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# *Natural Law and History: Challenging the Legalism of John Finnis*

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## *Introduction*

It is a truism, but nonetheless true, that modern philosophical discourse revolves around the question of how (or if) real knowledge is possible. Philosophers from Jürgen Habermas to Alasdair MacIntyre have begun their own efforts to establish a tenable foundation by observing that there is no common agreement regarding the basis of knowledge, especially moral knowledge. MacIntyre concludes that much modern political and social debate is futile because the contending parties have incommensurable moral visions, with many declaring a relativism (at least when convenient) that precludes any movement towards common truth.

*Basis of real  
knowledge  
a central  
question.*

One response to this epistemological predicament has been a revival of natural law theory, especially among political conservatives. In particular, the new natural law theory, of which John Finnis is the foremost champion, seeks to avoid the epistemological pitfalls in which the scholastic version of natural law theory had previously become entangled. By focusing on experiential human goods, this approach to natural law (which Finnis considers to be in many ways a return to Aquinas) buttresses itself against the skeptical critiques that had pushed the scholastic natural law tradition aside.

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Finnis's  
theory prone  
to reifications.

The problem of Finnis's emphasis on the experiential apprehension of the basic human goods is that he does not go far enough, and so the new natural law theory remains vulnerable on several points. It remains prone to reifications that fail to account for the particularity of human existence and moral choices. It is also subject to a legalism that neglects the contingency of communication and understanding. These flaws may be overcome, at least in part, by engagement with two philosophers from the continental tradition, Kierkegaard and Gadamer, whose insights direct us toward a fuller conception of the natural law.<sup>1</sup> This reconsideration pays heed to the particularity, historicity, and communicative nature of the natural law.

### *The New Natural Law*

New natural  
law avoids  
metaphysics.

Along with Germain Grisez, John Finnis has been a leader in propounding the so-called new natural law theory. The label is perhaps a misnomer, as Finnis himself identifies his views closely with those of Aquinas, asserting that much of what is considered the classic view of natural law is actually a late scholastic variation. While Finnis is extremely prolific, his primary points are contained within his magnum opus *Natural Law and Natural Rights* and in his study *Aquinas*. Central to the new natural law approach is an avoidance of metaphysics and a disavowal of biologicistic teleology. Rather, the new natural law takes its departure from what it considers basic goods experienced by humans. Early in *Natural Law and Natural Rights* Finnis offers this summary of the new natural law method:

There is (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound

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<sup>1</sup> Kierkegaard and Gadamer are not the only philosophers who have made the points considered here, but I find them to be particularly useful: Kierkegaard because of his passionate emphasis on the subjective experience of God in Christianity, and Gadamer as a prominent representative of the more conservative side of Heidegger's historicism. Meanwhile, criticism from a more traditional scholastic approach to natural law may be found in Russell Hittinger's *A Critique of the New Natural Law Theory*.

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practical thinking, and which, when all brought to bear, provide the criteria for distinguishing . . . between ways of acting that are morally right or morally wrong—thus enabling one to formulate (iii) a set of general moral standards.<sup>2</sup>

These basic forms of the good, or principles of human flourishing, are life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion. In later writings he has added marriage to this list. He considers these goods to be self-evident and argues that “[e]ach is fundamental. None is more fundamental than any of the others, for each can reasonably be focused upon, and each, when focused upon, claims a priority of value. Hence there is no objective priority of value amongst them.”<sup>3</sup> Nor is recognition of these goods a moral judgment. Aquinas’s first principle of practical reason, that good is to be sought and evil avoided, requires more than knowledge of various goods; it also has requirements as to how they are to be sought in order to promote true human flourishing. Since all the basic goods cannot be simultaneously pursued to their fullest, a means of mediating between them and practical action must be introduced.

Thus, another set of principles, described as the basic requirements of practical reasonableness, is needed. “The requirements to which we now turn express the ‘natural law method’ of working out the (moral) ‘natural law’ from the first (pre-moral) ‘principles of natural law.’”<sup>4</sup> The basic requirements of practical reasonableness in pursuit of the fundamental goods are:

*Requirements of practical reasonableness in pursuit of fundamental goods listed.*

1. Harmony of purpose/a coherent plan of life
2. No arbitrary preferences amongst values
3. No arbitrary preferences amongst persons
4. Detachment from particular realizations of good (avoiding fanaticism)
5. Fidelity to commitments (avoiding apathy and/or fickleness)
6. Efficacy (within limits)
7. Respect for every basic value
8. Respect for community and the common good

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<sup>2</sup> John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 23; hereinafter cited as “*Natural Law*.”

<sup>3</sup> *Natural Law*, 95.

<sup>4</sup> *Natural Law*, 103.

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## 9. Following conscience and being authentic<sup>5</sup>

*Task of  
practical  
reason  
never  
finished.*

It is these requirements, Finnis asserts, that provide for the transition between the pre-moral basic human goods and moral judgment. Life is such that simple recognition of goods is not enough to integrate them all into true human flourishing. Rather, choices must be made about how to pursue each good and how to balance one good with another. "For the real problem of morality . . . is not in discerning the basic aspects of human well-being, but in integrating those various aspects into the intelligent and reasonable commitments, projects, and actions that go to make up one or other of the many admirable forms of human life."<sup>6</sup> Finnis is keen to avoid resorting to teleology or a hierarchy of values. There is no simple good nor a single overriding principle that can settle all disputes, nor a metaphysical principle to settle all questions. Rather, "The basic values, and the practical principles expressing them, are the only guides we have. Each is objectively basic, primary, incommensurable with the other in point of objective importance."<sup>7</sup> Nor can there even be a final resting place where all is balanced, for "[n]one of the basic aspects of one's well-being is ever fully realized or finally completed."<sup>8</sup> Each basic good is incomplete by itself, and not all ways of pursuing one good are compatible with other goods. Thus, the task of practical reason is never finished, but further discernments and judgments will always be needed.

This ethical discernment cannot be a simple weighing of consequences. Finnis is fierce in his rejection of consequentialism, which he views as setting one basic good against another.

To choose an act which in itself simply (or primarily) damages a basic good is thereby to engage oneself willy-nilly (but di-

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<sup>5</sup> Perhaps this list, along with the list of the basic goods, could be printed out in wallet sized cards to assist with everyday moral decisions? While this suggestion is not entirely fair to Finnis, who is well aware of the need for habit and prudence, it illustrates the problem of summarizing moral decision making in a list or a chart. Reality is often much more complex than what can be encapsulated in such an approach. While such lists of rules and principles are perhaps indispensable for communication and teaching, they should never be mistaken for the whole of the moral order itself.

<sup>6</sup> *Natural Law*, 31.

