether this take on
Antigone’s act actually precludes either ethical import to her act, or indeed the very universal
law of nature that Honig wants to refute. Surely Antigone’s act may be both a political one that
signifies the inherently agonistic nature of the political sphere as a matter of fact \textit{and} an ethical
one that makes a normative claim on competing sources of law. For the political \textit{agon} is a
struggle \textit{for} something—that is, there are competing normative or moral forces at play in the
struggle; political actors do not struggle for the sake of struggling. Antigone’s act may indeed
lend itself to a profound political interpretation. But that act is so important in the political sphere
precisely \textit{because} it is an ethical act—the act of defying a human law to obey a competing
law.\textsuperscript{150}

If this is correct, then it is furthermore not clear that Honig has circumvented the law of
nature thesis she opposes. Why would an agonistic political sphere preclude the existence of a
law of nature (or otherwise higher law) by which all political acts—whether of those holding
power or those subjected to it—can be measured? I argue that the political nature of Antigone’s
act actually lends credence to, rather than opposes, the idea that there is a higher law by which all
political acts can be measured. For to accept Honig’s interpretation renders Antigone’s and
Creon’s competing claims as ones of political interest rather than of ethical principle, and this is
an implausible reading of either character’s motives. Antigone acts against her own interest in
every measurable way; we have no reason not to take her at her word when she claims to act out
of moral obligation to obey the divine law. Creon makes it clear that he believes it to be just to

\textsuperscript{149} Id.
\textsuperscript{150} This should not be taken to deny the political aspects of her act; rather, it is to accentuate the import of her act
because it was at once ethical \textit{and} political.
punish anyone who attempts to bury a traitor. Both characters are claiming that their respective acts are the right thing to do, not simply—or in Antigone’s case, not at all—the self-interested thing to do. But Honig denies any ethical meaning to the play, eschewing questions of morality and rights in favor of politics which, denuded of such ethical aspects, is left with naked interest.

None of this should be understood to mean that an agonistic reading of Antigone requires a universal law of nature; rather, it simply should not be said that it precludes it, and the ethical claims Antigone and Creon make should not be rendered purely political. It is difficult to deny the presence of agonism in the play, but I argue that, far from disproving its presence, this is precisely because there is a law of nature lurking in the background. Perhaps not an uncontroversial or even immediately grasped one—in other words, such a law of nature could exist, even were people unable to agree on it or unwilling to heed it—but there is room left for such a law.

C) Benardete: The Impossibility of Antigone

Still, while Honig is wrong to claim that Antigone leaves no room for an ethical law of nature, she is nevertheless correct that Antigone’s act does, in the end, defy the totalizing, logocentric nature of the political realm. In Seth Benardete’s reading, Antigone’s desire to bury her brother and honor the gods’ demands is an impossible desire, for in the context of the polis and its laws, that desire cannot be fulfilled. To Benardete, Ismene’s words to Antigone points out the impossibility, not mere imprudence, of her desired act: “You crave what can’t be done;” Antigone is “[w]rong from the start, to chase what cannot be.”151 Benardete speculates that there may be some link between Antigone’s love of the impossible task of burying Polynices and a divine demand for the same. That is, it is not accidental to Antigone’s predicament that what she

151 See Benardete, Sacred Transgressions, 16-17. Lines 90 and 92, respectively.
loves and what the gods demand are both impossible; rather, the thing that Antigone loves is impossible precisely because she loves what the gods demand—and what the gods demand is, essentially, impossible.\textsuperscript{152}

If the gods demand of humans what is impossible, then the city is practically by definition an \textit{agon}, the place where the man-divine and man-man bonds come continually to struggle and negotiate settlements. That is, the divine demands on a human (the vertical, human-divine bond) become impossible when the city’s laws are interposed; it would not be impossible for Antigone to bury her brother were there no city. But the city must be there because of the existence of man, or at least because of man-as-social creature. That is, the horizontal, human-to-human bond exists as well as well as the human-divine bond, and it, like the human-divine bond, demands governance and rules.

That this is all impossible, if we follow Benardete’s (and Sullivan’s) reasoning, is premised on the assumption that the demands of the gods and the demands of man or society are not the same, but they are both necessary. Thus do we find Creon’s (reasonable, even just) law conflicting with the (also reasonable, just) divine law to bury one’s kin. Hence, too, in Sullivan’s account of the \textit{Warner} case, Boca Raton’s reasonable, just law conflicting with the presumably reasonable, just religious practices of the mourning families.

This conclusion—the impossibility of not just religious freedom but, ultimately, of justice in the city—this agonistic view of the city and its laws, is indeed plausible. Indeed, both Plato and Augustine seem, in various ways, to suggest this, by separating the City of Man or the world of shadows from the abode of the Good or God. If there exists both man’s law and God’s law, man’s city and God’s city, then the freedom of man to obey God as he sees fit (i.e., religious freedom)

\textsuperscript{152} Id., 18. Perhaps, Benardete suggests, “Antigone’s love of the impossible does not just \textit{accidentally} express itself in an unrealizable attempt to obey the divine law [here, to bury one’s kin], but there is some connection between them…” Emphasis added.
freedom) is ultimately impossible, for man is still bound by the city’s law, and that law is by its nature and source not the same as divine law. The city, then, will remain a place of struggle—not only democratic struggle, between citizens, but also struggle between man’s law and God’s (or the gods’) law. That is, unless law is understood to comprehend not only human law but also natural and divine law, as I discuss below.

**D) Hester’s Antigone: The Impossibility of Religious Freedom**

Donald Hester makes a strong case for the ‘impossibility’ thesis as the correct one to draw from *Antigone*—and it is a rather troubling one for prospects of religious freedom even today. Hester points out that the tendency to assume that there can be no conflict between justice and the will or command of the gods is a fundamentally modern one. “To Christian and Humanist alike,” Hester writes, “it has become impossible to believe in the existence of a divinity that commands men to do what is morally wrong…” But this notion developed much later than *Antigone*, so there is no reason for us to believe that Sophocles necessarily saw a resolution to the ongoing *agon* of man and god. We must “pause and consider that Sophocles’ gods are not our gods.” In other words, the gods, to Sophocles, may very well command something not only against human law, but even immoral. “Sophocles was not a Christian, and for him the question [i.e., of whether a god may command something immoral] may have appeared differently.” Ancient religions were replete with examples of what Hester describes as divine hostility toward man, whether by punishing children for the sins of their fathers or for making one unfairly disposed to sin, such as in the case of hardening Pharoah’s heart (in Exodus

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154 Id., 41.
155 Id.
or the Greek doctrine in which the gods would blind a man, induce him to do wrong and then punish him for his wrongdoing. Moreover, we have to keep in mind that the gods themselves were not united; they fought constantly amongst themselves and the unity of divine justice could hardly be assumed.

Indeed at times Antigone herself seems to think the gods no better than Hester’s characterization of them. Twice during her first speech before Creon Antigone points out the inscrutability of divine law, once concerning its genesis: “…no one knows their [i.e., the gods’ unwritten and unfailing laws] origin in time” (457), and once concerning it content—when Creon asks how it could be that the gods would desire the burial of both brothers, good and bad alike, Antigone responds “Who knows but this is holiness below?” (521). This is not just a shroud of mystery than surrounds a divinity; such mystical elements perhaps belong to nearly every god and religion. Rather, Antigone—along with Hester—is pointing to gods that are of their very essence unknowable to man and unanswerable to reason.

Antigone questions not just the knowability of the gods but their loyalty and goodness as well. In her final speech, having been condemned to a living death, she backs off from the certainty she has clung to throughout the play, asking whether indeed she is the “ally” of the gods that she had imagined herself to be:

What divine justice have I disobeyed?
Why, in my misery, look to the gods for help?

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156 As a note, even this act can be taken as a just act. In a defense of man’s free will in Chapter VIII of the Eight Chapters, Maimonides explains this incident as itself a punishment for Pharaoh’s continuous and freely chosen refusal to let the Israelites go. In this case, he writes, it is not an unjust act on God’s part of setting man up to sin, then punishing him when he sinned as God had ordained. Rather, Pharaoh’s punishment for treating the Israelites as he did was the removal of the ability to repent. See Maimonides, *The Eight Chapters of Maimonides on Ethics*, ed., translated and annotated by Joseph L. Gorfinkle. (New York: Columbia University Press, 1912.)
157 Hester, “Sophocles the Unphilosophical,” 43.
158 Interestingly, Benardete points out both of these occurrences, though he insists that Antigone is the “living embodiment of the law.” See Sacred Transgressions, 68.
Can I call any of them my ally?
I stand convicted of impiety, the evidence my pious duty done.
If the gods think that this is righteousness,
in suffering I’ll see my error clear.
But if it is the others who are wrong,
I wish them no greater punishment than mine. (921-8)

Antigone took the path of piety and of loyalty to family and the gods, yet she is rewarded with misery, even the betrayal of the gods. She is no longer certain of her righteousness, or of the gods’ will; the “error” may be on either side.

All of this is quite troubling for contemporary religious freedom. For if we have no reason to suppose that the *agon* of human law and divine law can be resolved in a unified justice, then this *agon*, much more than Honig’s political one (which pits human against human rather than human against god), will foreclose the possibility of a robust sense of religious freedom. If the gods are apt to command something unjust, then human law cannot permit that divine law. This means that human law both must arbitrate and trump divine law, and we find ourselves with limited religious freedom. This is the picture that Sullivan paints, and it is not without reason.

The remaining hope is that Christianity and humanism *have* gotten it right and what the gods command cannot be unjust. That is, the hope is that there is some form of justice that comprehends both human and divine law. Critically, this justice would need also to be answerable to reason; otherwise, it is largely inaccessible to human beings, or is at best another esoteric form of law available only to the chosen few. The hope, rather, is for something akin to what classical Thomist natural law posits—that human law and divine law all participate in a higher law, known as the eternal law, and that all people, regardless of their particular divine and
human legal jurisdictions, know something of this eternal law through the natural law, which is known by reason.\textsuperscript{159}

While indeed Thomas’ God is not Sophocles’ god(s), as Hester points out, neither is this notion of law uniquely Christian (or humanist, the descendant of Christianity). First, as Rémi Brague points out (see discussion below), to the Greeks, the gods were distinct from divinity itself. Whereas the gods might be unjust, divinity itself was higher, and, one assumes, more just than the gods. Secondly, in Book I of *The Republic*, Socrates counters Thrasymachus’ endorsement of injustice in part by pointing out that “the gods will count the unjust man their enemy and the just man their friend,” precisely because they are themselves just (352ab).\textsuperscript{160} It is probably true that such a unified Law\textsuperscript{161} was a Socratic innovation, one that relied on and supported Plato’s Idea of the Good. But it is not accurate to claim that it requires a Christian or humanist paradigm to hold it.

If Socrates and Thomas are wrong, though, and there is no such unity of law, we must ultimately be left with the rule of power rather than the rule of law, as Thrasymachus so aptly portrays. For if justice is not unified, then reasoned persuasion is pointless—to what would it tend? (There is a reason Thrasymachus tries to exit the conversation after making his point.) There is no final answer; there is only the *agon* between man and god. We are thus left only with force to arbitrate such conflicts as *Antigone* illustrates.

\textsuperscript{159} To be clear, I do not mean to suggest that this eternal law or unifying justice would ever be known clearly or perfectly; this schema allows a great deal of room for human error and limitations. What I portray as an aspirational form of justice, however, is just that—something which humans may aspire to understand, on the assumption that such a unified justice exists, rather than settling for perpetual conflict between human and divine law.


\textsuperscript{161} “Law” with a capital L, what Plato might have called the idea of law itself, a law that incorporates human, divine, and natural law in one unified eternal law.
IV. Law in *Antigone*: Agonist, Thomist or Augustinian?

Setting aside for now the question of whether such a natural law does exist, we have to ask whether the play can support the ‘impossibility’ thesis that both Honig, Benardete and Hester, in various ways, imply. In my view, settling on the inevitability of conflict and impossibility of resolve would not be faithful to the play, nor to the possibilities of law. For tragedy comes in the play from Creon’s “stubbornness and stupidity” (1028) in refusing to yield until it was too late and Haemon and Antigone had killed themselves. The agonistic/impossibility thesis has us believe that this was an inevitable tragedy, a conflict of earthly and divine laws that could end only in the death of those for whom the laws commanded a clash.

In my reading, Sophocles has Antigone allude to and intuit the natural law but ultimately reject it as a reliable guide. Had she chosen otherwise, it might have served to mediate the competing demands of both human and divine law in the play and thereby achieve a more uniformly just outcome. Had Antigone had at her disposal the resources to articulate her intuition and argue to the King and the Theban council that Creon’s law not only clashed with the gods’ law but violated the very natural law that inheres in the world (i.e., had she followed the Thomist schema of law mentioned above), it is possible that she (and Creon) might have avoided the tragic ending with which the play, as it stands, necessarily concludes. H.S. Harris reaches a similar conclusion in his analysis of the play:

But if Antigone had proposed the pleading policy at the first, the approach to the Council, and to Teiresias…Ismene would have supported it; and then the Unwritten Law would have triumphed…without anyone having to die for it….[T]he play shows that it is because of these *megaloi logos* [i.e., of both Creon and Antigone] which we find so modern, *that the Divine Law cannot be successfully integrated with the Human Law.*

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In other words, in rejecting the approach of pleading her case with the unwritten (or natural) law, Antigone rejected any potential reconciliation between the law of Creon and the law of the gods. Antigone’s pride, unlike that of Creon, did not lead her to commit the wrong act, for in this case, both the natural law and the divine law correctly commanded her to bury her brother. Nevertheless, on this reading, it contributed to the play’s tragic ending.

Before we crow too loudly over Antigone’s fall from exegetical grace, though, we must not overstate the case. If we grant that both Creon and Antigone missed the mark in some way—Creon through his overwrought devotion to the human law, Antigone through her refusal to even attempt to reconcile divine and human justice—the play still inevitably reads with the stronger verdict against Creon. There are a number of reasons, both historical and speculative, for this. For instance, it could be because Creon is the one in the position of power that his act seems unduly cruel, or perhaps since family ties are stronger than civil ties Antigone’s transgression is the lesser one. Finally, there is the Hegelian view that Antigone, being more in tune with divine justice, is a closer representation of the right than is Creon.

My own argument resembles the Hegelian view in considering Antigone as closer to the right, but I argue that this is not a simple case of thesis-antithesis. Rather, to borrow Harris’ words above, *Antigone* paints a picture of a tragically failed would-be integration of the divine law with the human law, an integration that could have occurred by means of the unwritten, or natural, law. Below I elaborate on what this natural law looks like in the play. Before doing so, though, it is important to note that even if Antigone *had* taken the natural law route, this does not mean that the Creon would necessarily have listened and all would be resolved. Human will and obstinate ignorance can persist in the face of natural law as much as against any other form of
law. I mean only to suggest that the conflict was necessarily a tragic one because of the natural justice’s absence.

V) Natural Justice in Aristotle’s Interpretation of Antigone

Of the early notable commentaries on Antigone, Aristotle’s stands out for our purposes because he refers to Antigone’s act as an example of natural justice: “For there is something that all people have a notion of as naturally just and unjust, even if there is no unanimity or agreement among them, and it is such a thing that Sophocles’ Antigone is obviously speaking of in saying that it is a just thing, though forbidden, to bury Polyneices, since that is just by nature…” (Rhet. 1373b). 163 That is, Aristotle sees Antigone as invoking a source of law that is neither human law nor convention, but is found in the very nature of the world.

My own interpretation of the play is a qualified version of Aristotle’s. I cannot see that Antigone the character had at her disposal a theory of natural justice, so to the extent that she could be said to be “obviously speaking of” Polynices’ burial as “just by nature,” it is due to the fact that she collapsed what Aristotle means by “nature” into “the gods’ unwritten and unfailing laws.” That is, I interpret Antigone’s explicit claim of a higher justice to be the justice of the gods, not natural justice—even though it seems that to Antigone, these two are near synonyms. That said, there is a good deal of evidence that Sophocles was aware of natural justice and that he alluded to it in the play’s overall message. In writing the story as a tragedy precisely because neither Creon nor Antigone would admit of other aspects of the law than their favored ones, and by drawing attention to binding laws of unknown origin (450-7), Sophocles hinted at such natural justice as Aristotle saw in the play.

Tony Burns rejects Aristotle’s reading of *Antigone*. Instead, he reads in the play a warning of the dangers both of tyranny, which is hubris on the part of the ruler (Creon), and of anarchy, which is hubris on the part of the governed (Antigone). Burns describes Sophocles as deeply conservative, pointing to the need for both the governed and the governor to stick to the city’s constitution, not to an abstract ideal of natural justice. As such, there is no need to go beyond this to see Sophocles, through Antigone, as in any way presenting a natural law.¹⁶⁴

Burns charges Aristotle with a tendency, replicated by those who followed him, to conflate the tension represented by the fifth century Athenian debate over *physis* and *nomos* (nature and convention, respectively), on the one hand, with the tension illustrated by “the symbolic confrontation of divine or unwritten law with human law, understood specifically as an edict or enacted decree,” on the other.¹⁶⁵ That is, the fact that there is a human law-divine law conflict does not necessarily mean that there is a nature-custom conflict. In fact, to Burns, it does not even mean that there even exists such a natural law as interpreters are wont to discover in *Antigone*, i.e., a universal law that is “discoverable by the faculty of reason and which is considered to be applicable to all human beings at all times and in all places.”¹⁶⁶ Rather, to Burns, Antigone grounds her claim upon “the immemorial laws, customs and traditions of the particular community of which one happens to be a member, which are considered to be sanctioned by the gods and therefore divine.”¹⁶⁷ In this way, Burns sees Antigone as appealing to what Bernice Hamilton calls “sacred custom,” which, though sacred, is decidedly *not* universal but rather parochial—tied essentially to the community, and only accidentally to the gods that that community serves. To Burns, the conflict in *Antigone* is between customary law, represented

¹⁶⁶ Id., 547-548.
¹⁶⁷ Id.
by Antigone’s insistence on the custom of burying family members, and statutory law or decrees, as represented by Creon.¹⁶⁸

Puzzlingly, though, Burns at the same time defends the statement that for Sophocles, “nature was divine, physis was nomos,” a view he describes as typical in the Athenian intellectual milieu even prior to the Presocratics.¹⁶⁹ But if nature (physis) is both law (nomos)¹⁷⁰ and divine, then in what sense was Antigone not invoking nature and natural justice when she invoked the will of the gods? Here Rémi Brague’s discussion of the peculiar meaning of “divine” in ancient Greece sheds some light. Building on a fragment of Heraclitus as well as Platonic formulations of law, Brague explains that the Greek conception of the “divine,” as in “divine law,” corresponded to nature more than to the gods, whereas the gods themselves were particular manifestations of divinity. Nature, on the other hand, was in some important way emblematic of divinity itself. As such, divine law “takes on a broader extension than the gods themselves and can be used to describe, for example, what is ‘natural.’”¹⁷¹ In this characterization, the classic opposition of nomos and physis melts into a unified Law encompassing both custom and nature because, in Brague’s description of certain Greek conceptions, “the law is intrinsically divine.”¹⁷² It would seem that this Law, this fusion of nomos and physis that is linked to divinity

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¹⁶⁸ Id., 552.
¹⁷⁰ I recognize that nomos can render “custom” just as well as “law,” but in this case, the point would stand: if nature is both customary and divine, i.e., both human and god-like, then it is certainly like a law, for beyond gods, humans and nature, there is left no other possible legislator.
¹⁷² Id., 23-24. In support of this conception of the law, Brague cites Plato’s Laws and the Republic as well as Aristotle’s Politics (at 1287a30: “He therefore that recommends that the law (nomos) shall govern seems to recommend that God and reason (nous) alone shall govern, but he that would have man govern adds a wild animal also.”) Given the Platonic premise that what is most divine in us is the intellect, when Socrates points out that “our divine and admirable law (nomos) bears a name akin to reason (nous),” he assumes in some way that the divine, the intellect and the law are all bound up in one inseparable entity. (Brague, Law of God, 24, citing Laws 12, 957c6-7, R.G. Bury translation (Harvard UP, 1961)
itself, is what Aristotle saw in Antigone’s act, whereas Burns sees only custom and the
particular, local gods.

What I am arguing, against Burns, is that while Antigone did indeed ultimately invoke
the gods, not this divine fusion of _nomos_ and _physis_ that Brague describes, it is precisely because
her gods’ laws were not the divine _physis-nomos_ Law that the play ends in tragedy. Antigone,
forced by her own narrow construction of law and justice to choose between sacred law and the
king’s decree, failed to see this greater, unified justice in which nature, divinity and law are
intrinsically liked. Had she seen it, i.e., had her gods’ laws been linked to this _physis-nomos_ Law,
she might have been able to reason with Creon by pointing to the nature of law itself, which, on
this view, cannot contradict divine nature.

In other words, I agree with Burns that Antigone did not invoke the natural law; she
ultimately invoked the gods and custom. However, I disagree that Sophocles was endorsing this
position, as Burns holds; rather, I argue that the play shows that both Antigone’s and Creon’s
failures to see the law as this _physis-nomos_ Law are what gave rise to the tragedy. Burns, who
wants to resist the humanist urge to paint Antigone as a heroine of conscience, nevertheless
paints her as a heroine of convention, which he claims was Sophocles’ object. He bases
Antigone’s defense of her act on the fact that “the edict in question conflicts with this ancient
customary law, which she considers to be divinely sanctioned.”173 Sophocles, he writes, was
“essentially aristocratic, backward looking, and…fundamentally religious,”174 which is why
Antigone, who also fits this description, is the heroine. On this reading, Creon represents the
“modern political ruler” juxtaposed against the aristocratic, religious and custom-bound

173 Id.
174 Id., 548.
Antigone. One of Sophocles’ goals in writing the play, Burns argues, is to show that “even in a democracy the ancient constitution and the rule of law with which it has traditionally been associated ought to be respected by all alike—both by the rulers and by the ruled.” Antigone, then, did the right thing by respecting the ancient customs, and the play ends tragically because Creon, who represents democracy run amuck, did not.

I do not think, however, that the text fully supports an interpretation in which Sophocles’ primary object in writing the play was a defense of convention. First, recall Antigone’s first speech to Creon: “For to me it was not Zeus who made that order. Nor did that Justice who lives with the gods below mark out such laws to hold among mankind…Not now, nor yesterdays’, they always live, and no one knows their origin in time” (450-457). If we read into the order in which the various sources of obligation appear, we see that to Antigone, Zeus is first. Next comes “Justice,” which is distinguished from Zeus and other gods. That the laws of this Justice derive their force from their customary nature is an unlikely reading, for Antigone claims that no one knows their origin. Rather, she invokes the eternal nature of these traditions—they “always live” and are “unfailing,” which can hardly be said of custom. While she does not use the term “natural,” it is nevertheless clear that whatever this justice is, it is neither human justice, nor is it synonymous with divine justice in the sense of justice declared by the gods. It exists eternally, it cannot be overridden by a “mere mortal’s” edict, and no one knows its ultimate source. In short, it sounds a lot like a justice that exists naturally, or natural justice. Again, this is ultimately not what Antigone relies on—her defense crumbles in her last speech, and while the above lines give a clue that she has some awareness of the natural law, she takes recourse to a brittle divine law

175 Id., 552.
176 Id., 553.
that simply will not be reconciled with human law. Nevertheless, the text is there to indicate that Sophocles, at least, was aware of something like an unwritten law of nature.

A) Natural Law and Phronesis

Burns, in his concern with reading natural justice or natural law into *Antigone*, mirrors Aristotle’s concern, which follows in *Rhetoric* I.13, that natural justice will serve as a type of abstract universal standard which humans can thoughtlessly invoke rather than do the hard work of applying *phronesis* to ethical and moral questions. He writes that it was not Sophocles but rather his radical egalitarian democratic opponents who used natural law reasoning: “Sophocles attaches more importance to practical wisdom (*phronesis*) than he does to the abstract reasoning of the natural law theorists who are criticized by Aristotle in his *Rhetoric*.”

Something is amiss here, however, because Burns’ reading of *Antigone* actually leads to a decrease of *phronesis*. If Sophocles indeed attached a great deal of importance to *phronesis*, Burns’ version of *Antigone* seems an unlikely way to promote it. Burns sees Sophocles as proposing a reliance on the ancient customs and religion of the city when the human law fails. But to default to convention and custom in the face of an unjust law would be conservative in a bad way. We cannot simply do what we have always done, for this would obviate practical reasoning. Burns seems to take students of natural law to dismiss the need for *phronesis*, but in fact, Sophocles, Aristotle and Aquinas all agreed that *phronesis* is a necessary virtue; there need be no dispute on this. Aristotle, Burns rightly points out, did not see an abstract, universalized natural law as sufficient unto justice, but it is quite fair to say that Aquinas didn’t, either—the universal aspects of natural law are in fact quite limited, for him, and the application of it, which

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177 Burns, “History of Natural Law,” 554.
required prudence or practical reasoning, would vary from context to context. Janet Holl Madigan explains this well:

…But as we descend from the level of understanding universal principles to the application of those principles in specific situations, the natural law will prescribe different things. Thus, Thomas explains that the law of nations concerns ‘those things which are derived from the law of nature, as conclusions from premises, e.g., just buyings and sellings and the like, without which men cannot live together….. But those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides on what is best for itself” (I-II.q.95.a.4.c.).

So a theory of law that incorporates natural law in no way needs to jettison moral reasoning to a purely abstract, universal level. Rather, if we are to take seriously both the lessons concerning obedience to the “unwritten and unfailing laws” as well as those concerning hubris as found within Antigone, it would seem that the natural law, whatever it is, enjoins the humility of submitting one’s abstract reasoning—e.g., “the divine law is such”—to practical wisdom—e.g., “in this case, the divine law and human law seem to conflict; I should consider the circumstances and understand the ultimate command to be thus”.

B) Our Better Angels: Distinguishing Antigone’s Natural Law from Other Candidates

Antigone, then, illustrates the tragedy that follows from a failure to understand Law as constituted by divine, natural and human forms of law. The play, by casting a tragic character each for the human law and the divine law, portrays the need for a natural law to mediate the other two forms of law and bond them into one larger conception of Law. What if, however, Antigone is not invoking the laws of natural justice, but rather the ancient right of kin, the sort of natural law that commands the repayment of blood for blood? If this is the case, our “natural”

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justice derives from a more base sense of nature and is therefore hardly aspirational. That is, there may indeed be a natural law that declares that one must properly bury one’s kin—but do we really want to go down the road that law leads us?

My response to this is a bit surprising, perhaps, in the midst of an argument for natural law. There may be overlap between what I am referring to as the ancient right of kin and an aspirational natural law or justice, such that even if Antigone’s act only honors her own kin rather than a natural, universal law of justice, she is still obeying a higher law than that of the king. Such a law of justice is a higher law at least in the sense that, as Aristotle described natural justice, it “has the same validity everywhere, and does not depend on our accepting it or not” (NE V.7.1). This may indeed be an aspirational justice, one which humans perceive as higher than the king’s law but which is not—yet or even ever—perfectly realized. Even as Aristotle conceded that “in our world, although there is such a thing as Natural Justice, all rules of justice are variable,” he insisted nevertheless that “there is such a thing as Natural Justice…” (NE V.7.3). Thus, there can exist a natural justice even if it is not understood or practiced everywhere to equal degrees.

