Moral Laws and Moral Skepticism

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The fourth section, "Moral Laws and Moral Skepticism," deals with the relationship between law and morality, traditionally discussed under the rubric of natural law. The contributions in this section consider whether there are naturally-given moral laws.

In conversation with evolutionary epistemology, primatology, biological anthropology, and moral philosophy, Wentzel van Huyssteen argues that, while our moral awareness is a product of evolution, our moral codes are not determined by evolution. Thus, he writes that "from the evolutionary genesis of our moral awareness we cannot derive moral codes for right or wrong." Christiane Tietz demonstrates that we do not need naturally-given moral laws, because human beings "can convince themselves that certain things should be done by them." By discussing with each other as long as necessary, we can establish binding moral laws. Rüdiger Bittner goes one step further and claims that there are no moral laws: "We do not receive laws on how to live, but we can figure out how to go on from having done things and seen what happened, from suffering what others did to us, and from listening to what others tell us about what they have experienced and suffered." While Bittner, in line with the Western tradition, focuses on the necessity of individuals finding their way through their own experiences, Wang Liuer understands the Chinese concept of Li as "an outcome of the life experience of Chinese people from generation to generation." In this sense moral laws can be understood as the crystallization of shared experiences.

The modern debate about natural law has been shaped by the transformation of a morally integrated society into one that has been socially differentiated into various subsystems. The Protestant doctrine of the threefold function of the law has both reflected and helped shape this process of differentiation.

The political application of the law, i.e. the legal system, contributes to the "stabilization of normative expectations."[1] The law communicates

[1] Cf. Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993), 131, 138. English translation: *Law as a Social System* (Oxford: Oxford University Press, 2008).

which behaviors are expected now and in the future. Because the law is aware of the possibility of deviant behavior, it threatens violators with sanctions. Laws express the idea that normative expectations are not going to conform to deviant behavior but rather they are being claimed over and against any behavior in the future that may deviate from them. In this way, the law provides a level of certainty about what to expect from others and is thus a prerequisite for the development of a complex society.

By contrast, the theological application of the law serves to convict humans of their sin, thus forming the basis of religious communication. Being convicted of one's sin is supposed to move a person to flee to the grace of God encountered in Christ. Theology has decidedly transformed this use of the law (at least in part) in the twentieth century: It is not through the law but through the grace of God revealed in Christ that humans recognize their sin.[2]

In the light of the revelation of Jesus Christ, the law can also be viewed from a new perspective. The cross of Jesus Christ reveals that the good gift of the law can also work against God's good and positive intentions towards creation: Christ is executed in the name of both Roman and Jewish law.[3] So it is clear that even the law itself can come under the power of sin.

By simultaneously providing an underpinning for the law and raising awareness about the law's potential endangerment, the biblical tradition fosters a powerful connection between different traditions, which serves to strengthen and unsettle the law in equal measure. Just as law and prophecy mutually challenge one another in the Old Testament, in modernity certain systemic forms (such as law and politics) are confronted by the associations of civil society, which continually critique the systemic forms in order to transform them.

Keeping this connection between institutions and traditions vibrant depends on people whose consciences are not guided merely by the legally established normative expectations of their societies, but rather who fulfill their duties based on broader perspectives. The Reformers made use of the language of rebirth in this sense, which applies to the third function of the law.

> "The law teaches them not only the 'public' or 'external' morality that is common to all persons, but also the 'private' or 'internal' morality that is obligatory only for Christians. As a teacher, the law not only forces them to reject violence and violation, but also cultivates charity and love in them. It not only punishes harmful acts of murder, theft, and fornication, but also prohibits evil thoughts of hatred, covetousness, and lust.[4] Through the exercise of this private morality, the saints glorify God, exemplify God's law, and impel other sinners to seek God's grace."[5]

[2] See the essay by Christiane Tietz in this volume.

[3] Cf. Michael Welker, *Christologie* (Neukirchen: Neukirchener Verlag, 2012), ch. 3.

[4] Cf. *Institutes* (1559), II.8:6; CR 1:706–708; Martin Bucer, *Deutsche Schriften,* ed. Robert Stupperich (Gütersloh: Gütersloher Verlagshaus C. Mohn, 1960), 1:36ff.

[5] In the words of John Witte in an earlier contribution in our conference series.

This distinction between a public and private application of the law limits the scope of the law at the same time. Insofar as the law creates the preconditions for a humane existence of personal responsibility and self-determination, "its realization is left up to the free responsibility of the individual." The law does not specify how individual people should live their lives within the context of the law's limits, which apply to everyone, because how people live their lives falls within the purview of (private) morality.[6]

By contrast, the ancient Chinese concept of *Li*, which Wang Liuer explains, presumes a morally integrated society: *Li* cannot be extrapolated from a positive law; indeed, its validity is not dependent on whether it has been decided upon officially. In traditional China,

> "in addition to statutory laws, there is a large body of legal norms which has a constant and stable force, having never been derived from, or abolished by, the administrative and judicial authorities, because it is rooted deeply in the cultural soil and is an outcome of the life experience of the Chinese people from generation to generation, and, furthermore, [it is] a crystallization of the sentiment and wisdom of Chinese intellectual sages … searching after the true essence of human existence" (Wang Liuer).