<sup>7</sup> *Natural Law*, 119.

<sup>8</sup> *Natural Law*, 96.

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rectly) in an act of opposition to an incommensurable value (an aspect of human personality) which one treats as if it were an object of measureable worth that could be outweighed by commensurable objects of greater (or cumulatively greater) worth. To do this will often accord with our feelings, our generosity, our sympathy, and with our commitments and projects in the forms in which we undertook them. But it can never be justified in reason.<sup>9</sup>

Therefore some precepts of the natural law always apply in every situation, and may be expressed in negative formulations (i.e., thou shalt not). Finnis argues that “It is always unreasonable to choose directly against any basic value, whether in oneself or in one’s fellow human beings. And the basic values are not mere abstractions; they are aspects of the real well-being of flesh-and-blood individuals.”<sup>10</sup> Thus, there are certain absolute human rights, and certain acts against them are always and everywhere wrong. There cannot, however, be any such finality about what constitutes the good, for goods can be instantiated in innumerable ways in diverse situations. Thus, even if not all goods go together in the finitude of human existence, one must never act directly against a basic human good.

*Some precepts apply in every situation.*

### ***A restoration, not a revolution***

Finnis’s approach to natural law tries to neutralize many of the criticisms leveled against what is seen as traditional scholastic natural law theory.

A theory of practical reasonableness, of forms of human good, and of practical principles, such as the theory Aquinas adumbrated but left insufficiently elaborated, is untouched by the objections which Hume (and after him the whole Enlightenment and post-Enlightenment current of ethics) was able to raise against the tradition of rationalism eked out by voluntarism. That tradition presented itself as the classical or central tradition of natural law theorizing, but in truth it was peculiar to late scholasticism.<sup>11</sup>

Thus, the difficulty in deriving “an ought from an is” (the fact-value distinction) does not trouble Finnis, for he makes no claim to be able to do such. The good is known not by an

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<sup>9</sup> *Natural Law*, 120.

<sup>10</sup> *Natural Law*, 225.

<sup>11</sup> *Natural Law*, 47.

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examination of human nature or practice, but by reflection on experiential goods. “For Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but what is reasonable. And this quest will eventually bring one back to the *undervived* first principles of practical reasonableness—principles which make no reference at all to human nature, but only to human good.”<sup>12</sup> Finnis singles out Vazquez and Suarez as examples of the late scholastic viewpoint, and argues that, while their ethical theory used terms from Aristotle and Aquinas, it differed radically in substance from the tradition they claimed to represent. He especially critiques their rationalism:

Vazquez and Suarez maintained, *first*, that in discerning the content of the natural law, reason’s decisive act consists in discerning precepts of the form ‘ $\phi$  is unfitting to human, i.e. rational, nature and has the quality of moral wrongfulness’ or ‘ $\phi$  benefits human, i.e. rational, nature and thus has the quality of moral rectitude, and, if  $\phi$  is the only such act possible in a given context, the additional quality of moral necessity or due-ness.’ (We can call this thesis ‘rationalist’.) For Aquinas, on the other hand, what is decisive, in discerning the content of the natural law, is one’s understanding of the basic forms of (not-yet-moral) human well-being as desirable and potentially realizable ends of opportunities and thus as to-be-pursued and realized in one’s action—action to which one is already beginning to direct oneself in this very act of practical understanding.<sup>13</sup>

Finnis also criticizes the voluntarist aspect of these scholastics’ theory, but his primary condemnation is reserved for “the assumption of Clarke, Grotius, Suarez, and Vazquez that the primary and self-evident principles of natural law are moral principles (in the modern sense of ‘moral’), or that they are initially grasped as principles concerned with self-evident relations of conformity or disconformity to human nature.”<sup>14</sup> Considering the late scholastic argument as it has descended to today, Finnis finds it expressed in the notion that “natural functions are never to be frustrated or that human faculties are never to be diverted (‘perverted’) from their natural ends. But, as a general premise, in any form strong enough to yield the

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<sup>12</sup> *Natural Law*, 36.

<sup>13</sup> *Natural Law*, 45.

<sup>14</sup> *Natural Law*, 47-48.

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moral conclusions it has been used to defend, this argument is ridiculous.”<sup>15</sup> Finnis looks for the natural law neither in human nature nor in metaphysics. One need not definitely define human ontology or demonstrate man’s final *telos* in order to comprehend the natural law. Finnis largely ignores the former as unnecessary and leaves the latter until the end of his major books, where the discussion of friendship with God is an intellectual dessert, not the main course.

*Natural law  
sought neither  
in human  
nature nor  
metaphysics.*

Having avoided the perceived difficulties that the scholastic tradition of natural law entails, Finnis also faces up to the more radical tradition of critique that has developed in modern philosophy. In response to the argument that notions of the good have varied too much for any coherent set of principles to be discerned, he avers that “even the most elementary and easily recognizable moral implications of those first principles are capable of being obscured or distorted for particular people and, indeed, for whole cultures, by prejudice, oversight, convention, the sway of desire for particular gratifications, etc.”<sup>16</sup> While the natural law is present everywhere, so are the obstacles to perceiving it and the temptations to ignore it. He is thus unperturbed by the variety of mores that are present and by the historical evolution of various moral codes.

Finnis also addresses the critiques presented by perspectivism and relativism, employing a common argument to make his case. In a section entitled “Scepticism’s Self-Refutation” Finnis explains the self-refuting nature of

the claims that all opinions about good and bad in human actions are mere arbitrary opinions, that practical reasoning is always the slave of the passions, that reasons as reasons have no power to motivate the will, and the human goods are not willed because understood to be good but thought to be good because desired or preferred. The structure of self-refutation is in each case essentially the same: the reasonableness of taking the claims seriously and of treating them as giving one a reason to spend time reflecting on their content is inconsistent with that content.<sup>17</sup>

Nor is this refutation a mere logical trick, he declares.

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<sup>15</sup> *Natural Law*, 48.

<sup>16</sup> *Natural Law*, 30.

<sup>17</sup> John Finnis, *Aquinas* (Oxford: Oxford University Press, 2004), 60.

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Rather, it is an illustration of the self-evident nature of the basic human goods and the principles of practical reason. Criticisms of truth, for instance, nonetheless presume some ability to make and perceive true statements, or the desirability of true knowledge. However, this breezy rebuttal of skepticism does not confront a more moderate challenge which, while not denying the existence of truth, questions whether truth has the character Finnis assigns to it.