Such natural justice, however, need not be permitted to slide into honor killings or tribal justice, however natural—in a pejorative sense—such practices may be. Again, there is overlap between the ancient right of kin and natural justice, but it is crucial that these are by no means synonyms. For there is clearly a moral distinction to be made between Antigone’s act of honoring her brother by burying him and honoring him by avenging his death with, say, the death of one of Creon’s sons (were we to grant that it would be an honor). The unwritten laws of nature, as Aristotle points out, are not understood in the same ways in all places. Part of the

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reason for this is due to the expansiveness with which one understands “nature.” If we are to understand our “nature” as circumscribed by familial or tribal relations only, then yes—retribution would likely follow. But when we enter political society, this type of eye-for-eye justice quickly breaks down. The nature, as it were—or, if one prefers, the end or *telos*—of a political community is such that we must take from it a law that justice will be delegated to a central authority. In this way, then, natural law itself tells us that this ancient right of kin, which we might take Antigone’s act to represent, cannot be the correct guide for acting.

But, upon further reflection, even that political authority, which I am saying natural law leads us to create (or perhaps recognize), cannot be infallible in all matters. There will always remain the elusive higher, and natural, order of justice which human law cannot perfectly grasp. This is where we see the interaction and integration of all forms of law—human, divine and natural: The ruler is not infallible, nature can’t give us perfect or clear guidance, and divine law is forever in dispute. They need each other, and, as Sophocles shows us, we remove even one of these aspects of law to our peril.

But “natural law” has a second, equally pernicious, connotation beyond that of the retributive right of kin. In Plato’s *Republic*, Glaucon presents a challenge to the idea of true justice as natural justice in the Ring of Gyges myth. Here, the just man who knows that he will face no consequences if he commits injustice will, in the end, act exactly as the unjust man—he will make himself invisible and go where his desires lead him, just as the unjust man. “…we’ll catch the just person red-handed travelling the same road as the unjust.” The reason for this, Glaucon claims, is that in the end, we all “desire to outdo others and get more and more,” and it is only that we are “forced by law into the perversion of treating fairness with respect.” That is, fairness and justice are perversions brought about by convention. What is natural is *injustice*, not
justice: the desire to ‘get more and more,’ Glaucon states point blank, “is what anyone’s nature naturally pursues as good…” (359c-360d).  

This is a powerful argument, of course, and it is not unrelated to the Thrasymachean concept of justice alluded to earlier. Both versions deny a higher law than the self; Thrasymachus sees only the law of power and Glaucon the law of self-interest. Nietzsche would take up their combined mantle millennia later, theorizing that the will to power lies at the core of all human action. His claim today still stands in want of refutation.

Can this Glauconian description of what the just man does by nature be, at its core, the same natural law that Antigone evokes? No. In fact, the Glaucon’s natural “law” is so wholly opposed to the unwritten laws of justice of the play that it is not law at all, according to the play’s conception of law. We see this most clearly in Antigone’s opposition to Ismene in their dialogue at 49-75. In Benardete’s reading, Ismene’s line “in defiance of the law [60] we transgress against an autocrat’s decree or his powers” implies a conflation of law, decree and power. Ismene is speaking of a solitary act, that of burying Polynices, that would simultaneously transgress all three. Benardete attributes the first conflation, that of law with decree, to a democratic assumption (presumably, the assumption that law and decree both have their origin in the people, such that the law of the people reveals itself in decrees). But he points out that confusing law with power, the second conflation, is tyrannical, or at least indicative of a Thrasymachean belief that justice is nothing other than the advantage of the stronger. Ismene does indeed seem to hold both assumptions about the nature of law or justice. Her democratic predilections reveal themselves in her refusal “to act in defiance of the citizens’ will” (77), which

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181 Benardete, Sacred Transgressions, 9-10.
182 Id.
is to say, defying the king’s decree, but the passage cited above suggests that the will of the citizens is perhaps only law when backed by power.

Thus, to Ismene, whatever the law is, it is temporal, immanent, and related to both decree and power; assumes law, decree and power to occupy the same metaphysical space. She allies herself with the Thrasymachean and Glauconian principles of natural justice: viz., what is just is what the strong achieve, and the strong will achieve their self-interest, for this is natural. This is essentially the will to power. Ismene, though hardly on the surface a Nietzschean figure, thus betrays a notion of justice that is closely linked to the will to power, albeit with democratic trappings: the king’s decree is just because it is law, as willed by the majority of the citizens. If might doesn’t make right, then numbers do. Any other ‘law’ is subservient to this; hence, “in these things I am forced and shall obey the men in power” (67).

Antigone rejects Ismene’s concept of justice in its entirety—and her response brings into sharp relief the difference that her own view of justice portends. Whereas Ismene prioritizes the immanent at the expense of the transcendent—“I, therefore, will ask those below for pardon, since I am forced to this, and will obey those who have come to authority,” (65)—Antigone insists that it is the afterworld and “what the gods in honor have established” that will endure: “For the time is greater [75] that I must serve the dead than the living, since in that world I will rest forever.” Having chosen to “honor what the gods have honored” (77) over and above what the king has decreed, she attributes to herself “the crime of piety” (73) and calls it “justice” that the gods will hate Ismene for her inaction (94). In Benardete’s reading, Antigone here “sets herself in opposition to Ismene’s understanding of law, nature, and strength” and “pleads a higher law.” 183

183 Benardete, Sacred Transgressions, 10.
That Antigone’s “higher law” is so closely linked with divine law—i.e., she is invoking both Justice in the abstract and the gods themselves—is not accidental, nor simply a sign of what I have argued is her stubborn insistence on seeing only the divine law. Again, the idea present in the play is that natural law works, through the faculty of reason, together with the ‘revealed’ human and divine law to discern justice. In this schema, one cannot isolate one aspect of law and call it justice; that is, one cannot identify something naturally occurring and call it natural justice, for justice must also aspire to meet the lofty standards of divine justice. Which is to say, that something is natural does not necessarily make it natural law.

VI) Conclusion: *Antigone, Natural Law, and Religious Freedom*

Where does this leave us for the political and ethical problems of religious freedom identified above? Recall that we are looking for a political theory that can provide the sort of justice that both Sophocles and Sullivan are after, a justice that transcends both the law of the ruler and the religious customs of the people.

I submit that a theory of natural law can bring us closer to such a political theory, and I argue that the conception of law portrayed in *Antigone* supports this view. For what is especially interesting is that the play is not purely aporetic. As readers we sympathize with Antigone; we are not left wondering whether Creon or Antigone is the play’s hero. We sense that, in the end, Antigone had some right to act as she did, even though we are given the strongest possible case against the existence of any such right. Polynices is not only a traitor to the city, he even fought against his own kin in the treachery. He is in many respects the last person we would expect to be a bearer of rights. Antigone would consequently have no right to bury him, and in addition, she has openly rebelled against the city’s laws in a potentially destabilizing way. And yet we sense that Antigone did the right thing. How can this be?
On close examination of the play, very few modern readers would suggest that one ought, in general, to cling to the laws of the gods so unquestioningly as Antigone did. Yet they would still stand behind her act. I posit that we read the play in this way because indeed, we recognize a natural law of justice that commands that family be allowed to bury their kin—regardless of whether the gods had so declared or not. In other words, and in keeping with Hegel, Antigone did *intuit* the right thing to do, over and above her devotion to the divine law. This is why, in my reading of the play as a clash of two laws, it is not the divine law that “wins” in the end. Rather, in this case, we know that the divine law was rightly understood because it aligned with the natural law. In such cases, it behooves the guardians of the human law to adapt it to fit the other forms of law.

I mentioned in this chapter’s introduction that *Antigone* does not support the humanist reading in which Antigone defends a natural right to the freedom of conscience, yet that the play may nevertheless help us understand the right to religious freedom. My rationale for this is now hopefully clearer. For if the foregoing analysis is correct, then Antigone did do the right thing because she obeyed a natural law. If she acted rightly, then we must we assume that there would be some sort of right for her to do so. Taking this line of reasoning a step further, it seems that this right would indeed be a *natural* right after all. Thus, the natural justice that *Antigone* alludes to does shed light on the concept of natural rights after all, but through a detour, by showing us a integrated conception of law that respects human, divine and natural laws.

To the ancient Greeks, however, the integration of divine law with natural law was still centuries away, and the tragedy of *Antigone*, rather than serving to effect this integration, could only point ahead to later thinkers who would approach it. Ibn Rushd was one such thinker, and it is to his commentary on Aristotle’s *Rhetoric* that we now turn.
Chapter 3: Ibn Rushd and the Unwritten Law of Justice

Abstract
This chapter provides, first, exegesis on Ibn Rushd’s *Middle Commentary on Aristotle’s Rhetoric*, particularly those passages that concern the existence of natural justice. Secondly, it expounds upon what I argue is a theory of natural law that in the commentary. This version of natural law, largely consonant with Aristotelian natural justice, is thoroughly Islamic in a way that it can, and even ought to, inform contemporary understandings of shari’ā.

I. Introduction: Unwritten Law and Revealed Religion

The preceding chapter draws from *Antigone* the need for an intermediary aspect of law to address contradictions or conflicts between human and divine law. As explained in that chapter, if there is no such mediating device—that is, if law is conceived of not as a tripartite assemblage of human, natural and divine law but rather as discreet sets of divine and human law that are always potentially in conflict—religious freedom will be plagued by the constant tug-of-war between human and divine law. It could be added that this binary conception of human and divine forms of law threatens human rights more broadly, for it presents no obstacle to an understanding of divine law that is wholly in opposition to religious freedom human rights. If, for instance, one understands her religion’s divine law to command, say, gender inequality or slave castes by birth, or if it severely squashes freedom of speech, then the free practice of that religion undermines the very democratic system that, politically speaking, gives rise to religious freedom (and human rights more broadly) in the first place. From several angles, then, we see a need for a mediator between human and divine law.

*Antigone* gave us some insight as to what that mediating aspect of justice or law might be. Antigone’s concept of justice relied more heavily on what was due to the gods—i.e., on divine law—but she also articulated a pre-theoretical version of natural law, invoking “that Justice who lives with the gods below” (452), unknown in origin and thereby conceptually
distinct from divine law, as justification for her act in defiance of the human law. To the Greeks, however, this natural law remained largely just that—pre-theoretical—and Antigone ultimately sided with “those gods below,” whom she didn’t even consider reliable allies (921-3). Natural law loomed in the background, but Antigone couldn’t, in the end, give voice to it.

Such allusions to natural law are common to many Greek thinkers, yet fully theorized notions of it are wanting among them. The possible exception to this rule is Aristotle. In the *Rhetoric*, as discussed in the previous chapter, Aristotle noted that there is something resembling justice by nature that he observed in *Antigone*: “the general law…is based on nature, whereas the written laws often vary (this is why Antigone in Sophocles justifies herself for having buried Polynices contrary to the law of Creon, but not contrary to the unwritten law…)” (*Rhet.* 1375a15).184 He alluded to the existence of natural justice or natural law also in the *Nicomachean Ethics*: “Political Justice is of two kinds, one natural, the other conventional. A rule of justice is natural that has the same validity everywhere, and does not depend on our accepting it or not” (*NE* 1134b1).185 Though it is not always easy, Aristotle wrote, “to see which rules of justice, though not absolute, are natural, and which are not natural but legal and conventional,” this does not change the fact that “nevertheless, there is such a thing as natural justice” (*NE* 1134b15-18).

Whether this, together with a few related discussions, constitutes an Aristotelian natural law remains in dispute and exceeds the scope of this chapter. What is clear, however, is that by the medieval period, natural law had become a fixture of philosophical reasoning, due in large part to the Stoic contributions. Law was understood to reflect what is, i.e., what exists naturally;

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the natural law merely articulated the proper ordering of things by nature. But natural law is limited to what humans can know through natural reason. This fits well within the confines of philosophy but perhaps less well within revealed religion, which purports to make clear the will of God. So what happens to natural law, i.e., the knowledge of right and wrong as we can know it by nature, once God reveals Himself? Does this not override any other form of law, human or natural?

This project attempts to bridge the human law-divine law gap with natural law, which means that if natural law is to say anything for religious freedom, it must be able to work not only with natural reason but also from within the specific—and varied—confines of religions themselves; it must accept God’s self-revelation and still hold as law. For it is no solution to the problem of the conflict divine and human law to simply assert a third, independent law; there must be a resolution for those people who consider themselves bound by both human and divine law but who find themselves, with Antigone, caught between competing laws.

A) Object of This Chapter

Thus, I am interested in whether and how natural law can serve as a means of mitigating the sometimes conflicting demands of human law and divine law, which we see in Antigone as well as throughout the world today. If natural law can do this, it may very well support religious freedom because of its ability to straddle both reason and faith, human and divine law, in a way

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186 Cicero identified natural law with law itself: to him, law is the “the highest reason, inherent in nature, which enjoins what ought to be done and forbids the opposite” (De Legibus 1.18). Indeed, the Stoic conception of law was so closely bound to the idea of a law of nature that, as Elizabeth Asmis writes, in “strict Stoic terminology, the addition ‘of nature’ is redundant.” Elizabeth Asmis, “Cicero on Natural Law and the Laws of the State” Classical Antiquity 27, Issue 1 (Apr. 2008): 3.

187 This could be called the “existential warrant” for the existence of natural law, for which term I am indebted to Joshua Mitchell.
that the human law alone, \textit{pace} Sullivan,\textsuperscript{188} seems increasingly incompetent to manage. In this chapter, I attempt to show that an authentically Muslim tradition of natural law exists in the thought of Ibn Rushd and that it can be used to enrich the concept of “law” in Islam in such a way as can mediate or resolve the conflicts of human law and divine law, especially in matters of religious freedom. In order to do so, I establish the following:

- **Ontology of the unwritten law:**
  - Ibn Rushd wrote of and expounded upon an unwritten law (\textit{sunan ghaīr al-maktūba}) that is the functional equivalent of Aristotle’s natural justice and constitutes a theoretical natural law.

- **Epistemology of the unwritten law:**
  - That unwritten law is accessible to all by means of natural reason, which permits it to serve as a mediator between human law and divine law because with the human law it engages reason, and with the divine law, it admits of a higher law than what is posited by the Legislator.
  - However, there is a difference between how the elites understand the unwritten law and how the masses understand it. The masses understand its basic principles through the \textit{bādī al-rāʾī}, the immediate point of view, alone, whereas elites are able to understand its more specific precepts through deliberative reflection.
  - Still, one should not dismiss the masses’ grasp of the unwritten law, for their means of accessing it, the immediate point of view, resembles Aristotle’s endoxic method.

- **The unwritten law’s place in Islam:**
  - Ibn Rushd’s unwritten law is indeed law, even in the Islamic context, as Ibn Rushd’s text makes clear. It cannot override shari‘a, but it can serve to correct our understanding of divine law in such ways as may better accord with human conceptions of justice and law. Making this point requires some exploration of Islamic jurisprudence and theology, and I show that natural law such as what Ibn Rushd theorizes is by no means inherently incompatible with Islamic law or theology.

\textit{B) Why Ibn Rushd?}

If the object is to show that natural law can work from within a religion, the obvious choice for a medieval natural law thinker would be Thomas Aquinas. The integration of

Aquinas’ natural law philosophy into Catholicism is well known, and I borrow substantially from his categories of law in his Treatise on Law—viz., eternal, natural, divine and human laws. But for this very reason, i.e., the commonly-acknowledged integration of natural law within Christianity, Aquinas makes an uninteresting choice. If natural law holds promise for reconciling human and divine law, it must prove itself in a more challenging case.

I selected an Islamic thinker for this chapter because I believe that Islam provides one such challenge case for the reconciliation of divine and human law. The reason for this has to do with the role of divine law, both shari’a and fiqh, in Islam, as well as its historical trajectory of philosophical and theological developments. First, historically, both Latin Christendom and the Islamic world had to struggle with the implications of revelation for philosophy, but whereas Aquinas eventually integrated Aristotelian categories into Christianity, the Mu’tazilite premise that “everything is available to the unassisted human mind, provided the human mind is given time and applies itself” was superseded by the Ash’ari insistence on the necessity of

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189 Aquinas’ four-part division of law is found in Summa Theologica I-II, q.90. The eternal law stands as the source of all law, indeed, it is effectively “the Divine Reason’s conception of things” (Summa Theologica I-II, q.90.a.1.co). Below the eternal law are the natural, divine, and human laws. These are not competing sources of law; rather, they are of the same substance of the eternal law but revealed in different ways and consequently contain different precepts, though not contradictory ones. Aquinas’ description is that each of these forms of law is a “participation” in the eternal law. For example, the natural law contains those precepts of the eternal law that can be known through natural reason. (Aquinas describes the natural law as that which a person has through its “share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law,” ST I-II.q.91.a.2.co). Thus, one may know by nature or by natural law that it is wrong to take another’s property. However, what constitutes “property” will be left for the human law to discern, and this will vary from place to place. See ST I-II.q.95.a.4.c: “But those things which are derived from the law of nature by way of particular determination, belong to the civil [i.e., human] law, according as each state decides on what is best for itself.” Human law, then, is comprised of “particular determinations, devised by human reason” (ST I-II.q.91.a.3.co) of the natural law, assuming that the required characteristics of law (an ordinance of reason made for the common good by him who has charge of the community, and promulgated – see I-II.q.90.a.4.co) are met. Divine law, on the other hand, is particular to Christianity for Aquinas – it was necessary to reveal a divine law (e.g., the 10 Commandments) because humans are not competent to judge all moral matters on their own (see ST I-II.q.91.a.4.co). I use the category to indicate law revealed directly by God, whether that be the Christian God or another(s).

I borrow from Aquinas’ schema throughout this chapter in order to differentiate the different forms or modes of law. However, I do not mean to assume agreement with the overall Thomistic thesis. Rather, I assume that the reader differentiates between the sense of the term “law” used in such expressions as “canon law” or “shari’a law” (both forms of divine law), that used in “cheating on taxes is an offense against federal law,” and various expressions of “law of nature” that occur throughout the history of political philosophy. Whether these overlap entirely with Aquinas’ understanding of the forms of law is an open question.
In other words, the compatibility or complementarity of philosophy and religion, though perhaps once in similar places for both Christianity and Islam, took opposite directions. It is therefore understandable that within the Islamic tradition, literature on natural law, which attempts to dip its toes into both religious truth and philosophical reasoning, has been scant.

Given these historical developments, law (shari‘a) in Islam is a given, not constructed, entity, and as such cannot be molded to fit whatever one happens to find expedient. In Charles Butterworth’s description, “law” in Islam traditionally refers to “divine law handed down to a particular religious community by a divinely inspired lawgiver, a prophet or a messenger of the Almighty.” Because law is the inspired word of God, it cannot be reduced to opinion; “the divine law is not questioned, not even by the philosophers.” The divine command aspect of medieval Islamic law means that it is necessary that “those who accept this Law and believe in it do not speculate about it in the sense of asking where it came from or how it has evolved over the ages…” In other words, adherents accept, rather than theorize, the divine law. Again, they “need only consult the Law itself, as it is set forth in the Scripture…to see that it is…certainly not to be subjected to scrutiny about its origins or evolution.”

This being the case, Islam seems incompatible with natural law. If the law is not open to interpretation or the use of ‘aql, reason, (or at least not outside of the priestly class of fuqahā’, jurists), then natural law has no real place in Islam, for natural law relies on reason for its

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190 Muhsin Mahdi, “Philosophy and Political Thought: Reflections and Comparisons.” Arabic Sciences and Philosophy, Vol. 1 (1991), 27. Importantly, I do not mean to suggest that Islam must return to its Mu’tazili past in order to accept a natural law tradition; I believe that there is room within the Ash’ari tradition to accept rationalism as well as revelation. This question, however, must be settled elsewhere.


192 Butterworth, “Philosophy of Law,” 249.

193 Id.
interpretation. We are thus left with the rather unsatisfying prospects for religious freedom discussed in this chapter’s introduction, namely, that in the cases of conflict between divine and human law, one must merely choose between the two and not look for a theoretical reconciliation.

The situation is exacerbated by the role of jurisprudence, *fiqh*, in establishing Islamic ethics and norms. *Fiqh* can be thought of as a specification or clarification of the shari’a: in Alfarabi’s description, “The art of jurisprudence is that by which a human being is able to infer, from the things the lawgiver declared specifically and determinately, the determination of each of the things he did not specifically declare.” On first blush, this may appear promising for natural law—it requires the use of practical reason and prudence, which are starting points of natural law reasoning. Indeed, Anver Emon has made a similar point in tracing what he argues to be a tradition of natural law in classical Islamic *fiqh*. In *Islamic Natural Law Theories*, Emon does an admirable job of showing that natural law reasoning was present in medieval jurists such as al-Jassas, al-Jabbar, Razi, Qarafi and others, illustrating their use of natural reason directed toward human fulfillment as a source of shari’a. However, Emon’s argument extends only as far as does the shari’a. In other words, Islamic natural law *fiqh* has nothing to say to non-Muslims, for they are by and large not under its jurisdiction. Furthermore, jurisprudence is concerned not with the use of reason to determine right and wrong as it inheres within the nature of the universe, as is natural law philosophy; rather, it is concerned with the content of divine

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law. Even if we can say that the content of divine law is partially determined by human reason—and in Islam, we can rarely say this—we are still talking about the divine law.

Part of my argument is that the philosophy of law in any given religion needs something resembling natural law to inform its overall conception of law if it is to work with human law in pluralistic society.\(^{197}\) It is not enough merely to interpret what the divine law says (i.e., fiqh’s role); political philosophy must step in and articulate a theory of what law is, what the respective roles of human and divine law are, and how to deal with conflicts between the two. These tasks require the insertion of natural law into the overall philosophy of law, not only in jurisprudential interpretation of the divine law. At the same time, though, the role of fiqh in Muslim life and identity can hardly be overstated, and a theory of natural law that ignores jurisprudence will be of limited use. Thus we need both a jurist and a philosopher in order to examine natural law in Islam.

Ibn Rushd (Averroës) is one such jurist-philosopher. Born in Córdoba in 1126, he was trained in jurisprudence and theology, among other disciplines, and would become one of the foremost of the falāṣifa (Hellenizing Arab philosophers). With Alfarabi and Avicenna he was a leading commentator on Aristotle’s works. Rare among medieval Muslim philosophers, however, Ibn Rushd was also a jurist; indeed, he eventually became qadi (judge) of Seville. His philosophy, though rationalist, was thus not wholly separated from religious law. This chapter analyzes select texts from his *Middle Commentary on Aristotle’s Rhetoric (Talkhis Kitāb al-Khataba li Aristutālis, hereafter MCR)*,\(^{198}\) in which he refers to an “unwritten law” (sunan ḡaʿīr

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\(^{197}\) That is to say, natural law is desirable within any given religion. Whether it is there in a given religion’s theological and theoretical framework is another question. I attempt to show, in this chapter, that it is not only desirable but present and defensible within Islam’s legal, philosophical and theological framework.

\(^{198}\) All references to the *Middle Commentary* are from Ibn Rushd and Aouad, *Commentaire Moyen à la Rhetorique d’Aristote* (Paris: Vrin, 2007), 3 Volumes (General Introduction, Edition & Translation, and Commentary on the Commentary, respectively.) All translations from the French and Arabic are mine except where noted, with gratitude to Nadia Oweidat for her assistance with the Arabic.
al-maktūba). I argue that this unwritten law constitutes the foundations of a theory of natural law within Islamic political philosophy. Ibn Rushd fits well in my project because he, like Aquinas, commented on Aristotle’s works and found something resembling natural law therein. (Indeed, as a mediator of Aristotle to Islam, as Aquinas was to Christianity, we might expect something of the sort.) Unfortunately, with the rise of Ashʿari theologians, who resisted somewhat the rationalism of their Muʿtazilite predecessors, Ibn Rushd’s own rationalist approach fell out of favor and remains marginalized to some degree today within mainstream Islam. Nevertheless, his philosophy stands firmly within classical Islam and carries tremendous historical influence, yet it speaks directly to the very issues of reason and religion that preoccupy so many Muslim thinkers today.

C) Why Aristotle’s Rhetoric?

It is from within the confines of moral philosophy that one usually studies natural law theory today, though it is often finds its way into the realm of political philosophy for application. But it is not generally thought to occupy the same field as rhetoric, which is so often taken to be a near synonym to “persuasion.” Rhetoric in both Aristotle’s and Ibn Rushd’s eras, however, played an important role in both public life and political philosophy. It was of particular concern in Athenian democracy, in which the manipulation of the masses was an ever-present danger, but it was also of vital importance in Ibn Rushd’s time, when the concern was the dialectical theologians’ efforts to persuade the ‘umma (Islamic community). In his brief Summary of Aristotle’s Rhetoric, Ibn Rushd echoes Aristotle’s objective in writing The Rhetoric: “to the extent that man is a social being and a citizen, he necessarily uses rhetorical arguments

Rhetoric is inseparable from political life, and the study of political philosophy without attention to rhetoric’s role in forming political opinions is incomplete.

Rhetoric was important for its role in religious life as well. As mentioned above, Ibn Rushd was particularly concerned with the practice of the dialectic theologians’ attempts “to prove what is not susceptible to proof”. We thus see in both the Summary and the MCR a preoccupation with the relationship of rhetoric to the attainment of certainty, and a good portion of Ibn Rushd’s commentary is dedicated to the correct form of argumentation and its constituent parts. For example, he spent a great deal of effort discussing the enthymeme, a type of syllogism in which one premise was missing because it was assumed. He also attended to the non-logically based (which is not to say illogical) aspects of rhetoric, such as tradition and consensus, though he insisted that “the enthymemes,” being strictly logical, “are more noble and take precedence over these” other forms of effecting persuasion.

For both Aristotle and Ibn Rushd, then, rhetoric was concerned with correct standards of persuasion, i.e., with the question of what it takes to demonstrate that something is true. For our purposes, therefore, the study of rhetoric provides an opportunity to study what ancient and medieval thinkers considered to be sufficient for persuasion, i.e., adequate proof that something was true. It is in this context that the unwritten or natural law makes its appearance, as that Ibn Rushd considered to be something true, not merely persuasive, even if it was indeed also useful for persuasion.

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202 Averroës and Butterworth, Summary, 77 (at 44).
II. Beyond Religious Law: The Ontology of Ibn Rushd’s Unwritten Law

Ibn Rushd most clearly articulates what I take to be natural law in sections 13-15 of Part I of the MCR. There he writes of the existence of an “unwritten law” (sunan ghair al-maktuba, sometimes also called sunan ‘amma, or general law), one that comprehends “those [laws] that are in the nature of everyone,” those laws of which “everyone, by their natural disposition, is of the opinion that they are just or unjust…”203 Ibn Rushd reveals in these passages both ontological and epistemological links between the unwritten law and nature; that is, the laws both exist in the nature of humanity itself and are known through nature. In this section, I tackle the ontology of Ibn Rushd’s “unwritten law,” showing that it is the functional equivalent of an Islamic natural law, one that can help to reconcile the conflicts of human and divine law that are at the heart of the “impossibility” of religious freedom (as discussed in chapter one of this dissertation).

Ibn Rushd most clearly discusses the nature of this unwritten law in two sections of the MCR: that cited above (1.13.2) and 1.15.9-10. The first, 1.13.2, reads in its fullness: “I mean by unwritten, those [laws, sunan] that are in the nature of everyone (fi ṭabi’at al-jamiy’). They are the ones of which everyone, by his natural disposition (bi ṭab’hī), is of the opinion that they are just or unjust even if there is no agreement or contact between each of them.”204 This unwritten law, the sunan ghair al-maktuba, refers not to shari’ah, but rather to traditional law, sunna (plural sunan). This is our first clue that he is writing of law in general, not only of Islamic law. The text also makes clear that he is not speaking specifically of the sunan (here “traditions”) of the

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203 The full quotation reads, “I mean by unwritten, those that are in the nature of all. They are the ones everyone, by his natural disposition, is of the opinion that they are just or unjust even if there is no agreement or contact between each of them.” I am indebted to Charles Butterworth for this passage’s translation.

و أعني بغير المكتوبة تلك التي هي في طبيعة الجميع. و هي التي يرى الكلاً فيها بطبيعة أنها عدل أو حور وإن لم يكون بين واحد واحد من لما اتفاق و لا تتفاوت.