Governments are evaluated based on this ethical law. At the same time, *Li* represents "what people in general instinctively feel to be right." Led by *Li*, "everyone can realize his or her full potential as a human being." *Li* as natural law thus integrates law and morality.

Considering the differentiation of law and morality (at least in Western societies), natural law can no longer assume such a function. If we again take the doctrine of the threefold use of the law as our point of departure, which the Reformers assumed was connected to a doctrine of natural law,[7] we will recognize that natural law has lost its integrating power with respect to law, religion, and morality.

Today in jurisprudence, in place of natural law we can only point to clear examples of injustice. Even after the experiences of the National Socialist dictatorship and the Second World War, it was impossible to go back to deriving the legitimacy of positive law from its conformity with a supposedly natural law.[8] It is not the difference compared to natural law but only glaring injustice that can lead to people calling into question the

[6] Cf. Eberhard Schockenhoff, *Naturrecht und Menschenwürde: Universale Ethik in einer geschichtlichen Welt* (Mainz: Matthias-Grünewald-Verlag, 1996), 316.

[7] Cf. the essay by Christiane Tietz in this volume.

[8] In her essay, Christiane Tietz points out that during the National Socialist tyranny theologians used natural law theory to support the German National Socialist system. "This shows that arguing with naturally-given moral laws does not necessarily lead to convictions which we would judge morally right from our historical and cultural standpoint today. Sometimes the idea of naturally-given laws was used to support moral positions we would consider bad today. The morality of naturally-given laws is not unambiguous."

legitimacy of positive law, as Gustav Radbruch so famously expressed in 1946:

> "The conflict between justice and legal certainty should be able to be solved because positive law secured by statutes and power even takes priority when its contents are unjust and inappropriate, unless the contradiction between positive law and justice reaches such an extent that law as 'unjust legislation' gives way to justice."[9]

Human rights do not derive their persuasive power from their supposed basis in natural law, but rather are due to the "evidence of the violation of rights."[10]

Yet we do not observe the functional loss of natural law only in terms of the law: For the Reformers, natural law had the function of convicting all people of their sinfulness. However, "for the function of convincing human beings of their sin – and showing them their need for salvation – we do not need the idea of natural moral law. Barth argued that the gospel is the way to make people aware of their sin" (Christiane Tietz).

The limited function of natural law for morality was acknowledged as far back as Thomas Aquinas. For Thomas the necessity of the biblical commands derives from the fact that "the final goal of humanity goes beyond that which can be achieved by natural means, and thus special divine guidance is necessary."[11] A comparable distinction between natural law and Christian ethics can also be found in Hugo Grotius: "It may readily be admitted that nothing inconsistent with natural justice is enjoined in the gospel, yet it can never be allowed, that the laws of Christ do not impose duties upon us, above those required by the law of nature."[12]

Considering this functional loss of natural law in law, religion, and morality – which is especially pronounced against the backdrop of the old European concept of natural law (as well as its ancient Chinese equiva-

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[9] Cf. Gustav Radbruch, *Rechtsphilosophie,* 8th ed. (Stuttgart: Koehler, 1973), 345; English translation of this quote from Dr. Robert Alexy, http://www.uni-kiel.de/ps/cgi-bin/fo-bio.php?nid=radbruch&lang=e, accessed March 2012. Cf. Wolfgang Huber, *Gerechtigkeit und Recht: Grundlinien christlicher Rechtsethik* (Gütersloh: Gütersloher Verlagshaus 1996), 80–85. Huber reconstructs Radbruch's thesis as a "theory of natural *in*-justice [*Naturunrecht*]" rather than natural law [*Naturrecht*] (85).

[10] Cf. Niklas Luhmann, *Recht der Gesellschaft*, 577.

[11] Cf. Friedrich Lohmann, *Zwischen Naturrecht und Partikularismus: Grundlegung christlicher Ethik mit Blick auf die Debatte um eine universale Begründbarkeit der Menschenrechte*, Theologische Bibliothek Töpelmann 116 (Berlin: de Gruyter, 2002), 179; Eberhard Schockenhoff, *Naturrecht und Menschenwürde*, 178–9, 299.