### *History, particularity, and universality*

*Historicity of human life not given its due.*

While the new natural law theory is an impressive attempt to navigate between the Scylla and Charybdis of relativism and abstract rationalism, it is insufficient in several ways. First, it lacks sufficient regard for the historicity of human life and the value of tradition. Regarding tradition, Finnis's approach (and Aquinas's, by Finnis's account) "does not privilege conventional, unreflective *mores*. . . . True, moral philosophy starts from conventional moral judgments. But it subjects them to every relevant philosophical question."<sup>18</sup> A prudential critique of this position would perhaps argue that if one is not careful such relentless questioning could undermine the legitimacy of a moral, social, or political order. However, such criticism is likely to fall on deaf ears, as Finnis could assert that a full application of natural law would take any prudential concerns into account. A more promising line of critique is epistemological, for, though Finnis shows great acuity in some of his insights, he eventually succumbs to a form of rationalist universalism.

The basic goods are experienced and expressed through particulars and communicative action between subjects. Finnis has some recognition of this, acknowledging that each basic good "can be instantiated in indefinitely many ways in one's own life and one's own communities, as well as in the lives of other people and other communities."<sup>19</sup> There is no ideal way of life or political organization (or system) that needs only to be implemented according to a master plan.

And so, regarding the first principles of practical reason, he agrees with Aquinas that "we will understand and accept them

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<sup>18</sup> Aquinas, 50.

<sup>19</sup> Aquinas, 103.

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only if we have the experience and other relevant knowledge needed to understand their terms; for he points out that there are some practical principles (not perhaps absolutely first principles) which . . . are known only to people who are wise. The first practical principles are not, properly speaking, innate."<sup>20</sup> Rather, they come to be known over time as one grows and has both experience and instruction regarding human goods. Thus, Finnis affirms that

the epistemic source of the first practical principles is not human nature or a prior, theoretical understanding of human nature (though a theoretical knowledge of the efficacy, as means, of certain choosable conduct is relevant to our knowledge of first practical principles). Rather, the epistemic relationship is the reverse: any deep understanding of human nature, i.e. of the capacities which will be fulfilled by action which participates in and realizes those goods, those *perfections*, is an understanding which has amongst its sources our primary, undemonstrated but genuine practical knowledge of those goods and purposes . . . the goods to which practical reason's first principles direct us are not abstract 'ideal' or 'quasi-Platonic forms'. They are perfections, aspects of the *fulfillment*, flourishing, completion, full-being, of the flesh-and-blood human beings (and the palpable human groups or communities) in whom they can be instantiated.<sup>21</sup>

This is an important insight, but it does not go far enough. Not only are the basic goods instantiated in particulars, but they are also known through particulars and communicated in a historical existence that precludes any final or universal formulation of principles.

Thus, while Finnis sets himself against idealism, at least of a sort, writing that "a theory of justice is to establish what is due to individuals in the circumstances in which they are, not in the circumstances of some other, 'ideal' world,"<sup>22</sup> his determination to reject any form of consequentialism leads him to retreat into an ideal world of his own. He writes that reasonable "judgments are arrived at by a steady determination to respect human good in one's own existence and the equivalent humanity or human rights of others . . . rather than trade off that good and those rights against some vision of

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<sup>20</sup> Aquinas, 88.

<sup>21</sup> Aquinas, 91.

<sup>22</sup> *Natural Law*, 170.

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*Absolution in effect provided for failure to act.*

future ‘net best consequences’—consequences which overall, both logically and practically, one cannot know, cannot control or dispose of, and cannot evaluate.”<sup>23</sup> The future is, of course, unknowable, but this does not mean that it is unpredictable.

While humans must always operate with both limited information and uncertainty about the future, many consequences can be known, controlled, and evaluated with reasonable accuracy. Part of practical reason (even in his scheme) is the ability to predict and evaluate the consequences of one’s actions. Finnis’s sudden appeal to life’s incalculability is simply absolutism for those who fail to act because they are afraid of acting against one of the basic human goods, none of which his theory allows to be elevated above another. The wise man of experience is not for Finnis the standard by which to judge; rather, he ultimately relies on dogmatic formulations of the good.

His insistence on the universality of the basic goods also trends into moral absolutism. “We can add, to the second requirement of fundamental impartiality of recognition of each of the basic forms of good, a third requirement: of fundamental impartiality among the human subjects who are or may be partakers of those goods. . . . In the modern philosophical discussion, the principle regularly is expressed as a requirement that one’s moral judgments and preferences be *universalizable*,”<sup>24</sup> while the classic non-philosophical expression is the “Golden Rule” found in various traditions.

Thus, “the way from first practical principles to specific moral norms about murder, adultery, theft, and so forth is a way which runs through the ‘neighbor as oneself’ principle.”<sup>25</sup> This way is toward the universal, for “the direction the first practical principles give one’s deliberation is towards goods one can share in along with others, and it has no rational stopping-place short of a universal *common good*.”<sup>26</sup> This common good is not a result of consequentialist weighing of various goods against each other, or calculated along utilitarian lines. Rather, it is an integration of all the basic goods into a whole that allows for authentic human flourishing.

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<sup>23</sup> *Natural Law*, 226.

<sup>24</sup> *Natural Law*, 107.

<sup>25</sup> *Aquinas*, 128.

<sup>26</sup> *Aquinas*, 132 (emphasis in the original).

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Rationality, according to Finnis, demands that one set oneself aside to survey ethical choices from an objective impartiality: “to violate the Golden Rule is to allow emotional motivation for self-interested preference—independent of rational grounds for prioritizing among persons—to override the rational rule of fair impartiality.”<sup>27</sup> But is this actually what the Golden Rule demands? The neighbor one loves as one loves oneself is a particular person in need of particular goods, not an abstract universal. In the parable which illustrates the rule, the neighbor is the person right in front of one (literally, in the parable) in need of help.<sup>28</sup> The demand to treat others as we would be treated does not necessarily lead to reflection on universal norms, but rather on the specific situations of those with whom we are interacting. Furthermore, fair impartiality is at most an approximation, for it is something that no human can reach, nor is it clear that it would be desirable to do so were it possible.<sup>29</sup>

*The object of Golden Rule is a particular person in need of particular goods.*

In response, Finnis would likely agree that basic human goods can be instantiated in myriad ways but would retreat to his basic position in favor of universal negatives: his universalizing principle allows for the formulation of moral norms that always mark the limits of what is morally licit in any situation; “negative moral norms can be, and a number in truth are, binding and governing always and on every occasion {semper et ad semper}. Negative moral norms of this sort are, in short, both specific—immediately applicable without further moral reasoning—and exceptionless.”<sup>30</sup> These prohibitions preclude acts that are always against a basic good, regardless of the situation or consequences. Let justice be done though

*For Finnis, negative moral norms are both specific and exceptionless.*

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<sup>27</sup> *Natural Law*, 420.