« J’entends, par les lois non écrites, celles qui sont dans la nature de tout le monde. Il s’agit de ce que tous les hommes considèrent par leur naturel comme juste ou injuste, bien qu’il n’y ait entre eux, pris un à un, ni accord ni contrat à ce sujet. »

204 See footnote 203 above.
Prophet Mohammed, which are considered to be one of the four major sources of law for Muslims in Sunni jurisprudence, for “all humans” know something of justice and injustice by them, not Muslims only. In some important sense, then, this unwritten law is universal.

This universality, however, should not be understood as a bland generality that is overridden by the more specific shari’a and its jurisprudential tradition (fiqh); instead, both unwritten and written laws are needed to attain the fullness of justice. In fact, Ibn Rushd envisions a dialectic of sorts between the two kinds of law in 1.15.11: “The excellent judge must not limit himself to the written law, but use the two laws at once so that the truth…is purified for him…” This dialectic, to Ibn Rushd, is a means of arriving at justice in its fullest or truest form: “In effect, by this mode [of interpreting the law], the apparent contradiction between the two falls away and the joining [of written and unwritten laws] becomes correct.”205 This text makes it clear that Ibn Rushd does not envision unwritten law as a source of law that is wholly separated from the shari’a, at least not in such a way that one would be true and the other not. Rather, both are necessary to arrive at the truth. Presumably such truth is, for Ibn Rushd and for Muslims, God’s truth. As such, attending to the unwritten law is not optional, in Ibn Rushd’s schema, much less is it a distraction or hindrance to understanding God’s law. Rather, it is through the adaptation of the unwritten and written laws to each other that “the truth is purified.”

The unwritten law also serves to correct the written law in some manner: to Ibn Rushd, “we use the unwritten law to persuade [others] that what is believed to be unjust according to the

205 1.15.11 text:

و لذلک قد يوجب على الحاكم الفاضل ألا يقتصر على السنة المكتوبة فقط بل يستعمل السنة معًا حتی يخلص / له الحق في ذلك ... فإن هذا الوجه يستفاد من المعارض الذي بينهما في الظاهرة و يصبح الجمع.

« Aussi le juge excellent ne doit-il pas se borner à la seule loi écrite, mais utiliser les deux lois à la fois afin que le vrai soit, en cela, purifié pour lui…En effet, par ce mode, la contradiction qui est entre les deux en apparence tombe et la réunion devient correcte. »
written law is not unjust…” (1.13.2). In one instance, it would seem that Ibn Rushd even exalts the unwritten law above the written law, for he says that an offense against the unwritten law is more serious than one against the written law: “Injustice in unwritten laws, I mean the transgression of these laws, is greater than injustice in the written laws.”

Ibn Rushd’s unwritten law in 1.13.2 is linked to Antigone’s unwritten law, for this portion of the MCR treats the section of the Rhetoric in which Aristotle discusses Antigone’s insistence on burying Polynoeices. Aristotle’s words read: “…For there is something that all people have a notion of as naturally just and unjust, even if there is no unanimity or agreement among them, and it is such a thing that Sophocles’ Antigone is obviously speaking of in saying that it is a just thing, though forbidden, to bury Polynoeices, since that is just by nature” (1373b7-10). The context here is Aristotle’s effort to categorize “all unjust and just acts,” in which he distinguishes acts that are just according to two different sorts of law, particular law and common law. By the former, Aristotle is referring to law that is “determined by each group of people for themselves,” whereas common law is “that which comes from nature” (1373b2-7).

206 « Elles contredisent souvent les lois écrites de sorte qu’on persuade, par elles, que ce qu’on croit être injuste, selon les lois écrites, n’est pas injuste… »

207 For context, a larger quotation: “Injustice in unwritten laws, I mean the transgression of these laws, is greater than injustice in the written laws. In effect, the unwritten laws are as if something were constraining man to follow them, for they are as that which is natural to him…”

208 For example, a larger quotation: “L’injustice dans les lois non écrites, je veux dire la transgression de ces lois, est plus grande que l’injustice dans les lois écrites. En effet, les lois non écrites sont comme si quelque chose contraindait l’homme à les suivre, car elles sont comme ce qui lui est naturel…”

See also 1.15.10, which follows in text.
It is interesting that Ibn Rushd does not simply adopt Aristotle’s categories of law. Aristotle takes the “particular” laws to be take both written and unwritten forms (1373b6), meaning that there is an unwritten particular law—essentially, customs that exist among a particular people. Ibn Rushd, on the other hand, has no category for customary law but rather understands all unwritten law to be natural law, i.e., that which is “in the nature of everyone.” He thus seemingly identifies Aristotle’s common law with the unwritten/natural law (which is also how Aristotle identifies it) and the written law with Aristotle’s particular law. This is no small difference, for it signals to us that Ibn Rushd’s unwritten *sunan* are more than mere traditions or customs; if it were otherwise, it would have made more sense to keep Aristotle’s category of unwritten particular law, which amounts to customary law for a specific people. No, Ibn Rushd seems to mean by the *sunan ghaīr al-maktūba* something much closer to Aristotle’s natural justice.

On these unwritten laws, though he doesn’t mention Sophocles or Antigone by name, Ibn Rushd’s comment that “it is not known when these [unwritten] laws were instituted, nor who instituted them” is taken almost directly from Antigone’s mouth. In her speech concerning “the gods’ unwritten and unfailing laws,” Antigone claimed that “they always live, and no one knows their origin in time.” In fact, in 1.15.9, Ibn Rushd makes this link between Antigone and the unwritten law explicit. Here he reiterates that the unwritten law “is eternal and unchangeable because it is the nature of people, whereas the written laws are variable and changing.” He then uses as an illustration of this eternal and unchanging nature of the unwritten law “a famous

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209 This should not be taken to indicate common law as the term is understood in the Anglo-American tradition but rather simply those laws which are common to all; Sachs identifies it explicitly with Thomist natural law; see Sachs Rhetoric footnote on 1368b7, p.167.

Greek woman who defended a man who had been buried [in accordance with] something other than the written law, saying “I could not bury him according to a law which is current today and which will not be current tomorrow, but according to the law which never perishes.”

As in 1.13.2, Ibn Rushd here connects his unwritten law to the unwritten law of Antigone, which, as I argued in the previous chapter, constituted a proto-natural law. Here, however, the unwritten law is no longer left untheorized but is rather elaborated upon and situated within both Aristotelian and Islamic traditions (the latter of which I discuss below).

The common thread throughout these sources—Antigone, Aristotle and Ibn Rushd—is an ontological statement about the natural law: it simply exists in nature, specifically in human nature, whether or not we recognize or obey it. These laws “always live” (Antigone) “in the nature of everyone” (Ibn Rushd) regardless of unanimity or agreement (Aristotle and Ibn Rushd).

III. Epistemology of Ibn Rushd’s Natural Law

Accepting the existence of these laws is one thing, but knowing their content is quite another. It is important, if there is to be an aspect of law that mediates the human law and divine law, that it be accessible to all by reason; otherwise, it must be taken on authority, either human or divine, and would thereby fail to bridge the divine-human law gap that is at the heart of this dissertation’s project.

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211 « ...la loi non écrite est éternelle, inchangeable, parce qu'elle est dans la nature des gens, alors que les lois écrites sont variables et changeantes. » ... « ...une femme célèbre chez [les Grecs] a défendu un homme qui avait été enseveli chez eux selon autre chose que la loi écrite, en disant : « Je ne pouvais pas l'ensevelir selon une loi qui a cours aujourd'hui et qui n'aura plus cours demain, mais selon la loi qui ne périt jamais. » »

"أَنَّ السَّنَةَ الْخَبِيرَ مَكْتُوبَةً أَبَدَّةً غَيْرَ مَتَغِيَّةَ لَأَنَا فِي طَبِيعَةِ النَّاسِ وَالسَّنَةَ مَكْتُوبَةً مَبْتَلَةً وَمَتَغِيَّةً وَآخَرَهُ عَنِ الأَمْرَاءِ / عَنْهَا نُسِبَتْ عَنْ رَجُلٍ ذَٰلِكَ عِنْدَهُمَا عِنْدَهَا أَعْنَثَتْ عَنْ رَجُلٍ."

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In 1.15.10, Ibn Rushd tells us “the written law is of the order of opinion, given that it is received from another, whereas the unwritten law is not received from another and is known by nature.”²¹² If the unwritten law is known by nature (1.13.2) and is not received by or through anyone, we must take seriously the possibility that Ibn Rushd conceives of a source of law that is outside of the Islamic norm of “divine law handed down to a particular religious community.” This unwritten law is, rather, a form of law that is known, or at least knowable, by all humans by their very natures. But what, exactly, does this reason lead them to know? In other words, how does one know what the unwritten law prescribes or forbids in the first place? For it is one thing for a law to be binding, and even for humans to know that it is binding, but quite another for them to know what it says.²¹³ If the natural law is binding and known to exist but inscrutable in its truths, this does us very little good at all.

Ibn Rushd makes two points of particular interest concerning the accessibility of the unwritten law, found in the passages below:

1.15.6
...As for following the unwritten laws and for determining [what they are], this belongs to those who possess deliberative reflection and to the elites among the people.²¹⁴

²¹² la loi écrite est de l’ordre de l’opinion, attendu qu’elle est reçue d’autrui, alors que la loi non écrite n’est pas reçue d’autrui et n’est connue que par nature.
²¹³ Quant à suivre les lois non écrites et à les déterminer, cela appartient à ceux qui possèdent la réflexion délibérante et à l’élite d’entre les gens.
Those who are named as judges in the cities are but those who know the written laws, not the unwritten laws, for, concerning the apprehension of the latter, there is equality among all people.215

According to the latter statement, the unwritten law is equally apprehensible to everyone, yet according to the former, its precepts must be determined by the elites.216 How are these two positions to be reconciled? To answer this, it is important to understand the peculiar form of universality of the unwritten law. Aouad writes that this universal access to knowledge of the unwritten law “is a universality of approbation and not of discovery.”217 In these two quotations, Ibn Rushd is saying that although there is equality among all people in their apprehension or awareness, idrāk, of the natural law, but not everyone will be equally capable of making an assessment, taqdir, of its precepts.

Thus, the task of “determining” (taqdir) the unwritten laws, which is available only to the elites, likely refers to the process of discovering and articulating the specific precepts of the natural or unwritten law by means of theoretical reasoning; the masses, on the other hand, may know its general contours. That is, all people will recognize the unwritten law’s general precepts or principles with approval, but this will remain a pre-theoretical approbation for most.

Still, this elite-masses epistemological distinction seems to pose a challenge to my thesis. If there is a natural law but only the elites can know what it says, of what use is it over and above the written laws, which are also framed by elites? Would the two kinds of law not be redundant, both being articulated by elites? No. In fact, even were it the case that only elites had access to

215 Ceux qui sont nommés juges dans les cités ne sont que ceux qui savent les lois écrites, non [ceux qui savent] les lois non écrites, car, en ce qui concerne l’appréhension de celles-ci, il y a égalité dans tout le peuple. »

216 In fact, Ibn Rushd seems to differentiate the elites from “those possessing deliberative reflection.” It is worth asking what the difference is between these categories and how the latter category of people relates to the masses, but the objective at hand is to determine the difference in access to the unwritten law between the masses and the elites.

217 « est une universalité d’approbation et non de découverte » Aouad, MCR Vol. III, 207.
the truths of the natural law, this would not nullify the natural law’s importance, for it would (or
should) still guide their legislation to conform to the laws of natural justice. In other words, the
unwritten law of nature would serve to check the power and interests involved in legislating,
even if that task is left wholly to the elites.

Importantly, the unwritten law would not just serve as a check on those would legislate
according to purely human interest; it would also check those elites who would prefer to legislate
directly from divine law. In this case, the unwritten law of nature serves to mitigate the
tendencies less of personal interest and power but rather those of puritanism and extremism, thus
permitting greater flexibility, even pluralism.

More to the point of the natural law’s epistemology, though, note that Aouad’s
description of Ibn Rushd’s unwritten law, though it precludes universal knowledge of the
specific determinations of the unwritten law, does include “universality of approbation.” This
means that while the masses may not have access to the theoretical demonstrations of the truths
of natural law, they do have an innate sense that there is a natural law—though I would add that
we would expect this often to yield a fairly thin level of unanimity when it comes to its specific,
rather than general, precepts. Still, even the recognition of goods can prove pivotal in ethics, as
both moral intuitionists and the so-called “New Natural Law” school of thought illustrate.218 For
this approbation, inasmuch as it serves as a reflection of the unwritten law, has the ability to lead
even non-elites to the discovery of right and wrong; here Antigone figures as the prime
illustration of the unwritten law’s force, which Ibn Rushd acknowledges (see above in re a
“famous Greek woman,” 1.15.9).

218 Again, this is due to the fact that it is only the elites who will know the specifics of the unwritten law by means of
theoretical demonstration. On the other hand, Grisez, Finnis and others have built an entire moral theory on such
universal approbation of certain goods. See, e.g., Finnis, John, Germain Grisez and Joseph Boyle, “Practical
So what exactly is this approbation? To Ibn Rushd, it is linked to the good; it is not mere opinion: “For the good according to the unwritten law is [comprised of] the acts which, whenever a person increases them, without end, his praise and acclaim or dignity and status increase, [including] such [acts] as helping friends and paying back benefactors” (1.13.8). That is, approbation can serve to point out the good as the latter is known through the natural law. But Ibn Rushd’s words should not be taken to mean that the good consists in that which is praised but rather that it is indicated by approbation; i.e., when a person commits acts which are good according to the unwritten law, he will be praised. Recall 1.13.2, in which Ibn Rushd writes that the unwritten laws exist “even though, taken one by one, there is neither agreement nor contract on this subject,” as well as 1.15.10 in which he juxtaposes the written law’s place in the “order of opinion” with the unwritten law, which “is not received from another and is known by nature.” Ibn Rushd seem quite content to acknowledge that these laws exist and, in Aristotle’s words, that their validity “does not depend on our accepting it or not” (NE 1134b20). Still, while they certainly exist for all, not everyone needs to have elite-level knowledge of them. Rather, people will more or less universally approve of the unwritten laws’ general precepts.

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219 MCR 1.13.8: 
Falakh fi ḥabūb al-sunnat al-gharīb al-muktaḥa fī al-‘a‘amal iḥtīā‘a li kulli l-‘a‘aimma minhā ilā غیره تزده جمعه و مدحه و كرامته و رفعته،
«Le bien, selon les lois non écrites, c’est les actes dont il se trouve qu’à mesure que l’homme les accroît à l’infini, sa glorification et sa louange, ou son honneur et son élévation s’accroissent, comme aider les amis et rétribuer les bienfaiteurs. »

220 See footnote 203 above.

221 Ibn Rushd... 
السنة المكتوبة مفروضة إذ كانت مفروضة من الغير والسنة الغير مكتوبة ليست مقرونة من الغي وإنما هي معرفة بالطبع. « la loi écrite est de l’ordre de l’opinion, attendu qu’elle est reçue d’autrui, alors que la loi non écrite n’est pas reçue d’autrui et n’est connue que par nature. »

222 Al-Farabi’s writings on the distinction between the elites and the masses in his Book of Religion may be useful here: “Rather, most people who are taught the opinions of religion and instructed in them and brought to accept its actions are not of such a station [i.e., “as to understand what is spoken about only in a philosophic manner”]—and that is either due to nature or because they are occupied with other things. Yet they are not people who fail to understand generally accepted or persuasive things.” In other words, the masses, not having the leisure and/or training of the elites, were not able to access theoretical demonstration and advanced philosophical reasoning, but this did not preclude them from recognizing truth on a more general level. To Alfarabi, they were still open to dialectic and rhetoric “for defending, supporting, and establishing those opinions [i.e., of virtuous religion] in their souls.” See Alfarabi, Abu Nasr Muhammad Ibn Muhammad, “Book of Religion,” in Alfarabi and Charles Butterworth, Alfarabi: The Political Writings (Ithaca, NY: Cornell University Press, 2001), paragraph 47-48, p.98.
What I take Ibn Rushd to mean is that general approbation serves as an aid in deciphering the precepts of the unwritten law, but decidedly not as the determining factor of what those precepts are. Another way to say this is that as it concerns the unwritten or natural law, approbation helps point the way to the contours of the natural or unwritten law; it is theoretical demonstration that reveals the fullness of the natural law, inasmuch as it can be known.\(^{223}\)

The second point this description of the good elicits is that in linking approbation to the content of the unwritten law, Ibn Rushd is ascribing a relatively high standing to human reason, at least insofar as it is juxtaposed against revelation. For the view in most other accounts of medieval Islamic philosophy was that “without revelation, humans would not have any morality or law at all.”\(^{224}\) Ibn Rushd’s philosophy generally, but certainly this thought on approbation specifically, belies that notion. The possible analogue within traditional Islam to Ibn Rushd’s use of approbation would be the jurisprudential tool of \(ijmāʿ\) (consensus) that included the consensus of all Muslims (at least, this was both Ibn Rushd’s own as well as the eponymous Shafiʿi’s understanding of \(ijmāʿ\)).\(^{225}\) But even this, the most expansive role for consensus in classical jurisprudence, was limited to the community of Muslims, not all human beings, and was a procedural source of law that was only taken into account once the jurist had already used the Qur’an, Sunna and \(qiyās\) to arrive at a presumptive (\(ẓanni\)) outcome. Ibn Rushd, on the other

\(^{223}\) This is yet more clearly evinced in Ibn Rushd’s shorter commentary on the Rhetoric, the Summary, in which he exalts the syllogistic enthymeme as “more noble” than the “external matters” of rhetoric, which are the forms of persuasion that are not derived from logic, in which category he counted consensus. See Summary 44 and 33.5.

\(^{224}\) Crone, God’s Rule, 263.

\(^{225}\) In the Decisive Treatise, Ibn Rushd takes consensus (\(ijmāʿ\)) of Muslims to be authoritative on the question of whether “all the utterances of the Law [are] to be taken in their apparent sense”. Though the answer was a resounding ‘no’ in that the Muslim consensus was that the Law admits of both an apparent sense and one requiring interpretation, even the objects of consensus—in this case, the Law—were open to correction by demonstration. In other words, if Muslims had established by a non-certain consensus that some particular aspect of the law admitted only of its apparent sense, this opinion could still be overridden by demonstration. See Averroës, Decisive Treatise and Epistle Dedicatory, trans. Charles Butterworth (Provo, UT: Brigham Young University Press, 2001), section 14, lines 5-30. On Shafiʿi, Hallaq argues that Shafiʿi himself was inconsistent in holding to universal \(ijmāʿ\) of the entire Islamic community if that consensus was to be understood as a solitary tradition, i.e., rather than resting on text. See Hallaq, Wael B. “The Authoritativeness of Sunni Consensus,” International Journal of Middle East Studies 18 No. 4 (1986), 432-433.
hand, seems here to propose a much more exalted view of the utility of ordinary human reason in knowing, or at least recognizing, justice.

Here we find the crux of the matter, for it is on the understanding of human reason that a theory of natural law stands or falls. If reason is not sufficient to know at least some truths about justice and injustice, then indeed “all morality [takes] the form of positive law enacted by God,”\textsuperscript{226} and the insufficiencies of the written law described by Ibn Rushd stand (viz., it is rigid and inadaptable to changing circumstances, it leaves no room for forbearance, etc. See \textit{MCR} 1.13.9\textsuperscript{227}). If, on the other hand, natural reason cooperates with the written law in understanding the unwritten law, we are allowed a much richer conception of justice. This conception is able to tap into the common-sense morality of human beings and serve as a check against the rigidity of the written law’s sense of justice, just as the latter clarifies the former by its explicit terms.

\textit{B) The “Immediate Point of View” in Ibn Rushd’s Rhetoric}

Returning to the issue of the accessibility of the unwritten law, then, we must ask in what way reason—not just among the elites, but among all people—allows one to know what the unwritten law says. In Ibn Rushd’s analysis of rhetoric, there are two ways of being convinced of something: either the hearer is convinced of the premise and accepts it immediately upon hearing it (or immediately thereafter), or he accepts it on its reputation as true.\textsuperscript{228} Both of these ways of knowing are done through what Ibn Rushd refers to as the “immediate point of view” (\textit{bādī al-rāʾ}),\textsuperscript{229} which characterizes those “propositions that the hearer accepts without reflection, or by

\textsuperscript{226} Crone, \textit{God’s Rule}, 264.
\textsuperscript{227} The “determined law...is not sufficient in that it determines relative to good and evil in the behavior of each individual human, in such a way that one needs to add to it or subtract from it something according to the unwritten law...”
\textsuperscript{228} See 2.23.19 below.
\textsuperscript{229} Aouad, \textit{MCR} Vol. 1, 121.
himself, without their being generally accepted or inasmuch as they are generally accepted.”

That is, rhetoric is effective when the hearer is convinced without an intermediary, which might be anything from a teacher to a dialectical proof. The best text in the MCR on this matter occurs at 2.23.19:

It is necessary that the premises used here consist of presumed things accepted according to the immediate point of view, not from things that are not accepted, unless they consist in that which one can accept and be persuaded by easily and shortly after their mention. In effect, the things of which one lets oneself be convinced are of two sorts: one of these is that of which man is convinced and accepts by himself when he hears it, and the other is that which he accepts when he hears it because it is well-known and praised by all.

This excerpt comes from a rather technical passage in the Commentary, but for present purposes it is important to note that Ibn Rushd categorizes those things that are accepted by the immediate point of view into either a) those premises of which one is immediately convinced upon hearing, or b) which it is possible to grant or be easily persuaded of shortly after hearing it. This latter condition seems to amount to the ability of the hearer to be persuaded once a

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231 MCR 2.23.19

و ينبغي أن تكون المقترحات التي تستعمل هي من الأشياء المطلوبة المقولة في بادي الرأي لا من الأشياء التي لا يُصدق بها إلا أن تكون مما يمكن أن تقبل ويقع بها الإقلاع من قرب ومسهولة. و ذلك لأن الأشياء التي يقع بها التصديق هنالك صفان: أحدهما ما إذا سمع الإنسان صدق به وقيله من ذاته و الآخر ما إذا سمعه فيه شهره و لأنه محمود عند الجميع.

« Il faut que les prémises utilisées ici proviennent des choses relevant de l’opinion et admises selon le point de vue immédiat (al-asfi’ d’al-maznûna al-maqbûla fi bâdi’ al-ra’îy), non des choses dont on n’est pas convaincu (lā yusaddaq bi-hâ), à moins que ces prémises ne proviennent de choses qu’il est possible d’admettre et dont il est possible d’être persuadé (yaqd’ bi-hâ al-igna) peu de temps après [leur mention] et facilement. En effet, les choses dont on se laisse ici convaincre sont de deux sortes : l’une des deux est ce dont l’homme est convaincu et qu’il admet de lui-même quand il l’entend et l’autre est ce qu’il admet quand il l’entend parce que c’est notoire et loué par tous. »

232 As a note, in this same section Ibn Rushd later adds “certain” convictions as a third category. Certain convictions are juxtaposed against these two sorts of convictions that come about through the immediate point of view because both of the latter categories effectively amount to hearsay: “Now, man does not let himself be convinced of the first sort [of premises, viz., those of which one is convinced immediately upon hearing] unless he is of the opinion that they are a part of the second [category, viz., those premises which are known and praised by all].”
missing premise is added, or the context provided, for Ibn Rushd illustrates it in the following section with an ancient saying: “Laws need another law to correct them as the fish of the sea needs salt, even though the sea is salty, and as olives need oil, even though they have oil in them.”

At first, these analogues seem wholly unpersuasive, for a fish is surrounded by salt and therefore has no need of further salt, and olives are partly composed of oil, thereby not needing any further oil. But “one will without a doubt, shortly after their mention, be persuaded once you add that the fish needs salt because we want to maintain it by conserving it and we want to give it another taste; in the same way, we add something to olives when we want them to subsist and change taste—I mean that we add oil.” That oil, then, is the missing premise.

This description marks a condition for rhetorical success—viz., for a premise to be accepted in rhetoric, it must be able to be known through the immediate point of view. Indeed, Ibn Rushd goes so far as to exclude from the art of rhetoric anything that is not accepted according to the immediate point of view in one form or another. Speaking of the “two sorts” of acceptance as either immediate acceptance by the hearer without reflection or immediate acceptance based on common notoriety, he writes that “when rhetoric is deprived of these two sorts and [the rhetorical speech] does not concern that about which one will be convinced shortly after its mention, one must not use [such speech] in this art [of rhetoric].” In other words, if the speech is such that one neither immediately accepts it, nor accepts it with an easy and quick

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233 *MCR* 2.23.20: إن السين تحتاج إلى سنا ت يقوم بها كما يحتاج السمك الذي في البحر إلى المالح، والبحر مالح، و كما يحتاج الزيتون إلى الزيت وفيه الزيت.

« Les lois ont besoin d’une loi qui les corrige comme le poisson de mer a besoin de sel, alors que la mer est salée, et comme les olives ont besoin d’huile, alors qu’elles ont en elles de l’huile. »

234 Id.


236 *MCR* 2.23.19: ع اقول الخطط من هذين الصفين ولم يكن ما يفع التصديق به عن قرب لم يتعال أن يستعمل في هذه الصباحة.

« …lorsque le propos rhétorique est dépouillé de ces deux sortes et qu’il n’est pas de ce dont on va être convaincu peu de temps après [sa mention], il ne faut pas l’utiliser dans cet art. »

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explanation, nor accepts it on the authority of others’ opinions—all of which comprise acceptance according to the immediate point of view—then that speech has no place in rhetoric.

This discussion of the immediate point of view pertains to Ibn Rushd’s theory of unwritten law, if somewhat indirectly. The issue here is the accessibility on the part of the masses to the precepts of the unwritten law, since Ibn Rushd has declared them to be the purview of those capable of philosophical reflection. I submit, however, that the immediate point of view is closely related to Aristotle’s concept of the endoxic method, which was for Aristotle a means of coming to know truth, and one which does not require advanced philosophical training. As such, it can also serve as a clue for understanding how ordinary people might come to know Ibn Rushd’s concept of unwritten law. This requires some unpacking. The following section discusses an important similarity between Ibn Rushd’s immediate point of view as a means of accepting a belief, on the one hand, and Aristotle’s endoxic method of discovering truth, on the other.

C) The Immediate Point of View as Endoxic Method

The endoxic method is a mode of inquiry for understanding the good that Aristotle both explicated and employed in the *Nicomachean Ethics* as well as the *Politics*, though for the sake of brevity I focus only on the former. In the first chapter of Book VII, Aristotle articulates what this endoxic method is and how one proceeds by it in an inquiry: “As in the other cases, we must set out the appearances, and first of all go through the puzzles. In this way we must prove the common beliefs about these ways of being affected—ideally, all the common beliefs, but if not all, then most of them, and the most important. For if the objections are solved, and the common beliefs are left, it will be an adequate proof” (1145b5).
Aristotle’s inquiry into the virtue of continence provides a useful illustration of the endoxic method. He dissects the puzzles (aporiai) surrounding incontinence by first stating the common beliefs (endoxa) about it, examining these in their turn, and finally resolving each aporia more or less definitively. For example, in III.2, addressing “what sort of correct supposition someone has when he acts incontinently,” Aristotle first considers what “some say,” viz., that “he cannot have knowledge [at the time he acts],” then proceeds to the objections that “some people” raise and considers these dialectically until reaching his conclusion that the knowledge that an incontinent person has and acts upon is “not the sort that seems to be fully knowledge, but it is only perceptual knowledge” (1147b15). The discussion concludes with the definitive declaration of “so much, then, for knowing and not knowing, and for how it is possible to know and still to act incontinently” (ibid.). As mentioned above, he has considered the puzzle at hand, examined common beliefs about it, dispensed with objectionable ones, and finally arrived at “adequate proof” to establish which is the correct common belief.