[12] Hugo Grotius, *De Jure belli et pacis libri tres: Drei Bücher vom Recht des Krieges und des Friedens*, *Paris 1625, nebst einer Vorrede des Christian Thomasius zur ersten deutschen Ausgabe des Grotius vom Jahr 1707,* vol. 1, *Die Klassiker des Völkerrechts* I (Tübingen: Mohr Siebeck, 1950), 50. Translation of quote from the English translation of Grotius by A. C. Campbell (London: Boothroyd, 1814). Cf. Lohmann, *Zwischen Naturrecht und Partikularismus*, 183–4.

lents) – we must probably agree with Niklas Luhmann with respect to contemporary references to natural law that “[t]he natural law of old Europe goes so far back in time and is so far removed from our present day that we are not even aware of the distance today.”[13]

The gap between the ancient European concept of natural law and ours is also made clear in the contribution by Wentzel van Huyssteen. If we wish to understand human nature, we must understand it in terms of evolution, namely, in terms of how it has developed. Thus, for van Huyssteen “any discussion of . . . ‘moral laws’ should start with what we are learning from the sciences about the evolution of cognition and the evolution of morality. If our mental capacities and our embodied minds result from evolution, then we should realize that also our morality, or more accurately, our moral awareness, can be explained in terms of evolution.” By contrast, the old European concept of natural law takes a teleological interpretation of nature as its starting point. Nature in this tradition does not describe the condition as given, as it has grown to be, but rather – as Aristotle put it – “the nature of a thing is its end. For what each thing is when fully developed, we call its nature.”[14] Corresponding teleological statements are no longer the object of the natural sciences. The insights of evolutionary theory do not express binding statements about the goals of human life. “The theory of evolution, then, is a purely scientific theory and cannot by itself entail any normative or prescriptive ethical conclusions. In this sense no moral norms (*ought*) for either moral or immoral behavior can be supported on the basis of purely biological premises itself (*is*).” (van Huyssteen).

For this reason, we must address the question whether we should not give up entirely on the idea of natural law and admit in all honesty that we live in a world “in which nothing is laid down concerning what you should do, in a world that is mute in this respect. You have to figure it all out yourself.” (Rüdiger Bittner).

Yet even this skeptical perspective presumes that no one seeking to make his or her way through this world is starting from scratch. When Rüdiger Bittner explains that “[w]e do not receive laws on how to live, but we can figure out how to go on from having done things and seen what happened, from suffering what others did to us and from listening to what others tell about what they have experienced and suffered in turn,” then he is describing a process by which humans discover basic rules for life together which they have found helpful. In legal traditions that have evolved over time, in religious attempts to provide meaning, and in ethical tradi-

[13] Niklas Luhmann, *Das Recht der Gesellschaft*, 507. Quote translated by the translator of this chapter.

[14] Aristotle, *Politics* I, 2 (1252b); cf. Eberhard Schockenhoff, *Naturrecht und Menschenwürde*, 24–5.

tions, we identify the accretions of collective experiences from different eras. Legal, religious, and moral norms originate from common experiences and an ongoing process in which new experiences are generated based on these prior experiences. "Our moral codes or 'laws' in the fullest and deepest sense of the word are *a posteriori*" (van Huyssteen).

This certainly raises the question whether people coming from diverse experiential backgrounds and different aggregate traditions can successfully come to any agreement on basic normative expectations. It is precisely this agreement which natural law was supposed to have made possible at one time with the understanding that natural law could be recognized through reason. "But whenever you argue that *reason* is the means to discover these laws – as Thomas, Luther and Melanchthon did – then this includes the insight that these laws are *reasonable*. From this it follows that reason can *convince itself* these laws should be valid. That human beings can discover these laws by reason means they can *convince* themselves and others that the human community is better off living in accordance with these moral laws. Thus human beings would also have given themselves these laws if they had not been given. The idea of their givenness becomes superfluous. The argument that they are given by nature or by God is not necessary any more . . . Their *persuasiveness* guarantees their authority." (Christiane Tietz).

The promise of a natural law transformed into rational law [*Vernunftrecht*] continues to hold out the promise that this agreement about basic normative expectation is possible: "Human beings as subjects who have come of age . . . can convince themselves that certain things should be done by them." (Christiane Tietz) As the essay by Wentzel van Huyssteen makes clear, this expectation is supported by reflections and observations of primates from evolutionary theory: Social life can only be successful when forms of behavior develop that contribute to the resolution of conflict and make space for reconciliation to take place. Correspondingly, every species of great ape has "its own protocol for reconciliation after fights." (van Huyssteen) While evolution does not determine which protocols for reconciliation and justice humans should write and develop, it does foster the ability to agree on such protocols.

Such a perspective from evolutionary theory accords with insights from the theology of creation, according to which creatures have a share in the creative power of God. Just as the sun and the moon participate in the creative power of God according to Genesis 1 by providing structure for life on earth, humans also shape the creation through the rational development and maintenance of legal systems, religious attempts to provide meaning, and ethical traditions.

As Rüdiger Bittner points out in his essay,[15] individual responsibility for one's actions cannot be reduced through the laws of one's environment, so the reasonable development and maintenance of legal systems, religious attempts to provide meaning, and ethical traditions are all subject to ongoing critique. This is the abiding significance of moral skepticism.

Given the juxtaposition of torah and prophecy in the Hebrew Bible and the complex New Testament definition of the relationship between Law and Spirit, biblical theology will always be interested both in the reasonable development and maintenance of legal systems, religious attempts to provide meaning, and ethical traditions, as well as the process of ongoing critique. In this way it will simultaneously contribute to social enlightenment by pointing out how the difference between systemic forms and the associations in civil societies enhances life.

[15] "We cannot trust the laws of the state to guide us correctly." (Rüdiger Bittner)