<sup>28</sup> Indeed, the parable of the Good Samaritan was a response to a legalistic approach to the moral law. It was a lawyer seeking a more precise definition of “who his neighbor was” who prompted Christ to tell this tale. No definition is given, simply the example of one who helped a man in need when he came across him.

<sup>29</sup> Michael Polanyi, for example, has argued convincingly that true knowledge, far from being objective and impersonal, is always personal, known to a specific subject in particular circumstances. To desire to know objectively is to desire to be something other than human. See Michael Polanyi, *Personal Knowledge: Towards a Post-Critical Philosophy* (Chicago: University of Chicago Press, 1974).

<sup>30</sup> *Aquinas*, 164.

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the heavens fall (or more accurately, never act directly against a basic human good though the heavens fall) is his cry.

### *Lying for dear life*

The difficulty of Finnis's universalism and moral absolutism is clearly seen when applied to actual human experience, such as his total prohibition against lying. Citing Aquinas, he writes that, "It is always wrong to lie. It is wrong to lie to enemies in war. It is wrong to lie to save oneself or one's client from unjust conviction and execution. Or to save some other person or group from destruction by genocidal killers who have no right to be told the truth." However, one is not under an obligation to always tell the truth, for "it can be right to ensnare the enemy's forces by deliberately deceptive manoeuvres, ruses, and ambushes. . . . As for killers to whom one must not lie, one normally has a strong obligation to frustrate their purpose by silence, defiance, concealment, distraction, force, or any other morally acceptable means."<sup>31</sup> This distinction between direct and indirect or implied deception is all-important for Finnis, and holds even in the most drastic situations. For Finnis there is no "Anne Frank exception" to the prohibition against lying. Even in the extreme case of a Gestapo agent's asking the whereabouts of Jews, one may only engage in distraction or diversion; there is an absolute ban on directly lying.

However, the full consequences of Finnis's dogmatism are perhaps better seen in less extreme examples: the undercover investigator who gives a false identity; the spy who concocts a convincing back story; the counter-intelligence officer who passes false information to the enemy; the police officers setting up a sting—Finnis condemns them all. For Finnis, in lying, "what purports to be a relating of mind to mind and thus of person to person—the relationship whereby self discloses self to another—is in reality made to be not that relationship at all but an act of *duplicity*, the presentation to another person of a pretended mind and heart." This duplicity is absolutely wrong, for though "one can rightly 'hide oneself' by one's silence . . . if one does make an act of communication which, because assertive in its meaning, is purportedly self-disclosing,

*Finnis's  
dogmatism  
experientially  
harmful.*

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<sup>31</sup> Aquinas, 154-155.

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one should never make it the duplicitous act of projecting for acceptance (belief) a phony self while actually remaining hidden behind one's pretended self-disclosure."<sup>32</sup> Thus, while a spy or soldier behind enemy lines (say, Col. Robert Hogan in the classic television show about plucky Allied POWs in the Second World War) could wear an enemy uniform, speak the enemy's language, carry enemy equipment, etc, in order to deceive, he could not say his name was Hans Schultz. While some could occasionally get by with mere misdirection, much normal police work, let alone espionage, would be crippled by such an absolute prohibition on lying. However, a good deal of deception would still take place, with ever-finer legalistic logic chopping to exploit the distinction between direct lying and indirect deception. Thus, the new natural law would become inextricably entangled in the sort of casuistry that Finnis had hoped to leave behind.

This prohibition is troublesome not only because Finnis allows that intent to deceive may be morally licit, but also because there is no obvious reason why the experiential human goods demand such an idealistic ethic. The basic good that is harmed by a lie is community (otherwise described as sociability or friendship), but Finnis does not adequately connect the good of community with an absolute prohibition on lying. Finnis instead argues that to engage in duplicity is to affirm, to some extent, the views of the wicked.

Those who lie to the Gestapo enter, so far forth, into the Nazis' politics of manipulation. Those who instead refuse to make any communication which would violate their own duties of non-disclosure, and who remain silent or state a truth about themselves but not about the victim's whereabouts, by their silence or their (strictly limited) truth-telling affirm the human dignity of everyone concerned, including even the Nazis. . . . The good consequences of such an affirmation (and of refusing to join and promote the culture of the liars) cannot be estimated, but should not be overlooked when considering the bad consequences—equally incalculable though more palpable and affecting—risked in rejecting the option of lying.<sup>33</sup>

But this is nearly a call for martyrdom. The individual and his neighbors would suffer, and the basic good of com-

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<sup>32</sup> *Aquinas*, 157-158.

<sup>33</sup> *Aquinas*, 160.

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munity would very likely be harmed. The result of not lying to the Gestapo was rarely as incalculable as he here presents it. It was usually death for oneself and those one was protecting. As for the good consequences, they would indeed be harder to calculate, but most would seem to accrue in the next world. Of course, one cannot know for sure that one's moral example would not bear fruit in this world as well, but that the outcomes of the different courses cannot be precisely calculated does not mean that the probabilities cannot be compared. Finnis's adherence to a perfect standard of personal purity, and his appeal to the inscrutability of the future, has become a quasi-religious submission to duty and trust in an implicit Providence.

Responding to arguments for prudential exceptions to absolute moral prohibitions, Finnis counters that

*Prudentia* is nothing other than the disposition to guide one's choices and action by practical reasonableness. So it is informed and directed at every stage by every relevant practical principle and true moral norm. . . . And in the first instance *prudentia* will be guided by the norms which identify and exclude wrongful killing, adultery, false witness, and other offenses against justice. Such injustices cannot be justified by concern for the common good; indeed, the common good is inherently preserved and promoted by the good (e.g. the life) of innocents so injured.<sup>34</sup>

This perfectionist, impractical ethic comes from Finnis's insistence that the basic goods are all equally important and worthy of respect. Even though Finnis acknowledges the obvious reality that no one can pursue all basic goods equally in life, he insists on martyrdom rather than acting directly against a basic good. Better to be shot by the Gestapo than to lie. Better that others be shot by the Gestapo than to lie. As for the sad exigencies of war and law, best not even mentioned. Gone is the magistrate in Book XIX of Augustine's *City of God*, who carries out his duties (including acts against basic goods), recognizing in them the price for what tolerable order can be found in this life. The difficulties of Finnis's approach to natural law are fully revealed in his discussion of lying. On the one hand, there will be ever-expanding legalistic attempts to delineate between indirect deception and direct lying; on the other hand a temptation to resign oneself to inaction against evil lest one sully oneself.

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<sup>34</sup> Aquinas, 168.