This description is striking, for at first glance it seems to imply a rather air-tight method (one is tempted to say “recipe”) for discerning truth—it results in “adequate proof.” It also portrays a similar, though by no means identical, reliance on the commonly-held beliefs of others as that of Ibn Rushd in his description of the immediate point of view.

On this view, then, the endoxic method seems to leave little room for questions in which disagreement persists to the degree that a truly “common belief” doesn’t exist. Nor does Aristotle elaborate on what to do if the objections cannot be solved and the aporia is left as aporia, or if the puzzle can only be solved in such a way as to disprove common beliefs without offering an alternative explanation. Likewise, we are tempted to disregard Ibn Rushd’s immediate point of view as either naïve—for why should we accept something as true just because it is commonly
accepted? —or simply inadequate, for just as with the endoxa, there may not be any commonly held beliefs to compel a person to accept a rhetorical statement.

The above objections, however, betray a crude—and not terribly useful—understanding of the endoxic method. I argue that an understanding of the endoxic method in its complex fullness may provide us not only with a clearer conception of Aristotle’s method but also a defense for Ibn Rushd’s otherwise dubious reliance on the immediate point of view.237

It is important to note, first, that Aristotle provides guidance on which endoxa are to be given weight; i.e., it is not simple popularity that gives endoxa their force. “Presumably,” he writes, “it is rather futile to examine all these beliefs,” and we should instead “examine those that are most current or seem to have some argument for them” (1095a30).238 But what sort of argument are we looking for? Aristotle digresses slightly into a discussion of two types of knowledge used to support or justify arguments for or against given endoxa. Distinguishing between “arguments from principles and arguments toward principles,” he delineates two ways in which things are known: “some are known to us, some known without qualification,” then merely states that “we ought to begin from things known to us” (1095b).

Here we see Aristotle working out his epistemology, which at once elevates human rationality and acknowledges our tendency to err or mislead ourselves (and others) into opinions that are at best only apparently true.239 He is deeply concerned with distinguishing true endoxa

237 While Alfarabi’s commentary on Aristotle’s Rhetoric exceeds the scope of this chapter, it is worth noting that he, too, considered bādī al-rāʾî an appropriate method for instructing the masses. See Maroun Aouad, “Les Fondements de la Rhétorique d’Aristote Reconsidérés par Farabi, ou le Concept de Point de Vue Immédiat et Commun,” Arabic Sciences and Philosophy 2 (1992), p. 137. See also footnote 222, supra.

238 As a note, this concerns Aristotle’s discussion of happiness or the good life in NE 1095a, which also proceeds via the endoxic method.

239 In this sense, Aristotle appears as somewhat similar to Plato, who began with opinion in the cave and then ascended into the full reality of knowledge. With Aristotle, though, this is not an especially mystical process; as described above it is more akin to a modern sociological approach to knowledge. Where it would differ from the latter, however, and in some ways potentially rejoin Plato’s epistemological commitments, is in the conviction that
from the mere appearances of them, yet he is aware of the epistemic demands this places on the philosopher: “We must, however, not only state the true view, but also explain the false view; for an explanation of that promotes confidence. For when we have an apparently reasonable explanation of why a false view appears true, that makes us more confident of the true view” (1154a22-26). Thus, by employing common beliefs as the fundamental data of a system of ethics, Aristotle is insisting, in Martha Nussbaum’s words, “that he will find his truth inside what we say, see, and believe,” instead of truth abstracted from human experience.

Understanding the role of Aristotle’s *endoxa* can help us understand Ibn Rushd’s use of the immediate point of view. The question we are facing, at this point in the analysis of Ibn Rushd’s thought, is whether and how the unwritten or natural law is known. Being unwritten, after all, it is an easy target for the charge that one cannot know its content. But recall his words above: “For the good according to the unwritten law is [comprised of] the acts which, whenever a person increases them without end, his praise and acclaim or dignity and status increase, [including] such [acts] as helping friends and paying back benefactors.” That is, the good according to the unwritten law is known largely through acceptance on the immediate point of view of others. In other words, if I act according to the unwritten law, my acts ought to increase my respectability among other people. It belongs to the elites and those with the capacity for deliberative reflection to determine the theoretical truths of the unwritten law (1.15.6), but at the same time, the unwritten law *is* known to all people “by nature” (1.15.10). It is known to the people, then, through this immediate point of view, but its more complex theoretical truths are determined by the elites; likewise, the endoxic method allows the common sense opinions of the

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people to prevail in matters of justice and virtue so long as there are valid arguments leading to true *endoxa* backing them up. The latter, for both Aristotle and Ibn Rushd, might only be available to the elites, but this does not mean that the masses do not have access to the truths of the unwritten law.

The reader might object that Aristotle did not consider just any kind of *endoxa* in his philosophical method, but only those of well-formed men. As such, perhaps the masses have less insight into the truths of the unwritten law than I have suggested, for their immediate points of view may not qualify as well-formed *endoxa*. To this I respond that indeed, not all opinions of all people are always true, nor even tend toward the truth. I do not mean to suggest that the voice of the people is the voice of God; rather, I mean to point out that the philosophical method Aristotle employed makes use of the *bādī al-rāʾī* in such a way that those who are not formally trained in philosophy or recognizably elites might still, especially in a modern world with much higher literacy rates than the ancient world, be able to use natural reason—and common sense—to gain access to the unwritten law’s truth, seeing as it is known “by their natures” (1.13.2).

The unwritten law, then, can be known not only to the elites but to all people, however thinly, through the immediate point of view. As such, it holds promise as an aid in reconciling the divine law and human law in the city by rendering operable the unwritten law in moral matters, a task that is necessary because theoretical demonstration is not accessible to all citizens.241 Though they cannot therefore make use of this elite tool (i.e., theoretical demonstration), the city’s leaders can nevertheless “incit[e] citizens to excellent actions”242 by tapping into the immediate point of view. Even if the immediate point of view yields only the

thinnest of moral insight, as I explain below, it is an invaluable starting point in reaching the masses with moral argumentation (through deliberative reflection) rather than either fideist rhetoric or appeals to self-interest. As Aristotle wrote, “We must therefore possess some sort of capacity [to gain understanding] but not one which will be more valuable than these states [by which one gets to know principles] in respect of exactness.” This capacity, I submit, is what Ibn Rushd refers to as bādīʾ al-rāʾī, the immediate point of view.

The immediate point of view, however, is promising for another reason as well: it can provide a reflection of the unwritten law in the latter’s role of informing application of the written law. This is a vital role because, for Ibn Rushd, the written law is incapable of determining its circumscribed human activities with precision (see MCR 1.13.8-9). Positive laws must be written with strict definitions, yet their applications necessitate an understanding of the unwritten law because rigid laws can often fall short—or overstep the bounds—of justice. To prevent this, “certain written laws can be an application of unwritten laws.”

D) Is the Unwritten Law Accessible by Reason or Mere Intuition?

One may here object that what I am describing above as epistemological “accessibility” to the unwritten law actually refers to knowledge through instinct rather than reason, a “gut reaction” of common people that may or may not be a reliable guide for discerning justice. Were this the case, it would be incorrect to claim that the unwritten law is in fact knowable through

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243 Again, as mentioned above, others have worked out full theories of moral reasoning based on such basic goods as might be perceived through the immediate point of view. See footnote 218 supra. Beyond new natural law theory, ethicists from Henry Sidgwick to Robert Audi have defended forms of philosophical intuitionism that is not unrelated, in my view, to the bādīʾ al-rāʾī discussed here. *Posterior Analytics* quotation from Aristotle and Jonathan Barnes, *Aristotle Posterior Analytics*. Oxford: Clarendon Press, 1994. *eBook, Academic Collection (EBSCOhost)*, EBSCOhost (accessed 11.22.14). Whether Aristotle’s “some sort of capacity” aligns truly with Ibn Rushd’s bādīʾ al-rāʾī, however, is a question for further research.

244 Aouad MCR Vol. 1, 121.
reason; in fact, it might call into question the very existence of an unwritten law by subsuming it under the category of individual conscience.

I acknowledge that this is, first, a distinguishing mark from other medieval views of natural law, and secondly, a potential difficulty in claiming that Ibn Rushd has a theory of natural law in the first place. However, the text makes clear that it is indeed ultimately through reason, not merely sense or intuition, that the substance of Ibn Rushd’s unwritten or natural law is known. Recall *MCR* 1.15.6: “As for following the unwritten laws and determining them, this belongs to those who possess deliberative reflection and to the elites.” Knowledge of the particular precepts, the determinations, of the unwritten law does indeed come through deliberative reflection, not mere intuition.

So far, then, we have seen two separate ways of accessing the truth of the unwritten law: through deliberate reflection, for the elites and others who have this capacity, but also through the immediate point of view, if we consider it in light of the endoxic method as discussed above, for the masses. These divergent epistemological paths deflate any hopes for a wholly universally known, universally acknowledged, complete unwritten law. At the same time, however, they are tied together by the faculty of reason, as opposed to revelation, and as such can speak to the human, logocentric, law. They are also bound, however, to “what is,” in Aristotle’s words—i.e., to the real nature of things; neither the immediate point of view understood as above, nor the deliberative reflection of elites is meant to invent one’s own truth or cling to mere opinion. Whether through the immediate point of view or through deliberative reflection, therefore, the unwritten law is indeed knowable—and on some level, known—to all people.
IV. Ibn Rushd’s Natural Law and Islam

A) Status of Unwritten Law as Law

While we know that the unwritten law exists in and is known through nature, we do not yet know in what way it is properly termed “law.” To label the unwritten law as “law” in Islam is significant, for if it is correct, this would have profound implications on the methodology of fiqh—it would potentially not only constitute a fifth source of shari’a but would radically alter the status of independent reasoning of both jurists and individual Muslims. This is startling, yet it is difficult to avoid the conclusion that Ibn Rushd does take the unwritten law seriously as a source of law. In 1.15.11-12, he discusses the jurisprudential practice of jamʿ (addition, coming together), which refers to the various ways of reconciling apparently conflicting written laws. Ibn Rushd, however, suggests that it be used instead to adjudicate between written and unwritten law. I return to this point in the conclusion, but for present purposes we can note that Ibn Rushd did anticipate conflicts between the written and unwritten laws in such a way that the unwritten law, which is known by nature to all humans, was not there merely to be overridden or manipulated but to be taken seriously alongside the written law, as the two aspects of law were reconciled through jamʿ.

When set against shari’a, the above claims about the unwritten law are quite remarkable, for they reduce written law to a type of opinion. (Recall that Ibn Rushd writes that the written

246 See Aouad MCR Vol. III, 207-208 for a discussion of the use of جمع in Ibn Rushd’s time. Explicit discussions by jurists of jamʿ are rare, as the practice encompasses a wide range of tools and approaches, but Shafi’i’s Risaala fi Usul Al-Fiqh contains a section devoted to dealing with conflicting traditions (sunan) that illustrates the practice fairly well. It seems that jamʿ, at least to Shafi’i (and according to Aouad, the Shafi’is were largely in agreement on the matter of jamʿ with the other Sunni schools, including that of Ibn Rushd, the Maliki school; see Aouad MCR Vol. III, p.208) incorporated such tools as abrogation (naskh) and specification of legal rationale (takhsis al-ʿilla). See Mohammed Ibn Idris Al-Shafiʿi, Al-Imam Muhammad Ibn Idris Al-Shafiʿi’s Al-Risala fi usul Al-Fiqh: Treatise on the Foundations of Islamic Jurisprudence, trans. with introduction, notes and appendices by Majid Khadduri. (Cambridge, UK: Islamic Texts Society, 1997), paragraphs 181-350.

law is “of the order of opinion,” 1.15.10). Ibn Rushd also posits here the existence of a law that

does not originate with God, or at least the origins of which we cannot know. Elsewhere, in

addition, Ibn Rushd notes that breaking the unwritten law is in fact more serious an offense than

breaking the written law, for it is an offense against nature. He describes this subordination of

the written law to the unwritten in showing the written law as a constituent part of the unwritten

law: “It must be that there is, in these unwritten laws, a written justice and something superior

(tafaddal),” something that either adds to or subtracts from the written law. In other words, the

unwritten law contains within itself a built-in corrective to the excesses or deficiencies of the

written law.

It is important to keep in mind that Ibn Rushd’s writings were not intended to stand

outside of Islamic mainstream opinions on law. In addition to his philosophical works, Ibn Rushd

was a celebrated faqīḥ (jurist) and eventual qadi al-quḍa (highest judge) of Seville. Such

statements as the one above, then, should neither be hastily rejected as fringe legal theory. For

the same reason, though, they are not a means of erasing the dominant interpretation of centuries

of usul al-fiqh that God’s law is higher than any law, written or unwritten, human or natural.

Rather, I interpret his statement above to indicate that interpretations of written law—including

the entire written transmission of shari’a—are prone to both excess and insufficiency and that the

unwritten law of justice can serve to correct it when such instances arise.

248 MCR 1.14.11:

L’injustice dans les lois non écrites, je veux dire la transgression de ces lois, est plus grande que l’injustice dans les

lois écrites. En effet, les lois non écrites sont comme si quelque chose contraindrait l’homme à les suivre, car elles

sont comme ce qui lui est naturel, par exemple la piété filiale et le remerciement du bienfaiteur.

249 MCR 1.13.9:

« Il est donc nécessaire qu’il y ait, dans ces lois non écrites, une justice écrite et quelque chose de supérieur: il

s’agit soit du fait d’ajouter quelque chose aux lois écrites, soit d’en retrancher quelque chose. »

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To some, this may go too far—shari’a is off-limits as it concerns correction (though again, what is at stake is not the shari’a itself but rather interpretations of it). Nevertheless, from the text, it would seem that Ibn Rushd does indeed claim that the unwritten law serves this purpose. In MCR 1.13.11, Ibn Rushd moves fluidly from the topic of written and unwritten laws to that of written religion, the latter of which he uses as an example to clarify the former. That is, having just finished a discussion on the occasional need to “add or subtract something” from the written law, he states that “this becomes clear in [the case of] the written religions (al-milāl al-maktūba) of our time. To add or subtract something from them is not better unless it [i.e., the addition/subtraction] is enforced with dignity or honor.”

What is remarkable here is that this addition of religion is his own; it is not found in the Rhetoric in either its Greek or Arabic versions. The written/unwritten distinction now applies not only to law but to religion as well. Ibn Rushd illustrates the necessity of adding to or subtracting from the “written” things, whether law or religion, in his discussion of equity in 1.13.12. Here, Ibn Rushd’s illustration of the need to modify the written law is taken not from Aristotle but Islamic law. Ordinarily, the penalty for theft was having one’s hand cut off, but in the event that the thief was in need of food, the penalty was waived. In taking a specifically Islamic case, Ibn Rushd indicates not only that a) it is sometimes necessary to add to or subtract from “written religions of our time,” but also that b) Islam is one of those religions. In Aouad’s words, “Does Averroës here count, among the religions of his time, the religion of the Qur’an? The manifestly Qur’anic example of the end of

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the following paragraph (*MCR* 1.13.12 [this is the case of the thief above]) seems to indicate it.”252

Following Aouad in considering Islam as one such religion, I maintain that the apparently bold claims of sections 13 and 15 of part 1 are indeed bold claims—Ibn Rushd is positing the existence of an unwritten law that inheres in the nature of the world and that has some sort of jurisdiction over the written law, which, in Islam, will include the shariʿa. After all, it is from the unwritten law that one would know how to add to or subtract from the written law in order to compensate for it “insufficiency.” (See 1.13.9: The “determined law…is not sufficient in that it determines relative to good and evil in the behavior of each individual human, in such a way that one needs to add to it or subtract from it something according to the unwritten law.”253) Unlike the unwritten law, which is universal (1.13.2, also 1.13.10), the written law is of a determined, prescribed, fixed nature, such that “it applies neither to every individual, nor in every time, nor in every place.”254 Ibn Rushd seems to indicate that this includes religious law—even, if we are to take his example to mean anything, specific precepts of shariʿa.

**B) Un-Islamic Natural Law?**

The issue remains that Ibn Rushd’s philosophy at least apparently runs contrary to Islamic teachings about the origin and nature of law. In traditional Sunni Islamic jurisprudence,

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253 *MCR* 1.13.9:
« la loi déterminée...n’est pas suffisante en ce qu’elle détermine relativement au bien et au mal dans la conduite de chaque individu humain, de sorte qu’on a besoin de lui ajouter ou de lui retenir quelque chose selon la loi non écrite. »
254 Ibid.:... ("« [elle] ne s’applique ni à tout individu, ni en tout temps, ni en tout lieu »)
where there is no scripture to address a legal question, either directly or indirectly, one is left in a state of legal suspension (tawaqquf) without the epistemic resources to adjudicate. Ibn Rushd, on the other hand, holds that there is something beyond the written law, namely the unwritten or natural law, that tells us something about justice and injustice even when we lack positive guidance from the shari’a for making such decisions. Is Ibn Rushd’s commentary on this unwritten law un-Islamic? I argue in this section that while the unwritten law Ibn Rushd sets forth does indeed serve as a corrective of sorts to Islamic law, as discussed above, it also stands within the Islamic tradition—it is an Islamic natural law, whether or not it is recognized as such.

To understand Ibn Rushd’s resolution of the apparent conflict between the unwritten law and Islamic law, it is helpful to note that it is conceptually possible to hold to a divinely transmitted written Law that is unchanging and true without adhering to a strictly positivist understanding of the nature of law itself. Aquinas’ typology of law in Question 91 of the Prima Secundae of the *Summa Theologica* divides the eternal law (which exists in the mind of God) into the divine law (positive, known through revelation) and natural law (unwritten, known through reason). Thus, both types of law derive from the eternal, unchanging law. But they need not both be positive law, or words revealed in an historical instance.

Ibn Rushd’s schema bears some resemblance to the Thomist schema, although these similarities should not be overstated—for instance, Thomas’ written (“human”) law is not contained within his unwritten (“natural”) law, as it is for Ibn Rushd (see 1.13.9: “It is therefore necessary that there is, in these unwritten laws, a written justice and something superior.”); rather, both human and natural laws participate in the eternal law, which exists in the mind of

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255 That is, through a primary text or through secondary sources such as consensus (ijmāʿ), analogy (qiyyās), reason (aql), public interest (maslahā), or juristic discretion (istihsan).


257 *MCR* 1.13.9: « Il est donc nécessaire qu’il y ait, dans ces lois non écrites, une justice écrite et quelque chose de supérieur... »
However, what I would like to emphasize is the fact that both schemas contain positive, revealed, changeable written law as well as an unchanging, unuttered natural law known through reason.

Since the unwritten law is, by definition, not positive law, it requires certain points of establishment, or determinations, in order to form the written law. Aouad calls such determinations “a sort of stop in the infinite effort of adjusting the unwritten law—an implicit stop in certain circumstances.” Ibn Rushd discusses the process in 1.13.9: “one needs to add to [the written law] or subtract from it something according to the unwritten law.” That is, it is the task of the written law’s legislator to make determinations of what the unwritten law says and write, or adjust, the positive law accordingly. This characterization of the written/unwritten law distinction effectively makes the (idealized) task of the legislator one of codifying or establishing in definite legal terms that which is already in fact (unwritten, natural) law.

By this codification, however, it is clear that Ibn Rushd still intends to situate the unwritten law within an Islamic context. A particularly salient portion of the MCR in this regard occurs in the discussion of equity at 1.13.12-26, in which he delineates eleven premises leading to pardon by a judge. In Aouad’s interpretation, this discussion demonstrates serious thinking about the effort “to attenuate the rigors of the Islamic Law” by means of these premises. Ibn Rushd draws a direct correlation between examples of the deployment of the unwritten law to mandate equity in the Greek and Islamic legal contexts. In Aristotle’s example,

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258 This is, albeit, an important difference, for it adds a second category of particular/written law, the divine law, which cannot err, whereas human reason can err in promulgating human laws. Thus for Aquinas, both the unwritten natural law and the written divine law could serve as a measure of the justice of a written human law.

259 Aouad, MCR Vol. I, 139 (« …une sorte d’arrêt dans l’effort infini d’ajustement de la loi non écrite – arrêt implicite sur certaines circonstances »)

260 I have translated الحِلم (al-ḥilm) admittedly loosely as “equity.” The Arabic term properly indicates gentleness or forbearance, translated aptly by Aouad as longanimité. However, because equity (which does not have a perfectly corresponding term in classical Arabic, though استحسان [istithsan] comes close) has a legal connotation in English and because the Greek term used by Aristotle is εὐθεία, equity.

261 Aouad, MCR Vol. I, 140.
a man could be punished under Greek law for raising his hand while wearing a ring, because the written law forbids raising one’s hand while carrying an iron object—this was intended as a law against raising one hand’s while holding a weapon, but “weapon” was designated under the category of “iron object” (see Rhet. 1374a). However, the unwritten law in such a case would require that such a man be pardoned, “such that pardoning him is justice.” Similarly, Ibn Rushd writes, cutting off the hand of a thief is ordered by Islamic written law, but the unwritten law calls for forbearance, especially when the thief stole out of need for food.\textsuperscript{262} In this way, the thinking would go, inasmuch as the Greeks could invoke a law outside of the positive one, so too could Muslims.

Lest this law be taken too far, however, Ibn Rushd shows concern that the unwritten law not override Islamic tradition. In MCR 1.14.3, he delineates certain injustices that should not be endured with forbearance, justifying his strictness by means of the doctrine of \textit{maṣlaḥa} (translated by Aouad as “intérêt,” interest).\textsuperscript{263} The passage merits quoting at length:

> As for similar injustices, I mean those against the houses of God and the \textit{ouliah} (his close friends), there is neither pardon, nor forbearance, nor tolerance, for the pardon and the forbearance in these cases are not at all demanded by \textit{maṣlaḥa} (interest), but, inevitably, the judge must, in such cases, execute the punishment, either in vengeance against the guilty part, or for [the sake of] the general interest (\textit{maṣlaḥa ʿamma}). This is why our jurists have said that anyone who says about the Prophet—peace be upon him—that his clothing is soiled, must be killed.\textsuperscript{264}

This passage is important for two reasons: first, Ibn Rushd is taking pains to situate his system of unwritten law within an Islamic framework. Secondly, he does so without invoking

\textsuperscript{262} MCR 1.13.12.

\textsuperscript{263} Aouad, MCR Vol. I, 141.

\textsuperscript{264} الكمبيوتر نظام هذه المظلومات، أي الذي تفعّل يبيوت الله وأوليائه، ليس فيها صفح ولا حلم ولا احتمال لأنّ الصفح فيها والحلم ليس نقضيه مشاء بل يجب أن يكون الحاكم في أحوال في هذه ينفذ العقوبة ولا بدّ إنا لما تمكن الانتقام من الجاني فقط وأنا لما في ذلك من المصلحة العامة.

("Au sujet de pareilles injustices, je veux dire de celles qui s’abattent sur les maisons de Dieu et sur ses amis, il n’y a ni pardon, ni longanimité, ni tolérance, car le pardon et la longanimité à leurs sujets ne sont exigés par aucun intérêt [\textit{maṣlaḥa}], mais, inévitablement, le juge soit, dans de pareilles injustices, exécuter le châtiment soit pour se venger du coupable seulement, soit pour ce qu’il y a, en cela, d’intérêt général [\textit{maṣlaḥa ʿamma}]. C’est pourquoi les juristes ont dit chez nous que celui qui dit du Législateur—paix sur lui—que son vêtement est souillé, doit être tué. »)
Qu’ranic authority or shari’a. He is forbidding—and foreclosing the possibility of clemency for—acts that are specifically offensive to Islam by means of an Islamic but unwritten doctrine. In other words, to Ibn Rushd, “written religion,” like written law, may mask an unwritten aspect that is just as important for understanding its true nature.

Ibn Rushd’s placement of the unwritten law’s relationship to the written law links both unwritten and written laws to the law of God, without collapsing the distinct categories into each other. That is, God’s will is accessible through both revealed law, shari’a, and natural reason. This allows for a natural law of justice accessible through reason that does not contradict the divine law, but can rather attenuate the human understanding of it.

It is important that none of this should be understood to discount the role of Islam in an Islamic natural law. The point is not to secularize Islamic law but to provide a more robust concept of the term “law” itself—i.e., religious, human and natural. The challenge for the Muslim is to accept the normative force of natural law as well as to live under the human law. The challenge for the secular citizen is to conceive of “law” as something greater than whatever the legislator or king or democratic vote declares—both in its link to natural justice and in the possibility that there is a God Who has also spoken with law-like authority. My point in the section above, rather, is simply to illustrate that this theory of law that Ibn Rushd seemingly deploys is consonant with such a tri-partite conception of law.

C) Unwritten Law, Obligation and Voluntarism: Natural Law in Jurisprudence & Theology

I have shown that Ibn Rushd’s unwritten law stands within the Islamic philosophical tradition, but as mentioned in this chapter’s introduction, the role of fiqh in Islamic life is essential. In order for the unwritten law to be taken seriously, we need more details on what it would look like within the jurisprudential traditions of Islam.
Both Western natural law and Islamic law share the idea that right and wrong derive, in Mohammad Kamali’s words, from an “eternally valid standard that is ultimately independent of human cognizance and adherence.” According to Kamali, the difference between the two traditions is that while from a natural law perspective right and wrong inhere in nature, from an Islamic perspective, “right and wrong are determined...because God has determined them as such.” This characterization of the difference is fair as a description of contemporary Islamic law, which by and large recognizes no role for nature in the knowledge of good and evil. But the dichotomy implied by Kamali’s choice of words is a false one, for it is possible for right and wrong both to inhere in nature and still ultimately derive from the mind of God. The question then becomes, is Islam necessarily so inimical to natural law as Kamali portrays it to be, or has contemporary fiqh taken a turn away from natural law that could, theoretically, be reversed?

I argue below that neither the jurisprudence nor theology of Islam preclude the natural law premise that right and wrong inhere in nature, thus leaving a legitimate space for a theory of unwritten or natural law such as that of Ibn Rushd.

1. Natural law in jurisprudence: mašlaḥa and reason in creation

The obvious issue that arises when one introduces natural law into Islamic jurisprudence is that of obligation. Natural law is ill at ease in Islam, one may say, because it lacks a source of obligation; in Islam, it is God who obligates, not nature. An obligating force that is not identified with God Himself calls into question the foundational Islamic doctrine of tawhīd, or the oneness of God. Yet the picture of unwritten law we get from Ibn Rushd is one with an obligating force; this is how he can hold that an offense against the unwritten law is greater than an offense

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against the written law (1.14.11). This is, however, wholly contrary to Sunni jurisprudence, in which the sources of obligating law are, first, the (written) Qur’an and sunna, and then the (unwritten) sources of consensus (ijmāʿ) and qiyās, or analogical reasoning. This is standard Sunni fiqh, and it leaves very little room for natural or unwritten law. But Ibn Rushd was, as mentioned above, a highly regarded and influential jurist as well as philosopher. What do we make of his unwritten law, in this light?

I suggest that the key to understanding Ibn Rushd’s unwritten law in a jurisprudential schema is the concept of maṣlaḥa, which translates as “interest” though it can be thought of as “common interest.” It is linked philosophically to the notion of unwritten law as deployed in Ibn Rushd’s discussion of the limits of equity in legal reasoning (see above, 1.14.3). Both maṣlaḥa and natural law contain normative force yet lie outside the parameters of the written law. Both, too, are jurisprudential tools that require the use of reason for their application.

What most closely links maṣlaḥa and unwritten law, though, is that both require a key naturalistic assumption in order to have obligating force—i.e., in order to move from ‘is’ to ‘ought,’ both the unwritten law and the notion of general interest must participate in some way in the will of God. To this point, Emon writes that inherent in the very concept of maṣlaḥa is “a sense of divine purposefulness that provides a normative quality to the underlying empirical observation.” He argues that both Abu Bakr al-Jassas, a Muʿtazilite naturalist and Hanafi scholar, as well as Shihab al-Din al-Qarafi, a Maliki-Ashʿari jurist and critic of the Muʿtazilites,

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266 “Injustice in unwritten laws, I mean the transgression of these laws, is greater than injustice in the written laws. In effect, the unwritten laws are as if something were constraining man to follow them, for they are as that which is natural to him...”

267 Emon, “Natural Law and Natural Rights,” 360.
took the Muʿtazilite position to be that “empowered reason,” as an aspect of God’s creation, can obligate even as, with legal positivists, they agreed that all obligation comes from God alone.\(^{268}\)

The reasoning of these Muʿtazilite jurists proceeded as follows:

- All of creation is created for humanity’s benefit.
  - Although strictly speaking, to call this an argument from the unwritten law requires that this premise be able to stand on its own, it was here based it on Qur’an 2:29, which states that “[God] it is Who created for you all that is in the earth” (alladhi khalaqa lakum ma fi al-ard jamiʿan).
- This being the case, God put nature at the disposal of humanity and it can be used in any way that benefits humanity.\(^{269}\)
- Therefore, creation embodies the normativity of the divine will.\(^{270}\)

In other words, because reason is a part of creation, it is infused with divine obligation, for creation is an expression of God’s will. As such, natural law, which is known through reason, is suffused with divine obligation. Such was the Muʿtazilite juristic position, and it is remarkably compatible with Ibn Rushd’s role for the unwritten law.

That this view is not current in Islamic jurisprudence has much to do, at least initially, with the turn from Muʿtazilism to Ashʿari jurisprudence. The Ashʿari school developed in the 10\(^{th}\) century in response to what Abu al-Hasan al-Ashʿari’s and his disciples considered to be unorthodox or innovative ideas coming from the then-dominant Muʿtazilite school. To the Ashʿari, all knowledge of morality must find its root in revelation, thus apparently precluding nature as a guiding source. Nevertheless, in keeping with al-Jassas above, to consider nature as infused with morality is not to remove the role of revelation; instead, it is simply to understand God to have revealed something of Himself in the world he created. This is not an unknown perspective in Islam; beyond the Sufi mystics generally, including most notably Ibn Arabi, it finds expression in a hadith in which the Prophet is said to have exclaimed “Verily! In the

\(^{268}\) Id., 358.
\(^{270}\) Emon, “Natural Law and Natural Rights,” 355-356.
creation of the heavens and the earth, and in the alternation of Night and Day, there are indeed
signs for men of understanding.” Cre 271 Creation itself, including human nature, contains signs for
those who seek understanding, but only because it is a form of God’s self-revelation. In this way,
revelation remains a unified, but expanded, notion, one that includes nature as a form of
revelation.

2. Natural law in theology: al-aṣlah and voluntarist justice

The above Muʿtazilite position on the nature of obligation was not limited to
jurisprudence. In theological debates, the question of obligation revolved around the proper
understanding of the doctrine of al-aṣlah (literally, “the best”), which taught that God always
does what is best for his creatures. Brunschvig discusses this issue through a debate between two
9th century Baghdad theologists, Abu l-Hudail al-ʿAllaf and Ibrahim an-Nazzam, on the
question of whether aṣlah obligates God to goodness (i.e., rather than merely describes what he
does). Ibrahim an-Nazzam, though he held that God always does indeed always do what is best
(aṣlah) for his creatures, insisted that God is not capable of committing an injustice because this
would indicate an imperfection (naqṣ) on his part; injustice can only be committed by a
‘deficient’ creature (duʿafa). In this sense, then, he would be obligated by His own aṣlah.273
Abu l-Hudail held that although it was ‘unthinkable’ (muhāl) that God would commit injustice
(zulm, jaur), he must be capable of it, for to hold otherwise would be to charge God with a lack

271 Volume 8, Book 73, Number 235 of Sahih Bukhari’s collection of ahadith. Center for Muslim-Jewish
sbt.php.
273 The later Abu al-Qasim al-Balhi al-Kabi (d. 931) argued this explicitly. Id., 11.
of power (ʿuẓ). In other words, we cannot conceive of God committing an act of injustice, but he is capable of it, meaning that he is obligated by nothing.

Which side of this debate one falls on carries implications for what one believes to be the nature of God’s justice—namely, whether it is a voluntarist sort, i.e., whether justice is whatever God declares it to be, or, on the other hand, whether justice can be characterized by an a priori, rationalist ethic. If ʿaslḥ obligates God, there is a goodness or justice which can be invoked as prior to the goodness and justice known through revelation—i.e., it is not voluntarist. If, on the other hand, ʿaslḥ does not obligate God, then justice is that which God determines and declares it to be (i.e., it is voluntarist). It is not difficult to see that voluntarism is incompatible with a theory of unwritten law or natural law, for in such theories, justice is found not only in God’s declaration but in some aspect of nature, whether that be nature itself or, as I discuss below, the common moral sense of people.

This question, more than a medieval theological dispute, has great practical import. Were the question settled on Nazzam’s side, i.e., if God were immune to obligation, even to his own words or created norms, then whatever he declares is the final say in a sense that leaves very little room for ʿijtiād—or indeed ʿaqīl—for one needs only as much interpretation or reason as is necessary for understanding the very words of the divine command. If Hudail had won the debate, one would often be left in tawaqquf as to what is the just action in a given case, for God’s word could only get one so far—there is a prior conception of goodness which would, presumably, inform the nature of justice. Interestingly, the debate was never settled definitively.

With the rise of Ashʿarism in the 10th century, and especially through ʿAshari himself, the

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274 Id., 6-7.
275 This is an iteration of the Euthyphro dilemma: is what is pious so because it is declared so by the gods, or do the gods declare something pious because it is, in some a priori way, pious? If the former, the gods are capricious; if the latter, there is something greater than the piety of the gods and the problem is just pushed back one step.
doctrine of obligation from *aslah* was jettisoned from theological debates as inimical to the truth of God’s total power and total freedom.

A theory of unwritten law, such as that I believe is found in Ibn Rushd’s text discussed in this chapter, helps to avoid these two undesirable outcomes. For the justice inherent in nature, as the unwritten law affirms, is not exactly an a priori justice; creation, as Jassas points out, is infused with God’s goodness. Yet neither is it reduced to a simple declaration of justice on the part of God (or his representatives); this is justice as it is found in the nature of the whole world—including revelation and God’s declarations and those of his representatives.

V. Conclusion

The conflict in *Antigone* existed between a king’s decree and the demands of the gods, with the unwritten law of justice serving to mediate the conflicting laws, and it is this conflict that I have suggested lies at the heart of the problem of religious freedom. Islam, however, does not so neatly separate the law of man from the law of God; the two kingdoms have never existed entirely separately, and even in the modern era, Muslim-majority countries often incorporate shari’a into civil law. The conflicts between the law of man and the law of God in Islam, then, are not as clear-cut as they might be in other traditions, for man’s law is, theoretically, an extension of God’s law.

This is the theoretical case. The reality is, as usual, more complicated. Modern demands for human rights, equality of women and religious minorities, and other norms—not the least of which is the push for religious freedom—have inserted increased tensions between human laws,

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or at least human moral demands, and God’s demands as they have been interpreted. The risk, then, is that for those who seek to remain faithful to God’s demands may perceive a need to choose between Islam and human rights. The object in reintroducing natural law into the concept of law in Islam, then, is to obviate that false choice. Assuming that we can arrive at the precepts of human rights by natural reason, as natural justice, then those interpretations of divine law that seem to militate against them can be “corrected,” in Ibn Rushd’s terms, to incorporate the unwritten or natural law’s insights.

To be clear, the natural law is not a competing law; what I am suggesting in this chapter, rather, is that there is a tradition of legal philosophy within Islam that incorporates divine, human and natural law into its idea of what law, in its fullness, is. This is admittedly not the predominant view in most Muslim societies today. But as the crises that both underlay and followed the Arab Spring have made clear, the predominant understandings of law and justice in Muslim societies are in flux, even, in some cases, in crisis. The unwritten law that Ibn Rushd theorized 850 years ago thus presents itself as a powerful tool within the Islamic tradition for mediating the demands of changing human law and the unchanging will of God.

As we have seen, furthermore, Ibn Rushd even suggested a means of mediating these conflicts between the law of man and the law of God. The unwritten law of justice, known on some level to all humans, can mitigate the rigidity of the written law, whether this written law is understood to be the shari’ a as the fuqahā’ have interpreted it or the human rights laws that must be reconciled with centuries-old divine revelation. Recall his discussion of jamʿ, the juristic tool of reconciling apparently conflicting texts.278 To Ibn Rushd, jamʿ will appear by means of a dialectic between the unwritten and written laws, thereby resolving the “apparent contradiction” between the two: “…When [the judge] judges on one subject and the written law is the opposite

278 See p.144 of this chapter.
of the unwritten law, or if there are two contrary laws on the matter, the judge must sometimes use the ancient law—I mean the unwritten law—in one instance and withdraw it in another...In effect, by this means, the apparent contradiction between them falls away and the jamʿ becomes correct.279 As Aouad points out, such a use for the unwritten law—i.e., reconciliation by means of jamʿ, is so far without practical instantiation in Islam. Still, he concludes from the surrounding sections of the MCR that Ibn Rushd was aware that such conflicts between written and unwritten law would occur and Islamic law, like any other system of law, would need a means of dealing with them.280

This demand seems ever more urgent today. The process Ibn Rushd describes—that of carefully weighing the timeless, universal precepts of natural justice with the particular demands of either a people or a religion until reaching reconciliation between the two—is what Antigone lacked, and what, I suggest, is needed in order to arbitrate the conflicts between human law and divine law that we find at the heart of problems of religious freedom. This process is by no means simple or formulaic, and for that reason it is often laid aside in favor of simply following a written law, whether that of the polis or that of the gods. But as Antigone and Sullivan make clear, taking this simpler path eventually leads to natural injustice. To avoid the tyranny of either law, we do well to pay attention to Antigone’s cry for eternal, unchanging justice and Ibn Rushd’s unwritten law to shed light on the nature of natural justice.

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279 1.15.11: 

و لذاك متي حكم في شيء و كانت السنة المكتوبة ضداً لغير المكتوبة أو كانت فيه سنّان متضادان فقد يجب على الحاكم أن يستعمل السنة القديمة أحياناً. يعني الغير مكتوبة في موضع و يطرحها في موضع آخر ... فإن بهذا الوجه يسقط التعارض الذي بينهما في الظاهر ويصبح الجمع. 

« ...quand il juge au sujet au sujet d’une chose et que la loi écrite est le contraire de la loi non écrite ou qu’au sujet de cette chose, il y a deux lois contraires, le juge doit utiliser parfois la loi ancienne – je veux dire la loi non écrite – en un lieu et la retrancher en un autre lieu. ... En effet, par ce mode, la contradiction qui est entre les deux en apparence tombe et la réunion devient correcte. »

Chapter 4: Arguing Natural Law: Tertullian and Religious Freedom in the Roman Empire

Abstract
This chapter provides an overview of Tertullian’s writings as they concern religious freedom and related themes, drawing attention to his reliance on natural law argumentation. I analyze his epistemological commitments and link them to the commitments of the other writers’ use of natural law in this dissertation. Finally, I argue that the effectiveness of Tertullian’s argument for universal religious freedom relied heavily on his use of natural law as a mediating device between human and divine law.

I. Introduction to Tertullian

This chapter, though it falls chronologically between Antigone and Ibn Rushd, builds thematically on the foundations laid by the other two chapters. In other words, having provided a pre-theoretical account of natural law in Antigone, then the more robustly developed natural law theory of Ibn Rushd, we turn now to an application of the natural law using the writings of Tertullian. Quintus Septimius Florens Tertullianus, known as Tertullian (160-225 AD), was an early Christian theologian and apologist from Carthage, in present-day Tunis. Few biographical details are known about his life, but his prolific writings and multifaceted defense of the young Christian religion earned him the title of “Father of Latin Christianity.” He is famed for his articulation—thought to be the first—of the doctrine of the Trinity. A tireless apologist for the Christian faith to which he was himself a convert, Tertullian laid a foundation for much of Augustine’s work over a century later. He successfully opposed the Marcionite heresy, which declared the Old Testament God a separate God from that of the New, as well as defended Christianity to the pagan Roman empire. While not nearly as famous as several of his intellectual

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281 Timothy Barnes, dates Tertullian’s birth at around 170 AD with a death “before he reached old age.” But even his historical account of Tertullian contains little by way of biographical detail for sheer lack of historical record. Much of what has traditionally been said of Tertullian – e.g., that he was a priest, in Jerome’s record, or that he was the jurist Tertullianus—has been confused. See Timothy Barnes, Tertullian: A Historical and Literary Study (Oxford: Oxford University Press, 1971), 2; 24-25; 58.
heirs, in the centuries following his death he was counted as an intellectual giant and remains so today for patristic scholars. Timothy Barnes, whose biography of Tertullian remains the authoritative one, traces an “undeniable” influence of Tertullian on such early Christian notables as Minucius Felix, Cyprian, Arnobius and others; even Gibbon cites him extensively in *The History of the Decline and Fall of the Roman Empire.*

Besides laying a theological foundation for Christianity, however, Tertullian was also the first to use the term “religious freedom” (*libertatem religionis;* *Apol.*), which he declared to be a “human right” (*humani iuris;* *Scap.*). It is the task of this chapter to unpack Tertullian’s defense of religious freedom with a studied focus on his respective roles for human, divine and natural law. Ultimately, I aim to show both (i) that Tertullian’s defense of religious freedom rested on a theory of natural law, and (ii) that it represents a practical application of the theories we have seen thus far in this dissertation.

This chapter differs from the preceding discussions of *Antigone* and Ibn Rushd in that the focus is not limited to a single text but examines the better part of an author’s corpus. I am interested in how and on what grounds Tertullian agitated for universal religious freedom, as well as whether his methods and theories align with those I have drawn from the previous texts. His overall impact on religious freedom, of course, could not be restricted to the effects of a sole text; quantity of texts examined is thus purchased at the price of exegetical quality any one text receives. I therefore beg the reader’s patience for what may, at times, seem like insufficient treatment of a given text. Likewise, Tertullian’s works and achievements require us to step back

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282 See Barnes, *Tertullian,* 194.
283 See, e.g., extensive citations in chapter 15 of Volume 1 as well as chapter 28 of the same volume.
from the theoretical details of unwritten and natural law and look at the role it can play in negotiating religious freedom. As such, this chapter take a more practical than strictly philosophical approach to the question of how natural law helps us mediate the religious realm, including faith, ritual, and divine law, and the political realm of reason, pluralism and human law.

After a brief introduction to Tertullian, I begin with some observations on religion and reason in the public sphere, which are intended to frame the ensuing discussion of the epistemology behind Tertullian’s writings. This latter section both sheds light on the nature of Tertullian’s operative theory of natural law and serves to correct what is historically an area of misunderstanding among Tertullian’s readers. I then treat in greater depth the particular tenets of natural law reasoning at play in Tertullian’s works, exploring the ways in which this natural law served as a basis for his defense of religious freedom. Finally, I analyze Tertullian’s approach to religious freedom in light of predominant modern theorists of religion in the public sphere, with an emphasis on the work of Jürgen Habermas.

A) Why Tertullian?

Tertullian named religious freedom a “human right” as early as 212 CE, centuries before religious liberty would receive extensive treatment in political or philosophical history. His full statement declares that it is “a fundamental human right (humani iuris), a privilege of nature (naturalis potestatis), that every man should worship according to his own convictions (quod putaverit colere); one man’s religion neither harms nor helps another man” (Scap. ii.1-2). This statement is striking in its breadth. “Humani iuris” indicates that Tertullian saw a basis for religious freedom that could not be defined strictly as either divine law or human law, for it inhered in humanity itself, regardless of creed or political membership. As such, religious
freedom was not to be limited by either political or religious/cultic boundaries. “Naturalis potestatis” indicates that the capacity or power to worship was legitimized by nature, which, in the Stoicism of Tertullian’s background, implied normativity. In other words, this capacity for worship was not simply descriptive but was endorsed by nature as a good. Tertullian defended religious freedom, in other words, on the basis of natural or unwritten law.

I selected Tertullian not only for his use of natural law, however. It is important that in his defense of religious freedom, Tertullian operated from within a religion yet in the context of a pagan empire; that is, he was dealing with religious difference, yet he did not resort to what we would term a ‘secular’ or strictly philosophical defense of freedom of conscience. As I have argued throughout this dissertation, religious freedom is a challenge fundamentally because of the conflicts, real or apparent, of human and divine law. Attempts to resolve these challenges through purportedly ‘neutral’ secular frameworks, well-intentioned as they may be, typically miss the mark because they tend to ignore or undervalue the role of religion and divine law, thus disregarding an entire side of the conflict and denying, if implicitly, the validity of a real problem. Rather, as with Ibn Rushd, a figure who works from within the confines of his own religion with its laws and mores is better able to evince the possibilities for religious freedom, for his appeal admits the validity of both human and divine law and wisdom operating simultaneously in the political and legal spheres.

How did Tertullian achieve this? How did he manage to hold the sacred and secular, even faith and reason, together in one hand? As a Christian coming living in an era in which Stoicism pervaded philosophical thought, we might expect Tertullian to develop a mature theory of natural law. Later Christian natural law theorists would attempt to demonstrate the possibility of moral

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286 I understand “divine law,” here and throughout the dissertation, in a loose sense that incorporates non-explicitly legal norms and binding customs of religions.
knowledge absent divine revelation, and such a tactic would seemingly have suited Tertullian’s ends. Furthermore, Tertullian was well versed in philosophy and steeped in the Stoic atmosphere of his time, which contained its own natural law tradition. But this was not the case. Tertullian did, as I show below, deploy natural law reasoning; his defense of religious freedom relies almost entirely on it. However, he does not construct his own theory of natural law; in fact, he rarely engages in systematic philosophy at any length. In fact, as detailed below, Tertullian more often eschews, or claims to eschew, philosophy altogether, linking it to heresy and hubris. Put simply, his explicit motivating concern is the Christian faith, not philosophy.

This disdain for philosophy notwithstanding, Tertullian did not in any way abandon reason. In fact, he is interesting for the purposes of this project precisely because he made human sense of divine mystery—and did so in a politically compelling way that did not require a common religion in the empire. He had a complex relationship with reason and inquiry, insisting at once on understanding the reason for belief (ratio is said to be his favorite word) as well as on the superiority of simple faith over philosophical speculation. While infamous for a statement he never said—“Credo quia absurdum”—he did stand by his paradox “credibile quia ineptum est” (that which is inept is credible; Carn. v.4). Tertullian is, in several respects, a study in paradox, and his peculiar manner of resolving apparent paradoxes in faith and reason is quite

287 The extent to which Tertullian was a Stoic thinker is debated. Jean Daniélou presents a nuanced and persuasive case for a rather deep Stoic influence, especially as it concerns the notion of universal corporeity; see his The Origins of Latin Christianity, trans. David Smith and John Austin Baker (London & Philadelphia: The Westminster Press, 1977), 209ff. Nevertheless, his obvious first commitment was Christianity, and he balked at the efforts of some Christian thinkers to retrofit their religion with past philosophical systems, all of which he considered to have been superseded by Christian revelation. See Pull iv.4 for this latter point; for his rejection of efforts to fuse Christianity and philosophy, see Daniélou, Origins, 210-211. Tertullian’s approach is especially contrasted with that of Justin Martyr. Still, while the extent of his Stoic influence is debatable, its existence is not. See, e.g., De Anima v, in which Tertullian “call[s] on the Stoics also to help me...”); his commitment to aligning the will with nature, as discussed below, is also an unmistakable mark of the Stoicism of his era.


289 All references to De Carne Christe come from the 1870 Holmes version available at www.tertullian.org/works/de_carne_christi.htm.
helpful in our attempt to resolve the conflicts of human and divine law at the heart of religious freedom challenges.

II. Tertullian’s Epistemology: Reason without Philosophy

A) The Uneasy Relationship between Athens and Jerusalem

It was at least in part to his peculiar epistemology that Tertullian was able to offer such a sweeping defense of religious freedom for all people regardless of creed, even as he himself held to the Christian faith. This is a point that requires significant attention, for on account of his commitment to the Christian faith over philosophy, Tertullian has traditionally been understood as something as a fideist. It is true that he insisted on the truth of Scripture and, in many instances, denigrated philosophical reasoning. As Eric Osborn writes, for Tertullian, “inquiry is only possible when we follow our criterion, the rule of faith, which Christ taught and we confess.”\(^{290}\) This rule of faith, as Tertullian details it in *De Praescriptionem Haereticorum* xiii,\(^{291}\) is essentially the Christian creed; it serves as his first principle of reasoning as that reasoning concerns religious truth. It is important, then, to examine his epistemological commitments before examining his defense of religious freedom, for such fideism would be largely incompatible with the sort of natural-reason approach to the unwritten law on which this dissertation is based. What was Tertullian’s approach to the merits of reason versus revelation? Is there anything to be gleaned from it for the purposes of negotiating religious freedom today?

Tertullian’s irrationalist reputation is perhaps due principally to his famous question, “what hath Athens to do with Jerusalem?” (“*Quid ergo Athenis et Hierosolymis*?” from Praescr. vii.9), as well as his paradoxical statement that what is ‘inept’ is believable (“…*credibile quia


\(^{291}\) All English references to *De Praescriptione Haereticorum* come from the Bindley 1914 translation, available at www.tertullian.org/articles/bindley_test/bindley_test_07prae.htm.
ineptum est” from Carn. 5.4), both of which are understood to separate philosophy and reason from religion and faith. Furthermore, as mentioned, Tertullian quite evidently harbors very little affection for philosophy, calling it a “corrupt fountain” from which flows heresy, as well as a “rash interpreter of the Divine Nature and Order” (Praescr. vii). Philosophy corrupts the innocence of the soul and inclines men not to trust its natural wisdom (Test. i). It sometimes stumbles on the truth, but more often it perverts “that common intelligence wherewith God has been pleased to endow the soul of man” (An. ii). Though he is insistent on logical argumentation and will not concede the importance of reasoning, to Tertullian, philosophy itself is a human creation that brings about more harm than good; indeed, “it is really better for us not to know a thing, because [God] has not revealed it to us, than to know it according to man’s wisdom…” (An. i).

This disdain for philosophy notwithstanding, more recent scholarship has pointed out the error of reading Tertullian as irrational or fideistic. Both explicitly and performatively, his works betray a Stoic commitment the use of reason; it is impossible to read a single of his works without observing its clear logical, if rhetorical and at times, polemical, nature. Tertullian’s rationalism and Stoic influence are evident throughout, advocating as he does the use of reason in textual interpretation (Praescr.) and appeals to the authority of common consent (“de aestimatione communi aliquem”; Apol. xxiv.3) and nature (see discussion below).

Perhaps no other text better evinces his epistemological commitments—a great trust in natural reason accompanied by a great suspicion of philosophy—than De Testimonio Animae.

292 This is commonly misquoted as credo quia absurdum est, “I believe what is absurd,” and misunderstood as a statement of fideist or even irrational faith. Osborn, Tertullian, 48.
293 All English references to De Anima come from the 1870 Holmes translation, available at www.tertullian.org/anf/anf03/anf03-22.htm.
294 Osborn, Tertullian, 28, inter alia. Osborn’s picture of Tertullian is one of a committed Christian apologist who uses whatever philosophy is at his disposal to point to the truths of the Christian faith. Surely such a method has its shortcomings when it comes to discovering truth without prejudice, but it is not to be confused with irrational fideism.
Here, anticipating Rousseau’s *First Discourse* by a millennium and a half, Tertullian invokes the soul in its natural, unschooled state and enjoins his readers to seek what wisdom may be found within. Again eschewing philosophy, he asks the soul to share “those primal sparks you confer on man, those insights that you have learned from your own depths or from your creator, whoever he may be” (*Test.* i295). It is the “simple, unfinished, untutored, unformed nature” of the soul that testifies to truth rather than the “libraries” or “Platonic and Stoic academies,” the unrefined soul such as it is found “at the crossroads, on the street, in the workshop” (id.) that “pronounces those things which God gave his creatures to know” (*Test.* v). This knowledge is reliable because it is taught to the soul by nature as to a pupil from his teacher, and nature’s teacher is God Himself (*Test.* v).

I return to Tertullian’s reliance on nature below, but for the present it is worth noting that Tertullian’s larger point in separating Athens and Jerusalem is not to proclaim the worthlessness of philosophy. Again foreshadowing Rousseau, even as he disdains the overuse of philosophy, he builds his case on the foundation of his own philosophical training;296 as Barnes writes, even as he “explicitly rejected a Stoic, Platonic or dialectical Christianity…in a wider sense, he had himself reconciled Christianity and classical culture.”297 Rather—and here Tertullian parts ways with the later Rousseau—Tertullian’s apparent disdain for philosophy points to the fulfillment of all knowledge in Christ. As Osborn articulates Tertullian’s position, “[t]he solution…lies in the perfection of Christ; when the perfect is come, that which is in part, like philosophy, must be

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296 Much could be made of the extensive citations of philosophers in Tertullian’s works, perhaps most of all in the *Apologeticum*. As I note elsewhere, however, these references — “the long list of literary authorities…whom Tertullian triumphantly parades” — amount less to deep philosophical reflections and more to an effort, in Barnes’ description, at displaying erudition and impressing his readers with the end of goal of persuasion, not philosophical inquiry. See Barnes, *Tertullian*, 196ff.
done away.” To Tertullian, Christians have an elevated knowledge of the good compared with ordinary human knowledge, even advanced philosophy: “Man’s skill to make clear what is truly good is no more than his authority to enforce it; the one may as easily be mistaken as the other despised.” All human knowledge is just that—human—and as such is prone to error. Christians, on the other hand, “have been taught by God; in its perfection we know [innocence], as revealed by a perfect teacher” (Apol. xlv.2, 1). Likewise in De Pallio, Tertullian praises the Christian who dons the traditional philosopher’s garb (the pallium) on the grounds that Christianity has superseded philosophy: “Rejoice, pallium, and exult! A better philosophy has deigned you worthy, from the moment that it is the Christian whom you started to dress” (Pall. vi.4). Philosophy preceded Christian revelation and, as his extensive citations and quotations suggest, it is worth learning as foundational knowledge. But why, once Truth has been revealed by God Himself, would one cling to human efforts alone?

**B) Believing the Unbelievable: Credibile Quia Ineptum Est**

This principle that the incarnation and revelation of Christ has surpassed philosophical knowledge also helps explain Tertullian’s paradox “what is inept is believable” (credibile quia ineptum est). The incarnation of Christ is both ‘inept’ and believable because it is inept: if the incarnation is indeed true, it could not possibly come about by normal means; miracles are, by definition, supernatural. In Osborn’s phrasing, “If God, who is wholly other, is joined to mortal man in a way which is not inept, then either God is no longer God or man is no longer man…Truth on this issue can only be achieved by ineptitude.” Of course, the entire

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299 All references to *De Pallio* come from the Hunink 2005 translation, available at www.tertullian.org/articles/hunink_de_pallio.htm.
300 For this point, see Geoffrey Dunn, *Tertullian* (New York: Routledge, 2004), 23.
incarnation could be a spectacular lie, but Tertullian’s point is that the ineptitude of the incarnation is not a point against it; rather, in the event that such a miracle has indeed occurred, that rational ineptitude is to be expected. In holding thus, Tertullian follows both the testimony and experience of countless Christians living the century prior to his own, as well as St. Paul’s own paradox: “God chose what is foolish in the world to shame the wise; God chose what is weak in the world to shame the strong” (1 Corinthians 1:27).