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### *Kierkegaard and the absolute over the universal*

Finnis provides a natural law theory that claims to be solidly grounded in experience and prudence but then urges deliberate ignorance of the likely consequences of one's actions in order to maintain one's moral purity. His antipathy toward anything that smacks of consequentialism leads to an insistence that, when caught between a rock of moral absolutism and the hard place of circumstance, one should cushion the rock with a layer of incalculable ignorance and deliberate indifference to the suffering of others. He is firm: no amount of apparent good on one side can tip the scales to justify the smallest action against a basic human good.

*Finnis's theory encourages deliberate ignorance of probable consequences of one's actions.*

But to declare that certain actions are never to be done regardless of the cost (let not one lie be told, though the heavens fall) is not an exercise of practical reason but rather of faith. Finnis's disregard of the likely consequences of moral choices is carried to such an extent that it becomes mystical, not ethical. He is concerned first with what he perceives as the right order of the soul (in obedience to the Good or to God), and only second with the practical consequences of one's actions.

*Position mystical rather than ethical.*

His definitions of prudence and the common good lead one to act in ways that seem antithetical to both, and he can be rightly criticized for failing to take into account the fallen and sometimes tragic nature of human existence. But more insight may come by considering Kierkegaard's writing on the subject, beginning with his reflections on Abraham and faith in *Fear and Trembling*. Discussing what he calls the classic view of ethics, which overlaps somewhat with Finnis's universalism and moral dogmatism, Kierkegaard writes:

The ethical as such is the universal, and as the universal it applies to everyone, which can be put from another point of view by saying that it applies at every moment . . . the single individual is the particular that has its *telos* in the universal, and the individual's ethical task is always to express himself in this, to abrogate his particularity so as to become the universal. As soon as the single individual wants to assert himself in his particularity, in direct opposition to the universal, he sins.<sup>35</sup>

The duty of the individual is to conform himself to an ab-

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<sup>35</sup> Søren Kierkegaard, *Fear and Trembling*, translated by Alastair Hannay (London: Penguin Books, 1985), 83.

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solute, universal standard. But what then, is the role of faith, especially the faith of Abraham when he was about to sacrifice his son at God's command? Does the individual have an absolute duty to God that is higher even than his duty to the universal of ethics? Kierkegaard argues that "either there is an absolute duty to God, and if so then it is the paradox described, that the single individual as the particular is higher than the universal and as the particular stands in an absolute relation to the absolute—or else faith has never existed."<sup>36</sup> Faith cannot be a mere restatement and avowal of the ethical universal, for then there would be no need for faith. It is the relationship of the existing individual to the absolute (God), a relationship that is higher than that of the individual to the universal.

Finnis might argue that this poses no difficulty to his theory, for it is a system of natural law based on practical reasonableness, not a guide to what one is to do if God lays an apparently absurd burden on one (like sacrificing one's son, a miraculous gift of God, to God). Finnis does not describe his theory as a guide to faith. But as Finnis's logic has led him to a view that can only be considered as an article of faith (one must never lie, in any situation, for any reason, no matter the apparent consequences), it is reasonable to consider the ethical posture of a "knight of faith."

For Kierkegaard, the relationship of faith is interior, one of the soul to the absolute (God). The paradox of faith is that "the single individual . . . determines his relation to the universal through his relation to the absolute, not his relation to the absolute through his relation to the universal. The paradox can also be put by saying that there is an absolute duty to God, for in this tie of obligation the individual relates himself absolutely, as the single individual, to the absolute."<sup>37</sup> The individual stands responsible not before a code of universal ethics, but before God. Thus, far from absolving the individual of responsibility, this lays a heavier burden, for "to exist as the individual is the most terrifying thing of all."<sup>38</sup> This is not only because of the danger of evil (Kierkegaard warns that "the demonic has that same property as the divine, that the individual can enter

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<sup>36</sup> *Fear and Trembling*, 108.

<sup>37</sup> *Fear and Trembling*, 97-98.

<sup>38</sup> *Fear and Trembling*, 102.

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into an absolute relationship to it"<sup>39</sup>), but also because the existing individual is no longer guided by a system. Rational systems are incapable of describing the relationship of faith, or the duties of the one who enters into it.

### *God knows all particulars*

In his *Concluding Unscientific Postscript*, Kierkegaard attacks reliance on systems, declaring that, "An existential system cannot be formulated. Does this mean that no such system exists? By no means; nor is this implied in our assertion. Reality itself is a system—for God; but it cannot be a system for any existing spirit."<sup>40</sup> God can comprehend all, but a human cannot. Thus, an adequate system can be constructed only if there are certain universal formulas that can be applied to the unending variations of existence. But it is precisely because such formulas are insufficient that one has entered into the relationship of faith.

Humans cannot get outside of their own existence and therefore are incapable of constructing an adequate system. "If an existing individual were really able to transcend himself, the truth would be for him something final and complete; but where is the point at which he is outside of himself?" Such a point cannot be finally reached by objective thought, Kierkegaard answers, but only by a passionate subjective relationship to God. "It is only momentarily that the particular individual is able to realize existentially a unity of the infinite and the finite which transcends existence. This unity is realized in the moment of passion. Modern philosophy has tried anything and everything in the effort to help the individual to transcend himself objectively, which is a wholly impossible feat."<sup>41</sup>

Furthermore, the attempt is not only futile but foolish, for it misunderstands the nature of the absolute. God is not a principle but a person. "The existing individual who chooses to pursue the objective way enters upon the entire approximation-process by which it is proposed to bring God to

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<sup>39</sup> *Fear and Trembling*, 123.

<sup>40</sup> Søren Kierkegaard, *Concluding Unscientific Postscript*, translated by David F. Swenson and Walter Lowrie (Princeton: Princeton University Press, 1984), 107; hereinafter cited as "*Postscript*."

<sup>41</sup> *Postscript*, 176.

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light objectively. But this is in all eternity impossible, because God is a subject, and therefore exists only for subjectivity in inwardness."<sup>42</sup> The relationship is a personal (hence subjective) one, not an objective one. Writing of the "knight of faith," Kierkegaard extols "the wonderful glory achieved by that knight in becoming God's confidant, the Lord's friend, and—to speak really humanly—in addressing God in heaven as 'Thou'."<sup>43</sup> The absolute is a person, not a principle.

*The absolute is a person, not a principle.*

Furthermore, God is not only a subject who relates from eternity to the individual in time, but also, through the incarnation, the individual is related to God existing in time. "The object of faith is hence the reality of the God-man in the sense of his existence. . . . The object of faith is thus God's reality in existence as a particular individual, the fact that God has existed as an individual human being."<sup>44</sup> The relationship of the existing individual to the absolute runs through the particularity of the absolute as an existing individual.