Yet again, however, this does not mean that Tertullian’s position was one of irrationality. Osborn detects an interesting resemblance between Tertullian’s paradox and Aristotle’s use of enthymeme, or a syllogism with one premise missing, in Rhetoric 2.23.302 Here Aristotle discusses how to demonstrate a point using “things that are believed to happen but are hard to credit, because they would not have been believed if they had not been the case”303 (1400a5). He writes that things which seem incredible but which people believe to be true can indeed be believed as true, since “it is not on account of likelihood or credibility that it is believed to be so” (1400a7). Hence, there must be some missing reason to believe the incredible, and that it is believed despite its incredulity is at least a prima facie reason to accept it.

Importantly, though, Aristotle is not suggesting that something be believable merely because it seems incredible yet is believed. His illustration of the point—Androcles’ speech attacking Athenian law, in which he stated that “the laws need a law to correct them”—inserts a tacit second condition for accepting the incredible, namely, an added premise. Androcles’ statement was absurd to his listeners, who jeered him accordingly, so he illustrated his point

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302 Interestingly, this is the very same section which Ibn Rushd cited as exemplary of the immediate point of view, or that aspect of it that causes something to be believed shortly after it is said—viz., by supplying the missing premise. See previous chapter and Ibn Rushd and Aouad, Commentaire Moyen à la Rhétorique d’Aristote (Paris: Vrin, 2007), here 2.23.19, 20.

using the examples of fish and olives. On the face of it, it is incredible to believe that fish, coming as they do from saltwater, would need salt, or that olives, the source of olive oil, would need olive oil (1400a10-15). Yet both needs are real and true. As Ibn Rushd points out, Androcles was in fact omitting some information—fish, when removed from saltwater and when we want to preserve or eat them, need salt, and olives, when mashed and preserved, need oil added to them. “Without that [information], to say that what is in salt has need of salt and that that which has oil in it needs oil is not persuasive…” Thus, Aristotle is not proposing that anything that is believed to be true but seems incredible must necessarily be true; rather, he is suggesting that when such an event arises, we do well to suspend our disbelief and look for a missing premise or other missing information. For to Aristotle, in such cases the benefit of the doubt belongs with those who believe the incredible.

Similar, then, is Tertullian’s credibile quia ineptum est paradox. In this case, the missing premise to the syllogism is the truth of Scripture: Scripture announces—and many believe in—the incredible teaching of Christ’s incarnation and crucifixion; Scripture is divinely inspired and true; therefore, that which is inept/incredible is true. Thus, it is not because of but in spite of the incredulity of Christ’s incarnation and crucifixion that he finds this mystery credible, even as that very incredulity also gave it a prima facie reason for acceptance.

A final note on Tertullian’s paradox: As Osborn points out, Tertullian does not universalize his claim about the credibility of the inept; i.e., with Aristotle, he is not claiming that all incredible things are true simply because they are inept/incredible. Rather, limiting himself to this particular case, “truth…can only be achieved by ineptitude.” For if God, who is not man, becomes man “in a way that is not inept, then either God is no longer God or man is no longer

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304 See Ibn Rushd, MCR 2.23.20.
man, and there is no true incarnation.” We return to this paradox later, when we see that Tertullian’s tendency to paradox suits well the conundrums we face in contemporary problems of religious freedom.

C) Reason, Revelation, Nature

Although Tertullian holds Christianity in higher esteem than the philosophy that preceded it, then, he is hardly rejecting reason as such. Rather, reason is the contribution of the soul that renders man “supremely receptive to awareness and knowledge” (Test. i)—including the knowledge of Christ. To Tertullian, this epistemology elevates rather than degrades reason, for it incorporates both what man can know by nature as well as that which is revealed to be true by God. In other words, he is not asking for man to set aside his reason but rather to enlarge it, so as to gain understanding of the things of both heaven and earth.

Yet for all this, Tertullian did not expect everyone to accept the rule of faith or to reason as Christians; rather, his insistence on Scripture and apostolic authority was intended for those who already were Christians. For those who are not Christians, reason and nature are the available epistemic resources. In De Virginibus Velandis, Tertullian reveals a theory of the progressive revelation of justice and the consequent levels of knowledge in his epistemology: first came nature, then the law and the prophets, and finally the “Paraclete,” or the Holy Spirit, in his revelation in the New Testament and the Church’s teachings (Virg. i.7). Likewise, the soul itself testifies to the truth as it is taught by nature (Test. v).

305 Osborn, Tertullian, 58.
306 See, e.g., Praescr. xxi.
307 All references to De Virginibus Velandis (Virg.) come from Geoffrey Dunn, Tertullian (New York: Routledge, 2004).
308 Daniélou traces a similar developmental theme in Tertullian’s writings. For him, the process begins with the transition from natural law to the Mosaic law depicted in Jud. ii.3-5, the law undergoes a radical change between the Old and New Testaments in the Adversus Marcionem. This does not, importantly, make it a different law, for, in Daniélou’s terms, the development of the law happens “as a growth from a seed.” Finally, De virginibus velandis
Though knowledge of Christ and of the Paraclete supersedes past knowledge, this is not to say that the first two sources of revelation—viz., nature and the Mosaic law/prophets—are obsolete. Rather, natural knowledge and former prophecy are fulfilled in rather than supplanted by the Holy Spirit’s revelation. “Scripture establishes the law, nature is called to witness [to it], [ecclesiastical] teaching carries it out” (Virg. xvi.1). These three sources of revelation mutually support each other so that knowledge is made more certain: “Scripture is of God. Nature is of God. [Ecclesiastical] teaching is of God. Whatever is contrary to these is not of God. If Scripture is uncertain, nature is clear, and about its testimony Scripture cannot be uncertain. If there is doubt about nature, [ecclesiastical] teaching shows what has been more approved by God” (Virg. 16.1-2).

In fact, nature and unwritten law remain relevant even to Christians. The unwritten law serves not only to correct human knowledge in its error (Test. v,vi) but also serves to confirm religious practices that do not find a basis in scripture or written law. In one of his lesser-known works, De Corona Militis Tertullian expounds at length on the importance of unwritten traditions (traditio nisi scripta). This work, occasioned by the refusal of a Christian Roman soldier to wear a military garland during a ceremony, thus exposing himself as a Christian and bringing upon all Christians the risk of persecution, inquires “whether or not a tradition without a written source should be accepted” as authoritative for Christian practice (Cor. Mil.

310 “Unwritten tradition” is, as we saw in the previous chapter, the literal translation of Ibn Rushd’s ‘unwritten law’ (sunnan ghair al-maktouba). I endeavor to show above, however, that as with Ibn Rushd, these ‘traditions’ are binding in a way unworthy of the term ‘unwritten law.’ 
311 The fear was presumably that Christians would appear unpatriotic or incapable of military service, which would only further damage the burgeoning cult’s reputation among the Romans. Of course, here, as elsewhere, Tertullian argues that Christians should not serve in the military in the first place; military duties on the part of the Christian as “going over to the enemy,” it is the same as “[t]o leave the camp of Light and enlist in the camp of darkness” (Cor. Mil. xi.4).
iii.2). In this way, it resembles the *Warner* case in the first chapter, which also sought to determine which laws, written and unwritten, bound a believer’s practices. Before examining Tertullian’s answer to this, it should be noted that although he is dealing with authoritative traditions *within* Christianity more than their authority in the public sphere, I aim here to support my overall argument that the natural law can help mitigate apparent conflicts between divine and human law. The case at hand, that of a Roman soldier who abstains from a civic custom on account of religious custom, employs the unwritten law to answer whether the believer has correctly understood and acted on the divine law. As such, it provides an excellent case study to test my thesis. Put another way, natural and unwritten laws are often considered to be resources within the public sphere to test the justice of a human law; i.e., for natural law theorists, it is a valid critique of a human law that it contravenes or contradicts the natural law. But as we see below, Tertullian is here testing what is perceived to be a divine law and finding that it is not supported as such. In this particular case, the practice in question is supported by natural law, but whether it was or was not so supported is in fact beside the point. Rather, to overstate it slightly, the point is that the natural law can serve as something of a touchstone not only for human laws, but for divine laws as well.

Tertullian launches his defense of *traditio nisi scripta* by recounting the customs, at that time, surrounding baptism—professing a vow to disown the devil, three immersions in the water, refraining from bathing for a week thereafter, etc. If one “demand[s] a precise scriptural precept for these…practices,” Tertullian points out, “you will find none” (*Cor. Mil.* iii.3). Rather, they originate in tradition, are strengthened by custom, and observed by the faith. These traditions can even be binding in a law-like manner: other practices, such as not kneeling in worship on Sundays, “[w]e consider…to be unlawful,” even though they are nowhere forbidden in writing

312 I am indebted to Charles Butterworth for this connection.
But lest such practices become arbitrary, unfair, or otherwise undesirable, “reason (rationem) will support tradition, custom and faith” in these and other such practices (Cor. Mil. iv.1). The insertion of reason enables evaluation and debate of these practices and precludes a problematically conservative approach to tradition—viz., the idea that because a particular tradition has always been in place, it ought automatically to be a binding practice. Rather, it would seem, one gives a certain level of deference to these longstanding unwritten traditions—whether religious or civic—yet continues to employ reason to evaluate them.

It is not, however, unwritten law or tradition alone that gives us right practice. “The rational basis of Christian [unwritten] customs is strengthened when it is supported by nature, which is the prime rule by which all things are measured” (Cor. Mil. v.1). According to Tertullian, “Neither God nor nature is capable of lying” (Test. vi), which implies an inherent bond between the two. Tertullian goes so far as to imprint the divine law onto nature herself: “If you demand a divine law, you have that common one prevailing all over the world, written on the tablets of nature” (Cor. Mil. vi.1). Indeed, the Apostle Paul himself suggests both “the existence of natural law and nature founded on law” in Romans 2:14 by “affirming that the heathen do by nature those things which the law requires.” For the Christian God is “the Lord of nature” (Cor. Mil. v.1) and God Himself is first known though nature (Marc. i.18, Cor. Mil. vi.1). Nature is, furthermore, a guide for both Christians and pagans: “anything that is against nature deserves to be branded as monstrous among all people; we, surely, should also consider it as a sin of sacrilege against God, the master and author of nature” (Cor. Mil. v.4, emphasis added). The witness of nature in man is the soul, which “make[s] of mankind a rational animal” (Test. i), and “the testimonies of the soul are as true as they are straightforward” (Test. v), for
again, nature does not lie. Tertullian calls upon “the authority of Nature herself” to dispel the rumors about Christians and testify to the truth (Apol. vii.13).

Such paeans to nature are typical of Stoicism but fit seamlessly as well both within Tertullian’s Christianity and his epistemology. In the religious sense, recall that Tertullian considers Christian revelation to be a progressive phenomenon: God revealed His justice “first in a trial state…by reason of nature. From there it advanced to infancy through the law and the prophets. From there it fermented into adolescence through the gospel. Now it is brought to maturity through the Paraclete” (Virg. i.7). Nature serves as the first indicator of who God is—“I postulate that a god ought first to be known by nature, and afterwards further known by doctrine” (Marc.313 i.18). Relatedly, his epistemology sees no conflict between God and nature, for God teaches nature just as nature teaches the soul (Test. v), and Scripture, nature and Church teaching cooperate to reveal the whole of the Law (Virg. xvi.1). Thus, for both Christian and pagan, nature and natural reason are indispensable.

Tertullian’s epistemological role for nature in revealing justice becomes clearer below, as the basis for his arguments for religious freedom unfold. We turn now to those arguments.

III. The Father of Western Religious Freedom

A) Natural Law, Natural Rights and Tertullian’s Defense of Religious Freedom

It is said that Tertullian is the “father of Western Christianity” on account of his prolific theological writings, which took on early heresies and articulated tenets of the Christian faith that have endured throughout its millennia-long history. It is less acknowledged that ideals of

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313 All references to Adversus Marcionem are from the 1972 Evans translation, available at www.tertullian.org/articles/evans_marc/evans_marc_00index.htm.
religious freedom, as they have been known in the West, have origins in Tertullian’s thought as well.\textsuperscript{314}

Perhaps the most interesting aspect of Tertullian’s defense of religious freedom is his extension of it to all people, which is remarkable for his era. Rather than defending mere tolerance of Christianity, Tertullian writes that “[i]t is a human right (\textit{humani iuris}) and a natural capacity (\textit{naturalis potestatis}) that one should worship whatever he intends (\textit{quod putaverit colere})…” (\textit{Scap. ii.1-2}). Given the primacy of Christianity in his writings—the constant justification of the truth of Christian doctrine, warnings against heresy, and such statements as that in \textit{Praescr. xxi}, declaring that all doctrines which are not “derived from the tradition of the Apostles…come of falsehood”—he is a somewhat unexpected defender of a \textit{universal} human right, especially the right to choose one’s religion. Tertullian, while Stoic in upbringing, is no ordinary cosmopolitan, nor is he a systematic philosopher on the nature of man or natural law. Yet it is he who first refers to a \textit{libertatem religionis} that is owed not just to Christians but to all humans. How does this come about, and on what grounds does Tertullian make his case for religious liberty?

Tertullian’s writings on religious freedom appear primarily in the \textit{Apologeticum} and his letter \textit{Ad Scapulum}. The former, which I treat first, was composed around 197 CE and directed, at least ostensibly, to “the magistrates of the Roman Empire” (\textit{Apol. i.1}).\textsuperscript{315} Its principal aim is to

\textsuperscript{314} This is beginning, slowly, to change. See, e.g., Gregory Wallace, “Justifying Religious Freedom: The Western Tradition,” which acknowledges Tertullian’s role in the development of religious freedom. \textit{Penn State Law Review} 114 (2009), 485-570.

\textsuperscript{315} According to Barnes, however, both audience and purpose had a second aim: “If Tertullian appeared to invoke Roman magistrates and to address the pagan world, most of his statements were also designed to encourage Christians.” Tertullian set himself up as a confident and courageous spokesman for the persecuted minority “who could prove [the Christians’] respectability, both social and intellectual, by his very existence.” Barnes, \textit{Tertullian}, 110.
defend Christians against a number of practices of which they were purportedly accused—cannibalism (vii.1ff), adultery (e.g., xxxv.6), incest, etc.—as well as to “protest the injustice of [the Romans’] hatred of the Christian name” (Apol. i.4). The persecutions the Christians endured, Tertullian claims, stemmed from hatred born of ignorance (Apol. i.4-6), and much the first part of the *Apologeticum* is an effort to set the record straight on the true nature of Christian practice. He also sets out to show the insufficiencies of Roman gods and point to the necessity of one supreme being over them all, which he likens to the “Emperor…of the universe” (Apol. xxiv.3). If Roman gods are indeed gods, he avers, then “you must allow there is a God more sublime, true owner in his own right (so to say) of deity, who made the gods out of men” (Apol. xi.2). This quasi-monotheistic view is, according to Tertullian, how “most men apportion divinity: they hold that the control, the supreme sway, rests with one…” and it is this supreme divinity that Christians worship (id.).

It is somewhat surprising, in this context of a defense of Christianity as the one true faith, that Tertullian turns to a defense of religious freedom as a human right for all people. For the preceding paragraphs—indeed, the whole of the *Apologeticum* up until this point—has pointed to the truth and superiority of Christianity, not to an embrace of religious pluralism. Even as he accuses the Romans of “neglect of the true religion of the true God” (Apol. xxiv.2), Tertullian articulates an appeal for freedom of conscience, almost modern in spirit, that professes indifference toward which god one chooses to worship, so long as he does it freely: “Let one man worship God, another Jove; let this man raise suppliant hands to heaven, that man to the altar of

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316 Robert Sider speculates that at least some of these claims were exaggerated. Robert D. Sider, ed., *Christian and Pagan in the Roman Empire: The Witness of Tertullian* (Washington, DC: The Catholic University of America Press, 2001), 2.
317 Tertullian elsewhere defends the necessary unicity of God, especially in *Ad Marcion* (“God is not God if he be not one,” *Ad Marcion* 1.3.1). His argument here presupposes the same logic – surely the panoply of Roman deities must reside under some greater deity that unites them; this, then, is the only creature worthy of the name God.
Fides; let one (if you so suppose) count the clouds as he prays, another the panels of the ceiling; let one dedicate his own soul to his god, another a goat’s” (Apol. xxiv.5).

Tertullian’s understanding of religious freedom was remarkably expansive for his time; to him, it included what we would today call freedom from coercion in matters of conscience. Immediately following the above call for tolerance, he defends religious freedom on another basis, namely, that coerced worship is no worship at all. He enjoins his Roman magisterial readers to consider whether it would be just “to do away with freedom of religion (libertatem religionis), to forbid a man choice of deity, so that I may not worship whom I would, but am forced to worship whom I would not. No one, not even a man, will wish to receive reluctant worship” (Apol. xxiv.6). He had earlier argued along similar lines: “…no one may lie about his religion. For in the very act of saying he worships something other than he does worship, he denies what he worships; his worship and his reverence he transfers to another and by the transfer ceases to worship the God he has denied” (Apol. xxi.27).

What are we to make of this? Tertullian’s calls for religious freedom are unexpectedly inclusive for such an ardent defender of the tenets of a particular faith; it seems an abrupt shift to proceed from calling the Roman gods “demons” (Apol. xxiii.9) to then enjoin such expansive religious freedom as the equal right to worship God, Fides or a goat.

I argue below that Tertullian’s defense of religious freedom is based on a theory of unwritten or natural law. Tertullian is an occasional writer rather than a professional theologian; as such, his rhetorical tactics shift according to the point he is making. For example, Adversus Marcionem, directed against a fellow (if heretical) Christian, builds its case almost entirely on Christian Scriptures, as the dispute between Tertullian and Marcion revolved around the person of Christ and knowledge of His nature comes from revelation. Ad Nationes, on the other hand,
relies on classical sources—Virgil, Homer, Plato, etc.—to argue the injustice and absurdity of Roman treatment of Christians; this work is directed at educated Roman pagans. *Apologeticum*, likewise, ignores Christian revelation. It is my contention that his call for tolerance and religious freedom is based also on an argument about the nature of the law—human, divine, and natural.

Tertullian’s use of natural law as a basis for religious freedom is not entirely straightforward; he does not explicate a theory of natural law and show how religious freedom derives from it. To see how he arrives at this particular defense of religious freedom, then, we begin with his claim that there is something higher than human law by which human law is measured. Foreshadowing Augustine’s claim that an unjust law is no law at all (*De Libero Arbitrio* i.5), as well as Ibn Rushd’s belief that human law must be measured by something higher, he argues that law not backed up by justice is “mere force, an unjust tyranny from the citadel…if you say a thing is not lawful simply because that is your will, and not because it *ought* not to be lawful.” The human law can “rightly forbid” what is bad, but it is able to make mistakes and has in the past tended toward untold excesses, even tyranny (*Apol. iv.4, 5, 7-9, 13*).

There must, then, exist a higher standard or law than the human law. So far, though, Tertullian has not revealed what standard one should use to determine what “ought to be lawful.” It is clear that Tertullian’s appeal for universal religious freedom is not based on human law; Christianity was illegal in the Roman Empire at the time he wrote *Apologeticum*. It is equally clear that his basis for this “human right (*humani iuris*)…to worship whatever [man] intends” is not a strictly religious concept, for he extends it to the right to worship the Christian God, Jupiter, Fides, etc.

So from what *ius* Tertullian derive the *libertatis religionem*?

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B) Divine, Human and Natural Law in Tertullian’s Defense of Religious Freedom

In the event that the human law “has made a mistake” by forbidding that which is good, then we must keep in mind that this law is “the creation of man; it did not come down from heaven” (Apol. iv.5). At first glance, this statement seems to imply that Tertullian simply considered divine law—that which came down from heaven—to be a higher law than human law. Given a conflict, then, one’s loyalties lie with his religion rather than with worldly laws. In one sense, this is accurate—Tertullian did consider his religion’s divinely revealed laws to be higher than Roman law. As discussed above, Christ represented the fulfillment of all knowledge for Tertullian, and ultimately any questions pertaining to the truth must find their source in Him.

But the fact that this was his own belief—which, Tertullian would be the first to acknowledge, is an article of faith rather than philosophy—in no way need incline us to think that he had machinations for the public supremacy of divine law, nor was he making any such case in the Apologeticum or elsewhere. No, in his arguments concerning the political sphere—justice, rights, and the law—Tertullian appeals to “common consent” (Apol. xxiv.3), not the authority of his religion’s divine law. “What recommends a law,” he writes, is “its equity and nothing else,” and when a law is cruel, “common agreement” should be allowed to effect its modification (Apol. iv.9, 10). Recall also the role that he ascribes to innate human knowledge, purportedly shared by all people. Robert Sider locates in De Testimonio Animae a close affinity with the Stoic conception of communes sensus, or “common ideas,” in his rendering, that are “shared instinctively by all human beings, even those left untouched by learning…”319 This teaching held that the soul was divine in origin and carries with it some level of awareness of divine truth. Tertullian’s appeal to man’s simple, uneducated insights is thus an appeal to the

divine spark that he would have believed to have been present in all people. While this is in perfect keeping with Christian teaching—the Christian “could affirm that though sin has distorted the original integrity of the soul…there are moments in life when the soul is led to acknowledge the divine truth with which it entered the world”\textsuperscript{320}—in \textit{De Testimonio Animae} Tertullian rests on the soul itself, not Christian revelation, to lead man to truth, whether that soul is “divine and eternal as many philosophers attest…[or] not divine” (\textit{Test. i}).\textsuperscript{321} Nevertheless, when he turns to the issue of religious freedom in \textit{Apologeticum} (xxiv), it is now less surprising that he does so with an eye to all of humanity rather than to his Christian sect alone.

Rather than take Tertullian’s devout faith as a bias or weakness in his argument, we should consider that it is all the more striking that one who so ardently believed in the truth of one religion could agitate for religious freedom in the public sphere on the basis of consensus. Christian Scripture and the Paraclete’s revelation were Tertullian’s highest source of truth, so it took a great deal of imagination, as well as respect for the Roman other, to invoke instead shared beliefs on the nature of equity and the law (\textit{Apol. xxiv.3}; also iv.9,10). But of course, this was also necessary, as his Roman audience would not take seriously Tertullian’s strictly religious sources. In short, for its efficaciousness in the public sphere, it was crucial that Tertullian’s argument in no way invoked Christianity or the Christian God’s law, but for its efficaciousness among Christians it was crucial that took seriously the possibility of the divine law’s ultimate superiority.\textsuperscript{322}

\textsuperscript{320} Sider, \textit{Christian and Pagan}, 73.
\textsuperscript{321} As Sider points out, this is a fairly generous grant to \textit{communes sensus}, for it “ascribes to the common ideas some of the central Christian doctrines: that God is one; …that souls exist after death; and that there will be a future resurrection,” all of which one might question as a type of intuitive knowledge. Sider, \textit{Christian and Pagan}, 73.
\textsuperscript{322} This dual demand on the religious person in the public sphere is similar to what leads Habermas to conclude that religious reasoning should be “translated” into secular reasoning. I discuss what I believe to be fatal flaws in this thesis below.
This is not to say that Tertullian’s rhetoric is merely utilitarian, that he is using a rhetorical tactic to gain protection or advantages for Christians even though he does not actually believe his own claim that all men should be free to worship whom they will. For one thing, while not an ordinary Stoic, Tertullian does retain something of a Stoic cosmopolitanism. “One state we know,” he writes, “of which all are citizens—the universe” (Apol. xxxviii.3); likewise, “…we are your brothers, too, by right of descent from the one mother, Nature…” (Apol. xxxix.8). Elsewhere, writing on “the universality of nature,” he waxes multicultural, striking a modern chord in some of his language: “One humanity comprises all races, although the name varies. There is a single soul, but language is various. There is a single spirit, but speech is various…God is everywhere and the goodness of God is everywhere…the testimony of the soul is everywhere” (Test. vi).

This Stoic confidence in nature and concomitant belief in some degree of homogeneity, if not equality, among all (free) people made it no stretch for Tertullian to consider that which he took to be a right for himself to be a right for all people. He believed in nature’s divine origins (e.g., Apol. xlviii.11, inter alia) as well as its ability to bring the truth into the light: “It is well that time reveals all, as your own proverbs and wise saws witness, and does it by the law of nature, which has so ordained that nothing long lies hid…” (Apol. vii.12). In his later work Ad Scapulem (212 CE), Tertullian returns—even more pronouncedly—to this role of nature in determining justice. In this short letter to the Proconsul of Africa, Tertullian asserts both “a human right (humani iuris) and a natural capacity (naturalis potestatis) that one should worship whatever he intends (quod putaverit colere); the religious practice of one person neither harms nor helps another” (Scap. ii.1-2). As mentioned above, the fact that Tertullian locates the ius and potestas in nature and in humanity itself legitimizes it on naturalist grounds; Tertullian is
unequivocally placing the justification for religious freedom within the realm of nature itself. It is not religion-specific, time-specific or subject to human regulation; it is a right of every human by nature.

From this confidence in nature itself, it was a small step to natural law. As in Corona Militis, in Adversus Judaeos Tertullian explicitly invokes the natural law: “Again, I contend that before the law of Moses was written on stone tablets there was an unwritten law, which was understood naturally and was kept by the ancestors…” On what other basis, he asks, would Noah have been declared righteous “if the justice of a natural law had not come before the law of Moses?” Or Abraham, who was “counted a friend of God”—and this before the revelation of the law. How could such judgment be made, “if not from the fairness and justice of natural law?” (Jud. 2.7).323

Tertullian’s reliance on nature, custom and unwritten tradition strengthens the case for the utility of the natural or unwritten law in religious freedom. For certainly, Tertullian didn’t need to invoke unwritten law; he provided a plethora of other reasons to end Christian persecution that together would have been adequate to make his case without an appeal to natural rights. To name a few: first, the Romans use a legal double standard in persecuting Christians (Apol. ii.15-17), second, their hatred is based on ignorance (Apol. i.4-6) and even confusion about whom it is that Christians worship (Apol. iii.5), third, Christians are charged with a name rather than with the acts associated with the name, and fourth, there is no basis to the charges laid against their acts (Apol. iv.11-13). Finally, Christians are honest and known “for righteousness, for purity, for faithfulness, for truth…” (Scap. iv.8). By both legal reasoning and the proof of experience, Tertullian had a strong case for an end to persecution of Christians.

323 References to Adversus Judaeos (Jud.) taken from Dunn, Tertullian.
Yet Tertullian chose to make a case for the human right to religious freedom, not just for religious freedom for Christians, and he did so using evidence from unwritten traditions and natural law. He made claims about the nature of religion as such—that it ought to be free, whether one worships Jupiter or the Christian God—and that worship must be offered in truth; otherwise it ceases to be worship (Apol. xxiv.6 and xxi.27, respectively). He is not merely making a case for an end to persecution, then, as Apologeticus and Ad Scapulem are usually taken to be, but is laying the groundwork for religious freedom’s development and expansion for years to come.324

**C) Beneficial Religion**

Tertullian’s weakness lies, perhaps, in failing to recognize just how difficult a task this expansive sense of religious freedom can be. For it is one thing simply to declare that “one man’s religion neither harms nor helps another man” (Scap. ii.2), but another to embrace the influence of another religion’s norms and doctrines—or secular ones—on one’s own life, family and society. We can hardly expect a second century religious minority living in the Roman empire to have anticipated modernity’s radical pluralism, so in one sense we can overlook this deficiency. Besides, it is actually possible that Tertullian did anticipate this difficulty and hinted at a criterion for the sorts of religious practices he believed ought to be extended freedom. In Apologeticus, he objects to those Romans who derided as “silly” the Christian beliefs on death and resurrection. For according to Tertullian, had they come out of the mouths of philosophers these beliefs would be considered “unique genius” (Apol. xlix.1-2). His complaint, though, is not only that the Roman mockery of Christianity is unfair and biased but also that these teachings

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324 For evidence of this, we may look to Tertullian’s intellectual progeny, Lactantius (ca. 240-320 CE). Lactantius, another early Roman Church father living a generation after Tertullian, continued Tertullian’s work and defended religious freedom in similar terms: “[N]othing is so much a matter of free will as religion.” (Lactantius, *Divine Institutes*, Book V, chapters 19-20.)
would, if true, be “beneficial” to humanity, so they ought to be permitted. Furthermore, “even if they are false and silly, they are harmful to no one.” Therefore, let no one condemn—“on any grounds”—teachings that are beneficial (Apol. xlix.2-3).