Nor does God need to rely upon formulas or principles to order or understand existence, for he comprehends it in the entirety of its particularity.

God is a friend to order; and to that end he is himself present at every point; every instant he is omnipresent. . . . His concept is not like man's, beneath which the particular lies as that which is incommensurable with the concept. His concept comprises everything, and in another sense he has no concept. God does not avail himself of an abbreviation, he grasps (*comprehendit*) actuality itself, all its particulars; for him the single individual does not lie below the concept.<sup>45</sup>

*Principles can never describe the fullness of ethical choice.*

God comprehends everything in the fullness of its particularity, not through the application of abstract principles or ideas but through direct knowledge of its particulars. Man, being limited, necessarily resorts to the abbreviations of abstractions and principles in communication, but when taken as absolute these are movements away from the fullness of the mind of God, not toward it. Thus, the truly ethical is not found in an impossible objectivity expressing itself as ostensibly universal

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<sup>42</sup> *Postscript*, 178.

<sup>43</sup> *Fear and Trembling*, 105.

<sup>44</sup> *Postscript*, 290.

<sup>45</sup> Søren Kierkegaard, *The Sickness unto Death*, translated by Alastair Hanan (London: Penguin Books, 2004), 154; hereinafter cited as "*Sickness*."

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principles. These principles may be useful communicative approximations, but they can never describe the fullness of ethical choice in all its particulars. A man himself is incapable of comprehending all the particular factors implicated in a single moral choice. How could a humanly constructed system manage it for all?

Thus, reconsidering the ethical, the primary task of man is not to apprehend an ethical system, but to live out the ethical in relation to God. "For God the apprehension of the historical is interpenetrated by His knowledge of the innermost secrets of conscience. . . . That the ethical is present in the historical process, as it is everywhere where God is, is not on this account denied. But it is denied that the finite spirit can see it there in truth. . . . For the study of the ethical every man is assigned to himself."<sup>46</sup> Thus, rather than considering the ethical as a universal set of principles in which particularity is to be subsumed, the ethical is most fully realized as the individual lives out his particularity before God.<sup>47</sup>

The fullness of what is right and wrong in each particular is not understood by applying an absolute formula or principle, but by the guidance of the divine absolute as it comprehends the particular in its entirety.

*The ethical most fully realized in concrete action.*

The ethical is . . . a correlative to individuality, and that to such a degree that each individual apprehends the ethical essentially only in himself, because the ethical is his complicity with God. While the ethical is, in a certain sense, infinitely abstract, it is in another sense infinitely concrete, and there is indeed nothing more concrete, because it is subject to a dialectic that is individual to each human being precisely as this particular human being.<sup>48</sup>

### *The indelibility of each instant*

Consequently, the nature of wrongdoing must be reconsidered. In *The Sickness unto Death*, Kierkegaard praises the earlier dogmatics that held that "the fact that sin was before

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<sup>46</sup> *Postscript*, 126-127.

<sup>47</sup> Polanyi describes this in secular terms as accepting the responsibility of one's calling. The limitations of one's concrete existence need not lead to relativism, for we may "accept these accidents of personal existence as the concrete opportunities for exercising our personal responsibility." (*Personal Knowledge*, 322).

<sup>48</sup> *Postscript*, 138.

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*Wickedness lies in the deliberate doing of wrong though the good was perceptible in a particular situation.*

God infinitely heightened it." But they mistakenly regarded God as external, and therefore sins against Him as occasional. "But God is not something external like a police constable. What one must look to is the fact that the self has the conception of God and nevertheless does not do what God wants, that the self is disobedient. Nor is it just now and then that God is sinned against, since every sin is before God; or rather, what really makes human guilt into sin is that the guilty person was conscious of being before God."<sup>49</sup> Stripped of overt religiosity, the idea may be expressed by saying that the real problem of wrongdoing or wickedness lies not in an insufficiently understood system of universal ethics but in the deliberate doing of wrong even though the good was perceptible in a particular situation (or one may also sin through the deliberate forming and continuation of habits that render particular goods imperceptible).

*God grants faith and guidance in each instance, not through universal formulas.*

There can be no refuge from the responsibility of acting before God. There is no moral law whose stipulations include all that man is required to do and not to do, no final set of principles from which all answers can be derived. But truth is available from God in the moment. Kierkegaard explains how the relationship with God arises. "How then does the learner become a believer or disciple? When the understanding is excused and he receives the condition. When does he receive it? In the moment. What does this condition determine—his understanding of the eternal . . . He receives the condition in the moment and receives it from the teacher himself."<sup>50</sup> God grants faith and guidance in each instant, not through universal formulas apprehended by objective rationality. And each moment is indelible and bears the burden of conscience. Each person is alone before God; all men are

constantly individuals before God. The man sitting in a glass case is not so constrained as each human being in his transparency before God. This is the way it is with conscience. Things are so arranged, by means of conscience, that the report follows immediately upon each guilt, and that the guilty person is the one who has to write it. But it is written with invisible ink and only becomes properly legible when held up to the light in

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<sup>49</sup> *Sickness*, 112.

<sup>50</sup> Søren Kierkegaard, *Philosophical Crumbs*, translated by M. G. Piety (Oxford: Oxford University Press, 2009), 133.

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eternity while eternity does its audit of the consciences. Essentially, everyone arrives at eternity bringing with him the most exact record of every least trifle he has committed or omitted to hand over.<sup>51</sup>

This view is (no doubt surprisingly for some) akin in spirit to the psychology of the eternal return of Nietzsche, which also emphasized the indelibility of each instant. Nietzsche posits that what one does must be re-lived (the eternal return can be understood as an ever-present judgment day in which man redeems himself by affirming the totality of existence), while Kierkegaard considers man facing God's judgment upon each moment.<sup>52</sup> Another convergence is that both place an emphasis upon the will. Though Nietzsche repudiated Christianity and its doctrine of original sin, he nonetheless retained a very Christian (perhaps specifically a Reformed Protestant) concern with the will.

For Kierkegaard, sin is particular and before God, and primarily a matter of the will, not the understanding. "What then is the missing component of Socrates' specification of sin? It is: the will, defiance. Greek intellectuality was too fortunate, too naïve, too aesthetic, too ironic, too witty—too sinful—to be able to get it into its head that someone would knowingly refrain from doing the good, or knowing what is right, knowingly do what is wrong."<sup>53</sup> Furthermore, the sinfulness of the will consists not only in rejecting what the understanding perceives as right, but in corrupting the understanding so that it does not want to know what is right. "Christianity begins in another way, by saying that for man to learn what sin is there must be a revelation from God, that sin does not consist in man's not having understood what is right, but in his not wanting to understand it, and in his unwillingness to do what is right."<sup>54</sup> Consequently, "in Christian eyes, sin lies in the will, not in the knowing; and this corruption of the will affects the individual's consciousness."<sup>55</sup> What is needed to behave in

*"In Christian eyes, sin lies in the will, not in the knowing."*

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<sup>51</sup> *Sickness*, 157.