This is a fascinating insight. Tertullian, whose life and works reveal the singular aim of defending the truth of Christianity, here holds up a standard of tolerance for any religious belief or practice whatsoever: is it beneficial? If so, tolerate it. Even if not, does it harm anyone to permit believers to persist in it? If not, then tolerate it, no matter how wrong its adherents may be.325

Of course, this does not answer what “beneficial” and “harmful” mean, and the lines of tolerance will shift depending on culture, era and circumstances. One may thus object that this simply pushes back the question of what constitutes acceptable religious practice, and that we are no further than we were at the outset of this dissertation, with Winnifred Sullivan objecting to state interpretations to determine the parameters of religious freedom. This is not, however, the case. For the same natural and unwritten law theories outlined in this dissertation may provide epistemic resources for these questions as well, such as Ibn Rushd’s immediate point of view, Aristotle’s endoxic method, or Tertullian’s own reliance on common ideas. Adherents to the New Natural Law school of thought of John Finnis, Germain Grisez, Robert P. George and others will point out that their theory could rationally account for the terms “beneficial” and “harmful” by providing a foundation for the defense of so-called “basic goods” that does not rely on revealed religion. These fundamental goods of human life are the “reasons for acting which

325 It should be noted that this was not Tertullian’s standard for errors or “silly” beliefs within Christianity; in other words, he held a different standard for arbitrating disputes within a religion than among religions. I address this at greater length in the introductory chapter, but I maintain that this is perhaps a prudent practice.
need no further reason; these are goods, one or more of which underlie any purpose.” 326 This is not the place to address in full the strengths and weaknesses of New Natural Law theory, but it should be noted that benefit and harm can be meaningful concepts from within a natural law theory.

D) Mediating Human and Divine Laws

In both of the preceding chapters, the unwritten or natural law appears as something that can stand between the human and divine laws, if not resolving the tension between the two, then mitigating the tendency of either law towards rigidity or harshness. Can Tertullian’s natural law serve as such an intermediary? In short, yes. But it should be noted that Tertullian does not, to my knowledge, treat this question directly—i.e., the relationship of the natural to the human and divine laws. Rather, we must glean the intermediary role that natural law plays through the epistemological Tertullian assigns to nature.

Recall, Tertullian is not a systematic philosopher or even theologian but a writer for specific occasions and an apologist of the Christian faith. His defense of religious freedom comes about as a defense of Christians, though it reveals one of, if not the, earliest articulations of the universal right to religious freedom. As such, Tertullian is not a natural law theorist, at least properly speaking. His writings betray an unmistakable confidence in nature and a conviction that the natural law exists, but it would be wrong to place him in a category with St. Thomas Aquinas; his is not a fully developed and articulated natural law theory. Rather, the utility of Tertullian’s natural law is in its practicality: Tertullian invoked the natural law and unwritten traditions as a means of reaching those who did not share his religious commitments.

326 Germain Grisez, Joseph Boyle, and John Finnis. “Practical principles, moral truth, and ultimate ends.” American Journal of Jurisprudence 32 (1987), 103. It should be added that Islamic law has developed understandings of these concepts over the centuries (through the legal categories of mubah, permissible, and haram, prohibited); as such, an Islamic society will likewise not be at a loss to follow Tertullian’s rule of tolerating that which is not harmful.
an approach that is sorely missing in much of the religious freedom discourse today. Tertullian understood that, in conditions of pluralism (even, in his case, of a tiny minority of Christians in an otherwise homogeneous society of Roman religion), one must maintain a language that is accessible beyond one’s own religious community. What sets him apart, however, from such modern theorists as Rawls or even the more closely related Habermas (see below) is his very substantial role of nature in addressing the religious other.

Natural knowledge, or the “testimonies of the soul” that spring from nature (Test. v), points to a higher truth that is beyond man and even beyond nature itself, viz., the Christian God, creator of both nature and man. Yet while the soul is made naturally receptive to divine knowledge, it does not naturally know God Himself; it is not “born Christian” (Test. i). This fullness of knowledge, which the Christian alone possesses (Apol. xlv.1), is a gift of the Paraclete, the Holy Spirit (Virg. i.7). The mediating role of nature, then, bridges the gap between those who would cling to human knowledge alone—which in Tertullian’s case would be the philosophers—and those who insist that all knowledge must be revealed directly from God, whom he addresses in his treatment of unwritten traditions (Cor. Mil. iii-v), as well as throughout his discussions of natural knowledge and natural law treated throughout this chapter.

Nature helps to reveal truth in general (Test. i,v), right practice (Cor. Mil. iii-v), and even the nature of God (Test. v). But this is, in essence, another way of describing the natural law: that which is known to be right according to nature. As such, what I have described as an epistemological intermediary could also be a mediating device between human and divine laws.

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327 This point merits more attention than the present space affords, but I do not mean to enter into debates over the distinction between or relative merits of natural right versus natural law. Without collapsing the two, I simply intend natural law as an expression of what is right by nature; I use “law” in the moral sense analogously to the physical sense that gravity is described as a “law,” viz., as an expression of the order of nature.
IV. Tertullian in Contemporary Perspective: Habermas and the Problem with Translation

What would this look like in practice? As mentioned above, Tertullian’s approach to religious freedom, or to the conflict of Christianity and Roman law, differs importantly from the predominant modern approaches to the relationship of human and divine law. John Rawls’ schema of Justice as Fairness, so influential in the late modern imagination, famously eschewed a public role for comprehensive doctrines, such as religions, opting instead for the use of “public reason.” Justice as Fairness deals with the conflict of human and divine law in a way that ultimately insists on the automatic priority of human law (assuming certain conditions that exceed the scope of present purposes). Brian Leiter and Noah Feldman, discussed in the introductory chapter, take related approaches in which religion is only permissible in the public sphere if it is articulated in secular terms.

On the other hand, Jürgen Habermas’ approach to the use of religion in the public sphere seems at first to offer a modern parallel to Tertullian’s approach to the conflict of Christianity and Roman law. Habermas holds that at the formal legal level in a democracy, “all laws, all judicial decisions, and all decrees and directives must be formulated in a public language that is equally accessible to all citizens and that they must, in addition, be open to justification in secular terms.” However, Habermas is open to religious reasons at the informal level, in the “political public arena…below the threshold at which the institutional sanctioning power of the state can be invoked.” Religious citizens are thus free to employ religious reasons so long as they recognize the “institutional translation proviso” between the informal and formal

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328 See Jürgen Habermas, Between Naturalism and Religion (Cambridge: Polity Press, 2008), here p.5 but throughout. Habermas’ approach is too complex to treat fairly here, but the difference, more precisely, is that a Habermasion approach largely pushes the question back one step as to what constitutions a
329 Habermas, Naturalism, p.5.
330 Id.
levels, which is “the epistemic ability to consider one’s own faith reflexively from the outside and to relate it to secular views.”

This institutional translation proviso is essential for a just form of secularism; for Habermas, a “secularization that does not annihilate is brought about as a kind of translation.”

Again, Habermas’ schema seems at first to resemble that of Tertullian, for the latter also adapted his religious arguments and used terms familiar to his audience—in his case, natural law replaced overtly religious arguments in addressing pagan Romans. Indeed, Barnes speaks of Tertullian’s usage of both Christian and pagan sources as an effort “to make his inherited material relevant to [his] Carthaginian milieu.” Upon closer examination, though, the barrier between Habermas’ informal and formal levels becomes quite impenetrable, and religion becomes sidelined in a way that Tertullian never attempted. In fact, it becomes clear in Habermas’ discussion on the boundaries between faith and knowledge that Habermas finds the translation process that is necessary to prevent an annihilating secularization to be philosophically problematic: “The perspectives which are centered either in God or in human beings cannot be converted into one another. Once this boundary between faith and knowledge becomes porous, and once religious motives force their way into philosophy under false pretences, reason loses its foothold and succumbs to irrational effusion.”

This is not to say, of course, that the same individual cannot offer both religious and secular reasons for the same thing, which is close to what Tertullian did, but this would be coincidental and as such cannot be a prerequisite for participation in democratic discourse—one cannot simply count on the

333 Barnes, Tertullian, 105.
334 Habermas, Naturalism, 242 (emphasis original).
coincidence of both secular and religious reasons for the same proposition. Nevertheless, Habermas insists, “every citizen must know and accept that only secular reasons count beyond the institutional threshold that divides the informal public sphere from parliaments, courts, ministries and administrations.”

Habermas’ theory raises two issues. First, in agreement with Habermas, if we replace “perspectives” with “law,” the very problem I have identified throughout this dissertation once again rises to the surface: divine law and human law do, seemingly, conflict, and they cannot easily be translated one to the other, at least not in a way that would either mimic theocracy (if one translates divine law into human law) or denude religion of its metaphysical power (if vice-versa).

Secondly, Habermas betrays a bias of assuming that religion or religious motives are necessarily irrational. For if a religious perspective is expressed in philosophical terms, Habermas seems to assume that this will be but a mask for religious motives; he does not address the possibility of religious perspectives that can be authentically philosophical as well. Of course, even Tertullian himself would agree that we should not confuse religion with philosophy, nor consider faith and reason to be interchangeable. But this does not mean that religion must be irrational, and Habermas, unlike Tertullian, does not attend to the distinction between “philosophical” and “rational,” nor does he justify the implicit assumption that philosophy is always secular. To return to Tertullian’s texts, especially De Testimonio Animae, there is no reason to believe that rationality didn’t exist before the advent of philosophy: “thought predates the pen, and man himself predates the philosopher and the poet. Is it to be believed that before literature and its spread, man lived in silence on such subjects? Did no one ever speak of God

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335 Habermas, “Religion,” 10.
336 Indeed, much of the history of philosophy was intertwined with religion; most medieval philosophy, including that of Ibn Rushd in the preceding chapter, is both philosophical and religious in some measure.
and his goodness?” (Test. v). Here Tertullian raises the possibilities both of rationality without philosophy, as well as religious speculation together with rationality—all stemming from the “promptings of nature” (id.).

Perhaps because Habermas finds the translation process between religious and secular reasons problematic, he does not expect that religious citizens will necessarily engage in this process of translation: “many religious citizens would not be able to undertake such an artificial division [i.e., of translating religious into secular reasons] within their own minds without jeopardizing their existence as pious persons…A devout person pursues her daily rounds by drawing on belief.”337 If we accept this limitation on the translation of religious reasons, as Habermas explicitly does, “then the liberal state, which expressly protects such forms of life in terms of a basic right, cannot at the same time expect of all citizens that they also justify their political statements independently of their religious convictions or world views.”338 Secular co-citizens may and indeed should aid in the translation effort, but Habermas recognizes that they would be willing to do so “only under a cognitive presupposition that is essentially contested,” which is the presupposition that it is “plausible from a secular perspective that religious traditions are not merely irrational or meaningless.” Habermas calls this premise an “open question.”339

Setting aside the “open question” of the inherent irrationality of religions, and even avoiding the question of why religious people ought to carry the burden of translation, one does wonder whether Habermas has improved upon the much older tradition of natural law, as illustrated by Tertullian, for dealing with religion in the public sphere, especially when it concerns religious freedom. Because of the challenges of pluralism, it is tempting to make

338 Id.
339 Habermas, Naturalism, 5.
Habermas’ move: find a secular neutral ground for discourse and insist that all members of society work from it. The problem is that this isn’t really Habermas’ move; secularism is not creed-specific but neither is it neutral.\footnote{The point that secularism is not an inherently neutral alternative – or, perhaps, is never neutral – has been made sufficiently elsewhere. See, e.g., Charles Taylor, \textit{A Secular Age} (Cambridge, MA: Belknap Press, 2007) and responses in eds. Michael Warner, Jonathan VanAntwerpen, and Craig Calhoun, \textit{Varieties of Secularism in a Secular Age} (Cambridge, MA: Harvard University Press, 2013), Elizabeth Shakman Hurd, \textit{The Politics of Secularism in International Relations} (Princeton: Princeton Univ. Press 2008), and the various writers of the blog \textit{The Immanent Frame}, whose ongoing debates concerning the nature and metaphysical commitments—or lack thereof—of secularism themselves betray secularism’s controversial, rather than neutral, status.} Nor will it suffice for the world’s religious societies, many of whom have democratic aspirations but are ill at ease with normative secularism. Adopting a natural law approach, on the other hand, has the advantage for non-seculars of leaving room for belief in the divine, as well as maintaining respect for divine law as a real authority. At the same time, it adapts well to secular standards of rationality and respect for human law.

Before concluding this section, a note on reason and religion is in order. Lurking in the background of this dissertation is the question of what reason is, or, more concretely, what constitutes knowledge based on reason versus knowledge from faith or revelation. The modern public sphere, where such issues as human rights and religious freedom are negotiated, is thought to be one of rationality, whereas religion itself is considered extra-rational, perhaps even sentimental. This division is not without reason—religion resists scientific, even rationalist, categories and can hardly be described in the same terms as, say, economics. But in most ways, this division is highly unsatisfactory. First, it reduces reason to the empirical realm, confining anything that cannot derive from sensory knowledge to the sphere of opinion.\footnote{I address this point at greater length in Chapter One’s discussion of Hobbes.} This frustrates attempts to understand seriously such nuanced categories of human life and experience as family, love, religion, weakness, ability, advantage, etc. Secondly, it results in the very problem of
religious freedom outlined in the beginning of this dissertation: if religion cannot be discussed in rational terms, how can it be ascribed any legal standing or protection?

In short, it is true that religion deals in categories that many find uncomfortable in the public sphere—belief, mystical knowledge, divine law. Nevertheless, we should recall that it was not until the Enlightenment era that faith and reason were considered inherently opposed, and this strict division has never been established as a real one. This, then, is why Tertullian is such an interesting—and useful—figure for the modern conundrums of religion in the public sphere. It is precisely because Tertullian refuses to reduce Christianity to yet another philosophy that he is so valuable. He admits that religion is irreducible to reason alone—so much so that he is often accused of fideism—yet he is able to speak in political, not only religious, terms about its role in society to a hostile audience. Tertullian is a classical thinker for the modern era, defending the rights of a religious minority in the globalized setting of the Roman Empire, without either conceding tenets of his faith or demanding the majority’s conformity to his beliefs. He gives us politics without either sacrificing one’s own theological commitments or demanding that others adopt them—a difficult achievement in religious and cultural pluralism, whether that of Carthage under Roman rule or twenty-first century America.

Finally, Tertullian is important because his articulation of religious freedom does not fall prey to a common error in modern religious freedom theories. Many advocates of religious freedom mistakenly assume that religious freedom is simply one among the many human rights. Were this the case, a well-theorized defense of human rights *qua* human rights would suffice to defend religious freedom as well. Human rights theories place a primacy on human law for the protection of these rights, and all other interests and obligations must bow to such law. Thus, if religious freedom is simply one of these rights and nothing more, the question of how best to
protect it would be a question of legal theory—that is, of human legal theory. As I argue in this dissertation’s introductory chapter, however, religious freedom is the only human right that recognizes two distinct realms of authority, human and divine. As such, to reduce it to a purely immanent human right does violence to the very nature of religion, and therefore of religious freedom. A religious person whose religious liberty is circumscribed first by her obligation to human law will recognize immediately an artificial authority. For from St. Peter (“We must obey God rather than man,” Acts 5:29) to Antigone (“Nor did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unfailing laws,” Antigone 450-55) to Ibn Rushd (for whom there could be “neither pardon, nor forbearance, nor tolerance” for offenses directed against God Himself, Commentaire Moyen 1.14.3), to have a God is, most often, to have an ultimate authority higher than the state or human law—and an authority that can have much to say about the nature of human rights in the first place.

Thus, religious freedom is distinct among the human rights because as one such right, it must answer to human law, but for it to have authority with religion and religious people it must answer to divine law. All other human rights relate inherently only to human law, at least directly. A purely secular defense of religious freedom—of freedom of conscience—simply won’t do, for it fails to recognize the authority of the divine law, thereby (apparently) obviating the problem in the first place. Thus, when Tertullian, as a decidedly Christian apologist, offers a concept of religious freedom that is universal in scope—i.e., for all humans, not only Christians—we do well to pay heed.

V. Conclusion: Paradox and Possibilities of Religious Freedom

It is often said that Tertullian is a master of paradox. Not only did he “believe the inept,” he insisted on high epistemological standing for both faith and reason, holding in tandem the two
forces often considered to be inherently at odds. He uncovered inconsistencies in his opponents’ arguments and used every rationalist tool in the box to argue for both the legality and truth of Christianity. Nevertheless, he refused to reduce Christianity to another philosophy; the inspiration of the Paraclete should not rest on the same plane as the knowledge of men, however wise.

Paradox was yet more deeply engrained in Tertullian’s mind than this; for him, it was inscribed into the very nature of the universe, emanating from God Himself. God’s Reason so ordained “…that all things should consist of a unity made of rival natures, such as void and solid, animate and inanimate, tangible and intangible, light and darkness, yes! of life and death, too” (Apol. xlviii.11). But the pervasiveness of paradox hardly meant, for Tertullian, that the world is absurd; rather, all things find their resolution in Christ, who is Himself both paradox and its resolution. “…He is invisible, though He is seen; incomprehensible, though by grace revealed; beyond our conceiving, though conceived by human senses” (Apol. xvii.2), and “in one respect born, in the other unborn; in one respect fleshly in the other spiritual; in one sense weak in the other exceeding strong…” (Carn. v.7). Yet as the one being in whom meet heaven and earth, He is also the resolution of all paradox: “This property of the two states—the divine and the human—is distinctly asserted with equal truth of both natures alike, with the same belief both in respect of the Spirit and of the flesh” (id.). Paradox was both expected and resolvable because of the person of Christ.

To return to the problem of this dissertation, though, how does Tertullian help us make sense of a world in which many find themselves under the “two swords” of both human and divine law? I submit that his tendency toward paradox in fact renders him better suited to this task, because the idea of competing obligations was not an inherently illogical concept to him.
Rather, he saw an overarching unity in both nature and, ultimately, in Christ. His Christianity meant that he would not sacrifice faithfulness for human law. Like Antigone, Tertullian insisted on the superiority of divine law over human edict; he reminded his Roman rulers that they were “under the rule of another” (Scap. iv.1) just as Antigone defied Creon’s ability to override “that Justice that lives with the gods below.” With Ibn Rushd, Tertullian believed in a higher law existing in nature itself that could correct human laws’ excesses (e.g., Apol. iv.9, 10) and even, in Cor. Mil., help decipher the divine law’s meaning. His insistence on rationality, as well as his confidence in the pedagogical role of nature, allowed him to function effectively in a society that rejected his views.

Yet in one regard, Tertullian surpasses these others, for he built on the foundation of the unwritten laws of nature a human right to religious freedom—not just for his own religious community, but for all people. His libertatem religionis would recognize the freedom of both Antigone and Ibn Rushd to act according to their respective codes—the “the gods’ unwritten and unfailing laws” and Islam, even shari’a—alongside his fellow Christians “rais[ing] suppliant hands to heaven.” Again, to assert such freedom in society is hardly the same thing as to practice it, and in the conclusion I suggest more concrete ways of practicing this liberty in society. But that Tertullian arrived at this universal human right to religious freedom without relying on either his own religion’s divine laws nor on a “secularization that annihilates” is promising. That he did so using a theory of natural law similar to both those of pagan Antigone and Muslim Ibn Rushd is cause for giving natural law a second look.

Tertullian is not without his weaknesses, of course. In many respects he appears unable or unwilling to acknowledge the possibility of imperfection within his own religion, which could

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obscure his thinking on its proper role in society. For instance, though quite ready to point out the excesses and conceits of human law (e.g., *Apol. iv.7-9*), he does not anticipate the possibility of excesses, or at least unjust application, of Christian revelation and law. One wonders what his writings would have looked like in, say, medieval Italy rather than late-classical Carthage, for the fusion of temporal and heavenly realms that Christendom attempted may have proven too tempting to resist the enforcement of Christianity over all other religions and ideologies. Furthermore, in my estimation he betrays an overly dismissive attitude towards philosophy, or at least philosophy after the advent of Christian revelation, as a means of finding truth. Such disregard for secular means of pursuing truth is unlikely to be tolerated in a contemporary milieu, for understandable reasons. Philosophy, to Tertullian, was not a distinct discipline or mode of inquiry with perennial value but instead a pre-cursor to Christianity; the measure of philosophical truth was its level of conformity with Christian believe. He admitted that “philosophers have sometimes thought the same things as ourselves,” but explained this not by ascribing a measure of respect to philosophy; rather, he compared the discovery of philosophical truth to a ship stumbling across a harbor in the “confusion” of a storm, “by some happy chance…through blind luck alone” (*An. ii*). His unwillingness to grant philosophy a place in the Christianized world betrays, perversely, a presumption that the Christian (or any other) faith is something one can simply be argued into accepting—and this despite his insistence that the Paraclete is essential to Christian faith.

We don’t know, of course, how—or if—Tertullian would have changed his tone, attitude or beliefs were he a 21st century theologian, nor what he would have done in medieval Italy. Still, we have his writings as a religious minority in a pagan imperial age, defending universal religious freedom as a human right centuries before it would be accepted even rhetorically as
such. His devotion to his religion suggests that a natural-law defense of religious freedom is possible even in the most religious—and perhaps even religiously diverse—societies. The secular alternative of privatizing religion or downplaying the role of divine revelation and law need not be the only alternative. Indeed, if Tertullian’s defense succeeded—as history suggests it ultimately did—we have good reason to return to his approach today.
Appendix to Chapter 4: Abbreviations

An. De Anima

Apol. Apologeticum

Carn. De Carne Christi

Cor. Mil. De Corona Militis

Jud. Adversus Judaeos

Marc. Adversus Marcionem

Pall. De Pallio

Praescr. De Praescriptione Haereticorum

Scap. Ad Scapulam

Spect. De Spectaculis

Test. De Testimonio Animae

Virg. De virginibus velandis
Conclusion

To force all men in step toward the same goal—that is a human idea. To encourage endless variety of actions but to bring them about so that in a thousand different ways all tend toward the fulfillment of one great design—that is a God-given idea.  

*Alexis de Tocqueville, Democracy in America*

Religious freedom today faces a conundrum that is at once perennial and peculiarly modern. Human laws and divine law both exert power over human beings, but inevitably, the two forces come into conflict in social and political life. This conflict both occasions the need for and interferes with religious freedom. It occasions the need for it in that it is only when one’s obligations to divine law conflict with human law that there is a need to invoke religious freedom at all; if we could ensure that no such conflict would take place, we would not need to grant religious freedom. This is effectively the Hobbesian approach to the relationship between divine and human law, for by subsuming all religion under the state, Hobbes ensured that no divine law reached the citizen but what was mediated by the sovereign. In conflicts of human and divine law, one simply must obey the human law, even if it goes against the individual’s beliefs: the citizen is “bound, I say, to obey [the human law], but not bound to believe it.”

This conflict of human and divine law, however, also interferes with the very religious freedom it necessitates, ensuring that religious freedom will never be realized fully. No society can afford to weaken the social fabric to such an extent that each person can obey his or her conscience and religion with no accountability to the human law. This accountability is what Winnifred Sullivan highlights and, in some measure, decries in *The Impossibility of Religious Freedom*. Yet her preferred approach, which removes religion from the picture, merely pushes

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the problem one step back: granting freedom to conscience, or perhaps to press and assembly and speech, rather than to religion, still leaves unanswered the question of how to deal with competing obligations. Perhaps more importantly, though, this tactic—which I termed the “secular approach to religious freedom”—removes any competing authority to the state; i.e., without religion, only the state exercises authority over the individual. In the end, this is nearly indistinguishable from the Hobbesian option; in both cases, there is the citizen, and there is the state, but no other authority. This problem of religious freedom, then, is ineradicable and perduiring. From Antigone to Hobbes to Sullivan, we see that man cannot serve two masters.

Man, however, turns out to persist in seeking a second master. Whether it is the enduring power of religion itself, the perennial appeal of such literature as Antigone, or the retraction of the so-called Secularization Thesis by some of its very authors, history itself testifies to our need to obey something higher than the human law. What that something higher will be, however, is the pivotal question, and this is the aspect of the problem of religious freedom that is peculiarly modern. The history of modern philosophy in the West is, with some important exceptions, a history of skepticism about metaphysics. Political theory, as well, has largely nudged any transcendent truth claims, which are intrinsic to religious teaching and life, into the private domain. Replacing debate over the nature of God and the good are competing social contract theories, from Rousseau to Rawls. Divine law is thought to be too inaccessible to human reason in late modern epistemology and is therefore inadmissible in the rationalist liberal regime that underwrites such human rights as religious freedom in the first place. This is because it is thought, and not without reason, that taking recourse to divine law in political society breaks down unity and order, for the divine law cannot be known in the same way that the human law

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can be known. Hence, it is over this issue that religious wars have been fought and totalitarian regimes have sought to eradicate allegiance to anything but the state.

Our urge in the late modern era of democracy, so war-fatigued and yet so hopeful, is to elevate the individual’s conscience as the utmost authority, eschewing the divisive nature of religion and all things metaphysical. This is how we arrive at the pervasiveness of the humanist interpretation of *Antigone* as well as the trend in recent literature to move away from freedom of religion and toward the freedom of conscience. But again, if there are only individuals and their beliefs, on the one hand, and the state to determine which of these beliefs can be acted upon, on the other, the outlook is a grim one for the protection of those beliefs and consciences.

In its pure form, this settlement is fundamentally unworkable. From a theoretical perspective, the submission of the divine law to the human law means that when human and divine law clash in the modern nation state, religious freedom claims are settled by human law alone. Yet this very process denies the religious party her premise that she answers to a power that is higher than the state. From a practical perspective as well, Alexis de Tocqueville foresaw this quandary of modern democracy through simple observation of the American experiment at the dawn of the modern era. He observed that religion was a democratizing force, for it effected unity without the use of law by informing men’s mores, and as such it stood as a mediating institution between the citizen and the state. Tocqueville wrote that even absent laws to the same effect, Americans’ Christianity prevented them from acting in ways detrimental to society: “Thus, while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare.”

Practically speaking, then, removing religion and submitting divine law to human law will only expand the sphere of human

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346 Tocqueville defined mores, *moeurs*, as “the whole moral and intellectual state of a people.” Tocqueville, *Democracy in America*, 287.

347 Id., 292.
law to effect social cooperation. Once again, we come to Sullivan’s point: religious freedom is impossible if everything falls under the purview of the state.

There is a distinct democratic advantage of the social arrangement that Tocqueville described: disputes over social norms take place not at the level of an all-powerful sovereign and an intrusive bureaucracy, but nor are they purely private questions, which would tend to both alienation and the breakdown of cooperation and trust. Rather, citizens themselves work out their social mores in face-to-face interactions, building on their shared religious faith. There are, of course, other forms of mediating institutions—civic organizations, clubs, charities, etc.—and these, too, aid in maintaining a level of cooperation and trust among citizens without requiring the force of centralized law and bureaucracy. This is a very important point. The latter institutions, however, do not serve as authorities in the way that religion does. For Americans, then, Tocqueville considered religion to be “the first of their political institutions” because it “facilitates their use of [liberty]” by permitting them to work out the norms that govern society without recourse to the law to enforce morality.  