<sup>52</sup> This convergence is perhaps less surprising if we recall that Nietzsche's Zarathustra, the herald of the eternal return, was called the most pious of the ungodly.

<sup>53</sup> *Sickness*, 122.

<sup>54</sup> *Sickness*, 127.

<sup>55</sup> *Sickness*, 128.

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a moral manner is not adherence to an objective formulation of morality but a conversion of the will by the grace of God.

*Kierkegaard and the problem of communication*

But in emphasizing the inwardness of this conversion and relationship with God, Kierkegaard sometimes goes too far, excluding other existential considerations and ignoring aspects of human experience. Like Finnis he engages in an apparent rejection of consequentialism, but for different reasons. For Kierkegaard, the concern is that attention to the outward consequences of action will distract the individual from his subjective focus upon God. "The true ethical enthusiasm consists in willing to the utmost limits of one's powers, but at the same time being so uplifted in divine jest as never to think about the accomplishments. As soon as the will begins to look right and left for results, the individual begins to become immoral."<sup>56</sup> This is not a rejection of weighing likely consequences when considering a course of action, but a spiritual state that is anxious to avoid any attempt to justify itself on its own merits (recognizing always its dependency on the grace of God). Nonetheless, as stated, it could encourage a reckless disregard of consequence under the mistaken assumption that such is especially pious.

But the primary problem with Kierkegaard is how he treats communication. While Finnis is almost un-self-consciously confident of the easy communication of his principles of natural law, Kierkegaard considers such communication extremely difficult (an example may be seen in the discussion of the quotation in the preceding paragraph—where a dogmatic and objective reading obscures and even perverts the subjective communication). For him, the true ethical is found not in expressions of universal principles, but rather in the subjective relationship with God.

However, Kierkegaard states that "the entire content of subjective thought is essentially secret, because it cannot be directly communicated."<sup>57</sup> This is because "speech is after all a more abstract medium than existence, and all speech in relation to the ethical is something of a deception, because dis-

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<sup>56</sup> *Postscript*, 121.

<sup>57</sup> *Postscript*, 73.

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course, in spite of the most subtle and thoroughly thought out precautionary measures, still always remains an appearance of the foreshortened perspective."<sup>58</sup> Thus, the doing is always harder than the saying and the hearing, even assuming understanding. The challenge is for the communication to induce in the hearer the apprehension of the possibility of realizing within his own life the subjective experience of God and the good that is described to him.

Existential reality is incommunicable, and the subjective thinker finds his reality in his own ethical existence. When reality is apprehended by an outsider it can be understood only as a possibility. Everyone who makes a communication, in so far as he becomes conscious of this fact, will therefore be careful to give his existential communication the form of a possibility, precisely in order that it may have a relationship to existence. A communication in the form of a possibility compels the recipient to face the problem of existing in it, so far as this is possible between man and man.<sup>59</sup>

The subjective existential reality cannot be directly expressed in linguistic symbols, but only indirectly through their evocations in the soul of the hearer. It is glimpsed peripherally, but cannot be caught in a direct glance. In the end, Kierkegaard's knight of faith is a lonely soul. "The single individual is quite unable to make himself intelligible to anyone. One might suppose the single individual could make himself understood to another individual who is in the same situation. [But] the one knight of faith simply cannot help the other. Either the single individual becomes a knight of faith by putting himself into the paradox, or he never becomes one. Partnership in these regions is quite unthinkable."<sup>60</sup> Kierkegaard's rejection of the established church here becomes extreme, as it seems to come close to a rejection of the church as the body of Christ assisting each member. So too does his pessimism regarding the possibilities of communication, which (in another parallel to Nietzsche) he explored in a variety of non-traditional ways as he sought to reach the souls of readers.

*Kierkegaard's  
pessimism  
regarding  
communication  
extreme.*

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<sup>58</sup> *Postscript*, 412.

<sup>59</sup> *Postscript*, 320.

<sup>60</sup> *Fear and Trembling*, 99.

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### *The way of language*

*Finnis's statements of universal ethical norms cannot be sustained by practical reason.*

John Finnis has sought to retrieve the natural law tradition from the rationalistic tendencies that had come to characterize it, and to this end he has emphasized practical reason and experiential human goods over questions of ontology and teleology. However, his attempt to avoid both a hierarchy of goods and consequentialism has led to statements of universal ethical norms that cannot be sustained by practical reason, but only by faith.

Kierkegaard presents a way out of this difficulty, emphasizing that the truly moral is found in a subjective relationship to the absolute (God) who is able to provide direction not through derivations from universal principles but by a complete knowledge of the particular. But this introduces two other problems. The first is that the subjective experience of the absolute is so personal as to make communication about it extremely difficult, if not impossible. The second is that there is now an emphasis on Christianity that makes difficult the claims of any "natural law," which purports to be accessible to guide man without divine revelation.

*Private reflection constituted by language as a social medium.*

The work of Hans-Georg Gadamer provides assistance in resolving these difficulties. First, for Gadamer, language is not as abstract as Kierkegaard thought, because private reflection and even communication with God are constituted by language as a social medium. We might feel the nudge of divine guidance, but language is present as soon as we try to explain it to ourselves or to pray to God about it. And this language was not constituted from the subjective self, but from the society around one. It is a part of the given nature of human existence. Gadamer writes that an essential "feature of the being of language seems to me to be its I-lessness. Whoever speaks a language that no one else understands does not speak. To speak means to speak to someone. . . . To that extent speaking does not belong in the sphere of the "I" but in the sphere of the "We."<sup>61</sup> Before any communication is made language is already there as a common ground that belongs to both.

We say, for instance, that understanding and misunderstand-

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<sup>61</sup> Hans-Georg Gadamer, "Man and Language," in *Philosophical Hermeneutics*, translated by David E. Linge (Berkeley: University of California Press, 2008), 65.

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ing take place between I and thou. But the formulation 'I and thou' already betrays an enormous alienation. There is nothing like an 'I and thou' at all—there is neither the I nor the thou as isolated, substantial realities. I may say 'thou' and I may refer to myself over against a 'thou' but a common understanding always precedes these situations. We all know that to say 'thou' to someone presupposes a deep common accord. Something enduring is already present when this word is spoken.<sup>62</sup>

Kierkegaard should have seen that language is able to permeate the barriers of subjectivity. Christianity characterizes Christ as the Word of God, and the Holy Spirit speaks to believers through the Bible and in intimations of the divine will. Gadamer, though not particularly religious in his own philosophy, understood this communicative aspect of Scripture and its interpreters: "Genuine speaking, which has something to say and hence does not give prearranged signals, but rather seeks words through which one reaches the other person, is the universal human task—but it is a special task for the theologian, to whom is commissioned the saying-further of a message that stands written."<sup>63</sup> Kierkegaard himself engaged in this mission, but he neglected to realize the inter-subjectivity it entailed.