When religion’s authority on citizens is undermined, then, whether by legal force or by social trends, the mores that previously held society together begin to disappear, and law must take their place. This is observable in a general way: American culture war rhetoric no longer revolves around, say, the content of television and music but around Supreme Court cases and Congressional legislation. But similar truths have been theorized through the ages as well. Plato predicted that the “many-colored cloak” of democracy, in which every lifestyle and belief found a home, would be followed by top-down, even tyrannical, force. Tocqueville declared squarely

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348 Id.
349 I should note that by “authority,” I do not have in mind only, or even primarily, an institutionalized form of authority. Indeed, Tocqueville was writing of “men who, having shaken off the authority of the Pope, acknowledged no other religious supremacy…” Rather, I refer primarily to the moral authority of religion.
that “Despotism may be able to do without faith, but freedom cannot.” He held, and I agree, that “partisans of freedom...should hasten to call religion to their aid, for they must know that one cannot establish the reign of liberty without that of mores, and mores cannot be firmly founded without beliefs.” When religion provides a context for liberty rather than a wall against it, it is a guarantor of political freedom against a state that is often only too happy to take over the role of establishing moral norms.

From an empirical standpoint, Jonathan Fox concludes from a 152-country study of the relationship between religion and state that “[i]t is precisely in those states where modernity has most undermined the traditional community that religious elements within the state are most likely to try and legislate religious morals and traditions that were previously enforced at the social level.” This is what Tocqueville referred to as the “artificial strength of laws” to effect religious cooperation—always a failing tactic, in his estimation. To prevent the encroachment of an all-powerful state—or even of religious institutions turning to the state to enforce their standards—we do well to allow religion, and not just conscience, to live freely among our democratic selves. This is especially true in late modernity; as Fox also noted, “it is precisely the most modern states that have the greatest ability to interfere in the daily lives of their citizens.”

Absent religion, then, the only forms of authority will be the individual and the state, and in light of the state’s interests, the integrity of any given individual’s life and conscience may not always weigh so heavily. So when faced with the question of what the higher authority will be, individual conscience is insufficient at the political level. This does not mean, however, that the

350 Tocqueville, Democracy in America, 294.
351 Id., 17.
353 Id. 297.
The pendulum should simply swing in the direction of religion and divine law as the ultimate authority in society, however. First, the obvious practical obstacle of pluralism in late modernity means that the enforcement of one creed or sect’s divine law would erode the equality to which such societies also typically aspire. Beyond this, some religious commitments would themselves undermine the system of human rights that gives rise to the protection of religious freedom in the first place. Whether by leaning into human law or relying on divine law, then, the conflict of human and divine law admits of no clear resolution.

The alternative to this strict dichotomy of human law and divine law is to step back and see a larger picture of law that integrates both forms together with the natural law, which participates in both human nature and divine creation, or, if one prefers, deals in categories of both reason and revelation. Such was the project of this dissertation. Antigone illustrated why the mediating form of law is necessary: human law and divine law conflict, and without a mediator, force will prevail, eventually with tragic results. Ibn Rushd carefully theorized a possibility for one such mediating law, an unwritten law of justice that inheres in nature, to which all men have access. Tertullian showed how this natural law of justice can be used in the public sphere, even when religious difference is present.

I. Beyond Religious Freedom: Natural Law and Other Human Rights

It is important to stress that what I am advocating is not a panacea to modernity’s religion-state difficulties. Natural law is a notoriously slippery concept, and even if we could all agree to abide by it, we would face a great deal of difficulty in agreeing on what it says. As I argued in Chapter 1, however, given late modernity’s pluralism, it is likely the best option we have for preserving freedom of religion. Absent natural law, for instance, in the face of increasing religious radicalism, who is to say what is off-limits for a religion or, more
fundamentally, *why* it is off limits? Human law can and indeed must do so, but without any basis for saying what is good and what is bad, we have only human consensus on acceptable behavior in the public sphere. This does nothing to resolve the conflict of human and divine law; it ends up only as a tyranny of the majority and hardly worthy of the term ‘religious freedom.’

The same could be said for human rights in general; i.e., human rights go no further than human law are thus far more precarious than we like to admit. Absent natural law, what actually backs up human law other than force, whether the force of the majority’s will, the politician’s bank account or the tyrant’s fist? Janet Holl Madigan makes the point succinctly: “Regardless of the various ways in which they are articulated or defended, human rights are meant to express the inviolable moral worth of the individual. We must recognize that there is simply no logically consistent way to defend such a concept apart from natural law.”

Upholding the “inviolable worth of the individual” is historically an anomaly rather than the norm, and to simply assert it, even in seemingly powerful international human rights treaties or legislation, provides a weak defense against encroaching interests of the majority.

As an aside, even Hobbes, whose Leviathan subsumed every element of society, conceived of natural law as a real limit to the sovereign’s power: “nay, heaven and earth shall pass; but not one tittle of the law of nature shall pass, for it is the eternal law of God.” To Hobbes, if a judge errs in his interpretation of the law of nature, neither he nor any judge that follows him may consider that interpretation to be valid precedent—crucially, even though judges are “sworn to follow it [i.e., the human law in the form of precedent].” In other words, the judge, who is authorized by the sovereign to interpret both human and natural law, must not follow any judgment that errs in interpretation of the law of nature, such is his obligation to obey.

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357 Id.
the natural law. Hobbes’ law of nature is not synonymous with what I have referred to as natural law, but it is striking that even Hobbes, who is light-years away from advocating human rights and religious freedom, did not take the step that late modernity has taken by removing natural law from the idea of law itself.

Returning to the relationship between natural law and human rights, Madigan is right to point out that we simply cannot have human rights without at least a natural law foundation. She is also right to admit that taking this step has tremendous ramifications for public life: “to acknowledge that natural law is an essential component of moral argument is no small concession—for it is to admit that the universe is ordered, and that this makes a difference to the conduct of human life.” Gone is Plato’s “fairest of regimes,” the “many-colored cloak” of democracy, in which all ways of life are considered equal. Rather, appetites exist not to be sated but to order human life to a particular end, to the good life. The good life, furthermore, is not something that each person gets to define for him or herself, but rather which follows from human nature, from the application of right reason to observations of what conduces to flourishing and living well.

Such a project is ambitious, to say the least; indeed, a regime in which natural law is so prevalent is unlikely to take practical shape in any society, late modern or otherwise. This does not mean that we should disregard it entirely; rather, it is my modest claim that we should simply

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358 Why Hobbes’ law of nature is not substantially the same as what I mean by natural law is the subject of another work. For present purposes, though, the crucial distinction is that Hobbes’ law of nature begins from the exclusive goal of survival, whereas mine, which follows from the earlier Thomist tradition, aims at the good life rather than mere survival. Beyond substance, formally all interpretive authority of the law of nature lies in the judge, for Hobbes, whereas in my schema, which aims to work with, rather than against, democracy, the fact that all people can by their nature know something of the natural law has implications for their political participation. For further clarification, I refer the reader to section V.B (p.39) in Chapter 2 on Antigone, in which I distinguish my natural law from the ancient right of kin.

359 Id.
re-admit natural law into the discussion of political and legal theory, especially as these concern human rights and religious freedom.

II. Beyond Political Theory: The Study of Nature

I have, throughout the dissertation, referred repeatedly to a “return” to traditions of natural law, and not without reason: whether in its Stoic formulation, Christian Scholastic version or its Muslim variety and patterns of *fiqh*, natural law theories were at their most robust in centuries past. I find, however, that natural law theoretical commitments are indeed alive and well throughout the disciplines of political theory, philosophy and even sociology, but they are concealed under different names. If this is the case, there is no need to resist what I have termed a “return” to natural law on the grounds that it is antiquated, unsuitable to modern academic discourse, or, to cite the oft-unspoken nightmare, that it is ultimately reliant on a defunct and defeated Aristotelian physical universe. Rather, we can build on and clarify existing scholarship’s reliance on what is effectively natural law theory by another name.

In *The Orders of Nature*, philosopher Lawrence Cahoone argues that “naturalism can be scientific yet pluralist,” i.e., neither reductive to physicality and thereby a narrow empiricism, on the one hand, nor requiring a heavy-handed metaphysics, on the other. Studying the nature of what is, he claims, allows us “to forge a metaphysics that aspires not to finality or the end of inquiry but to an adequate, yet corrigible, set of concepts for further inquiry, always vulnerable to our conceptual criticism and best empirical guesses about the world.” This kind of naturalism “needs to be local, claiming not that all being is natural or part of nature, but that of what does, has or will exist, nature constitutes the most robustly accessible elements.”

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361 Id., 2-3.
362 Id., 6.
Cahoone’s point is an important one: nature does not get us all the way there, if “there” is the answer to our political, philosophical and legal quandaries. However, as a starting point for getting us out of those quandaries, it is perhaps the most publicly accessible yet still robust starting point for inquiry; as I have argued, nature, more than divine law, is accessible by human reason, yet not denuded of metaphysical aspects and therefore open to both divine and human affairs.

Philosophically speaking, then, something akin to Cahoone’s approach underwrites the natural law theories I have attempted to defend in this dissertation. In positing a “return,” I am, it is true, asking contemporary readers to consider the natural law theories that have been shelved for generations, and sometimes for centuries. But I am not asking that these theories be simply adopted wholesale and that the conceptions of nature on which they rest—Aristotelian physics, for example—be once again entertained. Rather, it is the fundamental approach to law and ethics that natural law theories embrace that I am advocating; to borrow from Strauss as quoted in the introduction, I propose that “the rules circumscribing the general character of the good life,” as these can be known through our natural reason, be considered as part of our concept of law.⁶³⁶ Cahoone’s updated version of naturalism provides but one robust foundation for beginning this “return” to what would nevertheless amount to a new approach to law and human rights in the late modern era.

Christian Smith takes on this method in his own discipline of sociology, which is perhaps one of the more difficult fields in which to adopt the approach I am advocating. Smith states point-blank: “I am first of all assuming that human beings have a specifiable nature, that there is

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a real quiddity of ‘whatness’ about human personhood that can be known.” To ask what can be known about human nature would often, if not usually, form the first step in what I am proposing as a role for the natural law, and here Smith proposes that even in the empirically dominated field of sociology, this not only can be done, but that it must. Smith goes on to discuss what we can know of what is “real,” which is often taken as synonymous with what is material. Reality, Smith claims, “has a deep dimension operating below the surface of empirical experience,” which, to ignore, entails committing the epistemic fallacy of reducing what really is to what we can observe empirically. As I am doing with this dissertation, then, Smith, too is attempting to deal with human phenomena and actions beginning from the question of what really is there—I would add, “by nature.”

In political theory, I find that natural law has some affinities with the cluster of thinkers whose works are loosely grouped into the category of “personalism.” This school of thought, while somewhat roughly-hewn as a theory, also purports to provide a basis for human rights and dignity, and it attempts to draw together all of the elements of human life and the natural world into a human-centered political theory. It is a laudable and serious project, and in my opinion certainly more convincing than some of the non-foundationalist accounts of human dignity. I find, however, that personalism requires a comprehensive, universal conception of what the human being is. This is perhaps a product of its formative years—the bloody first half of the twentieth centuries, when the seemingly universal World Wars inclined one to believe that nothing short of a cosmopolitan ideal, embraced and even enforced universally, would suffice to protect human rights. But the latter half of the twentieth century taught us that one-size-fits-all

365 Id, 13-14.
political theories, even those purporting to define the seemingly universal rights of man, tend perhaps inevitably to reflect and perpetuate the ideas and interests of the strong. Although personalism has both secular and Christian versions, it requires a fairly robust answer to the question of “what is a person?” as a starting point, which is likely to prove a non-starter in many contexts. What I am presenting as natural law theory in this dissertation, on the other hand, may eventually have to make some anthropological commitments, but it does so within different contexts—post-Christian secular, ancient Christian, medieval Muslim and so on—which allows a considerably greater degree of flexibility.

The above approaches, then, reflect but are not identical to what I propose. Cahoone’s naturalism probably comes the closest as it concerns underlying suppositions, but his does different work—philosophical naturalism attempts to explain what is rather than what ought to be, as I seek to do with natural law in this dissertation. But it is indispensable to what I propose, for political theory is ill-adapted to answer the former question, and natural law relies on an accessible understanding of nature’s normative aspects. Personalism, in my view, though helpful in providing an account for the rights that are due to human beings, is less than sufficient as a comprehensive tool for political theory more generally. Natural law, I suggest, can take us further in that regard.

III. Beyond Theory: The Practices of Natural Law and Religious Freedom in Society

I have thus far attempted to make good on my promises, offered in earlier chapters, to put some flesh on the bones of my idea of what natural law is rather than what it can do, the latter of which assumed a greater role in the present project. I have also attempted to expand the link between natural law and religious freedom to include human rights more generally, arguing that natural law theories are our best hope for continuing to protect robust versions of human rights in
a late modern, pluralizing and globalizing context. But we must now ask, what would my proposed schema of law look like in practice? In other words, what does it look like to live in a regime in which religious freedom and human rights are underwritten by natural law?

First, it is important to stress that it would not be a simple matter of “translating” natural law into human law, with legislators or judges merely asking “what does the natural law say?” and then writing or declaring the human law to be such. Natural law is not meant to provide a wholly new legal regime but rather to fill the void of a mediating role between human and divine laws. It enriches, rather than replaces, our current understanding of what law is.

More concretely, at every stage in legal life—legislating, interpreting and executing—one would ask what we can know from the nature of the thing in question (a community, workplace, family, human being), as well as what natural law teaches us about the relevant human and divine law. Still, written, human law would continue to work alongside both written and unwritten divine law; what would be new (or “new”) would be the natural law’s role in making sense of both. Thus, natural law and the natural ends of things would be considered when crafting human legislation. At the level of the judiciary, for both secular judges and religious fuqahāʾ (jurists of Muslim jurisprudence), the natural law would provide a lens of interpretation rather than a means of innovation. This would preclude what I take to be a dangerous precedent on the part of judges to ask what the law ought to be and asking, rather, what the best and most complete interpretation of the law is, given the nature of the relevant things involved. This is what Robert Sokolowski referred to as “distinguish[ing] our purposes from the ends of things,”367 and it obtains equally in the case of legislation and execution as it does in judiciary matters, for the human tendency is to write, execute or interpret the law as we think best, rather than as we are constrained to do given the nature of things involved.

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As far as the substance of the natural law, this must remain a question for the next stage of the current project. For present purposes, though, the essence of what I propose is a self-consciously teleological conception of nature, i.e., one in which both material and immaterial entities have ultimate aims or ends. We may not know these ends in full, but we can know something of them, and this, I submit, should be considered in ethical, political and legal theory. Again, filling in the substance of such theories is the work for a later project, but for now, a few candidates for starting points are worth mentioning.

While what I have proposed in this dissertation would take different forms in different settings, developments in philosophical naturalism, as discussed above, provide a promising basis for natural law theory. Other options do avail themselves, however. Readers may be familiar with the John Finnis-Joseph Boyle-Germain Grisez school of New Natural Law Theory, which posits a number of basic goods inherent in human nature towards which one’s actions ought to be directed.\(^{368}\) This is one possible route if one is concerned with concrete precepts. While the Finnisian version of New Natural Law eschews creedal commitments as well as a teleological direction, however, it may hold sway with only a certain cohort of theorists, and it is important that for others, there are alternative theories of natural law that can fill the role I have proposed for it in this dissertation. Jonathan Crowe has recently, and quite helpfully, written on a post-Finnis future for New Natural Law in which the core claims of New Natural Law theory are distinguished from the social conservative and Catholic tendencies of the original Finnisian version. The core claims, he writes, are two: “first, the plurality of both the basic forms of good and the associated principles of practical reasonableness; and, second, the logical priority of the

good over the right.”

These goods inhere in human nature, which is what accounts for the ‘natural’ label, but the emphasis on pluralism, i.e., the plurality of goods worth pursuing, makes this a more flexible theory than its persistently Catholic, conservative image has so far conveyed. A version of natural law based on the naturalism discussed above or on New Natural Law theory, then, could fairly naturally (as it were) take root in many Western societies.

In Muslim societies, Anver Emon’s work on natural law theory in Islamic jurisprudence is a starting point. Emon’s work, mentioned earlier in this dissertation, provides an historical and logical account of how and why “we can use our reason to investigate the world around us to form principles of normative ordering that reflect what God would want for us.”

But his is not a purely theoretical project; rather, he demonstrates the work of several competing schools of pre-modern jurisprudence that made use of nature to establish reason as a source of shari’a. From a political theory (i.e., rather than jurisprudential) perspective, Abdullahi An-Naim paints a picture of what a Muslim society might look like with an established role for natural law, though he does not use the term. An-Naim advocates the establishment of a secular state (“secular” in that the state is officially separate from religion, not a secular society in which religious commitment is necessarily low) based on principles distilled from early Islamic society as understood in the light of modern commitments to universal human rights. He follows the tradition begun by the twentieth-century Sudanese political and religious leader Mohammed Mahmoud Taha who, without wholly historicizing the text, distilled from the Qur’an a vision for an authentically Muslim society that adapts to the milieu in which it finds itself. This approach

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370 I am paraphrasing Crowe a bit here, but Crowe does emphasize the degree to which “recent developments in natural law scholarship” that are not in agreement with the version Finnis espouses have “so far escaped widespread notice” (id., 296). See Crowe, “Beyond Finnis,” especially 296 and 299-300.
employs the very prudence and practical reasoning that are trademarks of natural law to understand the role of human and divine law in society.

An-Naim’s theory and exegesis of the Qur’an is a creative but highly plausible undertaking, but it cannot be said that it is either incoherent or merely wishful secular thinking. I raise his project here because one of his objects in it is “to shift the focus of human rights advocacy to a more ‘people-centered’ approach…the purpose [of which] is gradually to diminish reliance on international advocacy by progressively reducing the need for it through the development of the capacity of local communities to protect their own rights as the most effective and sustainable way.”373 This is exactly the type of approach that leaves room for the human law to take both natural and divine law into account, and vice versa.

Still, when it comes to practical application of the theory of law I have propounded in this dissertation, I resist attempting any easy solution. A robust right to religious freedom exists very uneasily as an abstract universal right when it comes to defining its features, and there will be tradeoffs involved in protecting religious freedom in the manner I advocate in this dissertation. In practice, the particular versions of both human law and of divine law vary, and so will the settlements of religious freedom and natural law. In concrete terms, the use of natural law theory in actual jurisprudence on religious freedom might result in an increased use of the legal standard of “reasonable accommodation,” which has been widely applied to cases of disability but is quite new to the religious freedom landscape. Advocates of this approach, which is currently the predominant legal approach for religious freedom and human rights in Canada, claim that it is better equipped to address the multifaceted, complex cases of religious freedom better than are

courts because it employs “constructive dialogue and negotiation” rather than traditional arbitration. Of course, this is but a formal tactic to permit the substance of natural law reasoning to enter the picture; dialogue and negotiation will lead nowhere if, like Creon and Antigone, the parties insist on purely religious or purely secularized principles. But it’s a start. Again, there is a tradeoff—black and white principles give way to blurry gray lines when the question is “what is reasonable?” rather than “what does the human/divine law say?” Furthermore, what looks like religious freedom in one setting may be religious oppression in another; what is unreasonable restriction in one time or place may be necessary restraint in another. But the tradeoff may be worth it to ensure that the natural law keeps a place in the public conception of what the law is.

IV. Moving Forward: Religious Freedom and the Way of Aporia

Meghan Sullivan has constructed an interesting typology for dealing with conflicts between reason and faith, and her terminology is useful for addressing the related conflicts of human and divine law that I have attempted to capture in this dissertation. A believer who holds what Sullivan terms “thick faith,” i.e., one that makes specific historical, theological, philosophical and moral claims, inevitably finds that his faith and his reason at times appear to conflict. He can respond to this in one of four ways: (1) dilute his faith, such that he parcels out only those uncontroversial aspects of it and identifies them with the whole of his faith; (2) fundamentalize his faith, i.e., reject those claims of reason that conflict with his faith; (3) separate faith and reason, believing both sets of premises at once but maintaining that they belong to discreet—and non-mingling—spheres; or (4) follow Sullivan’s favored way, the “Way

of Aporia.” In this path, the believer accepts both the claims of reason and the claims of faith, though only on careful consideration and “with good reason,” and carries on until finding some way to resolve the conflict. Crucially, this may never happen, as the name of “aporia” suggests. Still, it is in fact the only truly rational path, because if the premises of rationality and the premises of faith claims seem on their own grounds well founded, as they at least sometimes do, then to reject one or the other is arbitrary. “The best thing to do is to admit that some part of his understanding is flawed (he doesn’t know which), that he needs to keep working to resolve the conflict, and that it is rationally acceptable to go on believing both until he finds a way to break the stalemate.”

Scaled up several levels from the individual to society, we can see that Sullivan’s proposed faith-reason schema captures well much of the challenge of religion in the public sphere, including the conflict of divine and human law. The first path of diluting religious claims finds expression in those societies which may carry the shells of religious observance, but the controversial elements are whitewashed and eventually denied. This is, perhaps, the situation of Western Europe, in which the human rights and equality that arose in and from its Christian past are retained while denying the importance, or even validity, of the “thick faith” that birthed them. Secondly, and conversely to the religiously diluted societies, fundamentalist societies insist publicly on not only a religion’s worth but on the specific tenets of it, rejecting whatever cultural, scientific, or political elements that may threaten the maintenance of that religion’s tenets or practices. Thirdly, Sullivan’s “Way of Separation,” in which faith and reason are simply kept separate as distinct—and ultimately incompatible—epistemic realms perhaps captures popular ideas of twenty-first century American approaches to religion and politics, the famed “wall of separation” that asks religious people to privatize their beliefs. The neatness of this path makes it

an appealing option on its face: religious freedom is nearly absolute within the private sphere, but religion and religious practice are fair game for human legal intervention in the public sphere. But this path is ultimately unsatisfactory for resolving the conflicts inherent in religious freedom, for it purports to exalt human law, at least in public life, over divine law, thereby feigning to nullify, rather than resolve, the inherent tension between the two.

What, then, of the Way of Aporia? Is there a public version of this path of perpetual tension? I believe that there is. As the preceding chapters illustrate, there is a tradition across times and cultures of holding the law as something more than a human creation. Even as the human authors recognize the reality of written law, they sense—and in some cases articulate—the much thicker understanding of law as something human, natural, and divine.

This more robust conception of law provides resources, both intellectual and spiritual, for resolving the seemingly intractable conflicts of human and divine laws and norms at issue in our struggle to understand religious freedom. It thereby avoids the joint tyrannies of religious fundamentalism and of “a secularization that…annihilate[s],” in Habermas’ terms. But to adapt our late modern notion of law as something more or less purely positive, whether human or divine, to a conception of law that is tied to the nature of the world and the nature of human beings is no small feat, either in effort required or in implication. Natural law means that human law answers to something higher than itself, but it also means that divine law is not the only means of understanding the order of the universe—and that all humans are able to know something of these ultimate truths. These traditions of natural law may very well make the sort of difference that can preserve the possibility of religious freedom.

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Perhaps, then, employing natural law as part of our conception of law would settle not on “religious freedom” but on “religious freedoms,” with some blend of a universal recognition of the importance of religious freedom together with localized understandings of what that freedom entails. Perhaps, paradoxically for such a globalized era, it will be local contexts that will ultimately determine—whether through reasonable accommodation, a Muslim secular state, or another mechanism—what religious freedom looks like in the 21st century.
Epilogue: Religious Freedom in Qatar

I am writing this concluding chapter from Doha, Qatar, in a society wrestling with questions of how to reconcile shari’a with human law, especially the human laws in various international rights documents and the norms that they express. The arrival of one a version of one of those rights, religious freedom, in a society dominated by Wahhabi Islam is no small achievement, and it is worth a few moments to recount how that happened.

Today, Qatari residents are guaranteed freedom of worship by the national constitution, although public worship is limited de jure to the Abrahamic faiths and de facto to Christianity and Islam. Non-Muslim proselytism remains illegal and the substantial Hindu population has no legal recognition for their faith. Still, the crowded “Church City” complex on the outskirts of the city, which is bustling with public religious activity every day of the week, is a testimony to how much has changed—and to how different the country is from its neighbor Saudi Arabia, where public worship by non-Muslims is punishable by prison. In The Knight and the Falcon, Dr. Joseph Ghougassian, former United States Ambassador to Qatar, details his role in the conversion, as it were, of Qatari religious authorities. The story that transpired of legal and cultural change, though apparently nearly overnight, is in fact one of patience and incremental progress, and of a reliance on shared culture and language rather than on abstract universal norms.

Ambassador Ghougassian, an Egyptian-born and Lebanese-raised American, was appointed by President Reagan to serve in the then-obscure Gulf country, arriving in 1985. In 1987, a British Roman Catholic priest, Father Lezek Winniewski, approached him in the American Embassy asking for his support in the event that he should be arrested by the secret police, who were allegedly attempting to locate him at the time. He had gone into hiding,
celebrating mass in different locations and on different days every week. According to Ghougassian’s account of Fr. Winniewski’s testimony, members of his small Catholic flock had already suffered punishments ranging from confiscation of property to jail and torture for praying in a group in public.377 Within one year of this meeting, Catholic mass would be celebrated publicly at the American School of Doha, with full knowledge and permission of Qatari authorities, even with state security officials guarding the event.378

Ambassador Ghougassian’s story is one of diplomacy, patience, and some measure of being in the right place at the right time. Still, the account in The Knight and the Falcon reads, if somewhat ramblingly, as a tale of three laws: first, the human law, as represented both by the Qatari Ministry of the Interior and the various human rights instruments to which Qatar was signatory;379 secondly, the divine law, as represented both by the Qatari shari’a court authorities and the divine obligations of Catholics living in Qatar; and finally, the natural law, which is not articulated as such but appears throughout the book as a sense that Christians were subject, in Ghougassian’s words, to “unjust and unfair treatment” of fellow human beings.

Here we see the natural law intervene at two levels: first, it mediates the conflict between human law—the Qatari law forbidding non-Muslim public worship—and the divine law of the Catholics, who were obligated to participate in mass every week. Secondly, it provided a framework of interpreting the divine law of Islam in a way that could integrate it with the various human laws found in multilateral human rights documents. As I have argued, the natural law does not form a wholly new, competing body of law; rather, it integrates human and divine law by assisting our interpretation of the latter and crafting of the former. Ghougassian attributes

378 Id., 46.
379 See id., 9.
Qatar’s position at the time of denying religious freedom to non-Muslims to the fact that Qatar “was following Saudi Wahhabi ideology to the letter.” But rather than advocating the realization of either an abstract natural law or of a universal human rights treaty, he drew upon his own—and, it would seem, his Qatari interlocutors’—sense of natural justice to draw out from within Islam an interpretation of divine law that supported what we would indeed recognize as a universal human right, the freedom of religion. This neither required the secularization of a strongly Islamic country, but nor did it come exclusively from within the Muslim divine law—indeed, Ghougassian was a Catholic speaking to Muslim authorities as an official of the secular US government. The settlement relied rather on natural justice, on a recognition that if we take the divine law to be such and craft human law accordingly, yet we sense the result to be an unjust outcome, perhaps we have misunderstood something. And perhaps natural law can help explain what that something is.

Today, Qatar boasts not only the aforementioned Church City but also the quasi-governmental Doha International Center for Interfaith Dialogue, marking a prioritization rather than simple tolerance of interfaith relations. This is not everything, and one would be naïve to celebrate Qatar’s standard of religious freedom as sufficient unto itself. I raise this story, then, because it is illustrative of the potential of natural law. In Ghougassian’s situation, neither the human law in itself, nor the divine law—whether Catholic or Muslim—as it was understood could bring about a uniformly acceptable and just outcome in a pluralist environment. A mediating law was needed, and Ghougassian and his Qatari sympathizers, though they shared neither human law nor divine law, could come together on the natural law. This is but one example, but its unlikely setting and dramatic timeline should give us both pause and a cautious

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380 Id., 21.
hope that others, too, might find in natural law a path beyond aporia towards greater justice in a contradictory world.
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