*Language able to permeate the barriers of subjectivity.*

Language is not a set of objective symbols that can be used to explain the world in objective terms. Rather, as Gadamer states, it always involves interpretation; it is both conditioned and creative.

*Language always involves interpretation.*

Language is not coincident, as it were, with that which is expressed in it, with that in it which is formulated in words. The hermeneutical dimension that opens up here makes clear the limit to objectifying anything that is thought and communicated. Linguistic expressions, when they are what they can be, are not simply inexact and in need of refinement, but rather, of necessity, they always fall short of what they evoke and communicate. . . . Hermeneutical analysis is able to show, rather, that such relativity to situation and opportunity constitutes the very essence of speaking. For no statement simply has an unambiguous meaning based on its linguistic and logical

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<sup>62</sup> Hans-Georg Gadamer, "The Universality of the Hermeneutical Problem," in *Philosophical Hermeneutics*, 7.

<sup>63</sup> "The Universality of the Hermeneutical Problem," 17.

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construction as such.<sup>64</sup>

But this is not to trade one source of incommunicability (Kierkegaard's intense subjectivity of the God relationship and the abstractness of speaking) for another in a linguistic relativism in which meaning is in flux and translation always insufficient. Gadamer avers that "understanding is language-bound. But this assertion need not lead us into any kind of linguistic relativism. It is indeed true that we live within a language, but language is not a system of signals that we send off with the aid of a telegraphic key when we enter the office or transmission station." Such an image does not accurately describe speaking, "for it does not have the infinity of the act that is linguistically creative and world experiencing. While we live wholly within a language, the fact that we do so does not constitute linguistic relativism because there is absolutely no captivity within a language—not even within our native language."<sup>65</sup>

*Truth exists  
not in  
universally  
valid  
situations  
but within the  
particulars of  
each situation.*

As Kierkegaard understood, truth is subjective, but it is inter-subjective, existing between man and God and man and man. This truth exists not in universal formulations eternally valid but within the particulars of each situation, communicated between God and man but also between man and man. It is through particularity that truth is open to us. As Gadamer puts it, "Precisely through our finitude, the particularity of our being, which is evident even in the variety of languages, the infinite dialogue is opened in the direction of the truth that we are."<sup>66</sup> Truth is found through participation in existence, not in an objective observational point outside of it.

*Language  
part of the  
constitution of  
our existence  
in the world.*

Just as there is no point outside of existence from which objectively to survey it, there is no point outside of language from which to examine or critique it. "All thinking about language is already once again drawn back into language. We can only think in a language, and just this residing of our thinking in a language is the profound enigma that language presents to thought."<sup>67</sup> Nor can one get behind language, or

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<sup>64</sup> Hans-Georg Gadamer, "Semantics and Hermeneutics," in *Philosophical Hermeneutics*, 88-89.

<sup>65</sup> "The Universality of the Hermeneutical Problem," 15-16

<sup>66</sup> "The Universality of the Hermeneutical Problem," 16.

<sup>67</sup> Hans-Georg Gadamer, "Man and Language," in *Philosophical Hermeneutics*, 62.

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see through it. It is part of the constitution of our being and of our existence in the world.<sup>68</sup> Gadamer states this emphatically: "Language is the fundamental mode of operation of our being-in-the-world and the all-embracing form of the constitution of the world."<sup>69</sup> Our understanding or familiarity with the world does not precede language, but develops with it. "Learning to speak does not mean learning to use a preexistent tool for designating a world already somehow familiar to us; it means acquiring a familiarity and acquaintance with the world itself and how it confronts us. . . . We are always already at home in language, just as much as we are in the world."<sup>70</sup> Our existence is neither objective nor even subjective, but rather inter-subjective. "Language, then, is not the finally found anonymous subject of all social-historical processes and action, which presents the whole of its activities as objectifications to our observing gaze; rather, it is by itself the game of interpretation that we all are engaged in every day. In this game nobody is above and before all others; everybody is at the center, is 'it' in this game. Thus it is always his turn to be interpreting."<sup>71</sup>

*Our existence  
neither  
objective nor  
subjective but  
inter-subjective.*

Thus, statements of the natural law cannot be understood as objective formulas to be dogmatically applied, but as communicative expressions always in need of interpretation into the hearer's own particular circumstances. They seek to evoke a response within the soul of the hearer, not simply to present a symbolic equation. Kierkegaard emphasized that the goal of inter-subjective moral communication is to alert the hearer to "possibility," the potential to realize an existential good in

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<sup>68</sup> A point that has been made by others, such as Benedetto Croce: "A thought is not for us thought unless it is formulated into words." Benedetto Croce, *Guide to Aesthetics*, translated by Patrick Romanell (Indianapolis, IN: Hackett, 1995), 34. In *Aesthetic as Science of Expression and General Linguistic* Croce emphasizes the creative role of language. It is given to us, but we also create with it as we use it. "Language is perpetual creation. What has been linguistically expressed cannot be repeated, save by the reproduction of what has already been reproduced. The ever-new impressions give rise to continuous changes of sounds and of meanings, that is, to ever-new expressions. To seek the model language, then, is to seek the immobility of motion." Benedetto Croce, *Aesthetic as Science of Expression and General Linguistic*, translated by Douglas Ainslie (Lexington KY: Dunda Books, 2012), 213.

<sup>69</sup> "The Universality of the Hermeneutical Problem," 3.

<sup>70</sup> "Man and Language," 63.

<sup>71</sup> Hans-George Gadamer, "On the Scope and Function of Hermeneutical Reflection," in *Philosophical Hermeneutics*, 32.

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one's own circumstances.

Consequently, the constitutive role of what Gadamer calls tradition (what Finnis might call prejudice or bias) cannot be overlooked, or even overcome. "We are always already biased in our thinking and knowing by our linguistic interpretation of the world. To grow into this linguistic interpretation means to grow up in the world. To this extent, language is the real mark of our finitude. It is always out beyond us."<sup>72</sup> "It is impossible to set aside all preconceptions, for that would mean setting oneself outside of language. Thus, "language is not only an object in our hands, it is the reservoir of tradition and the medium in and through which we exist and perceive our world."<sup>73</sup> The world as constituted for us by language is something that is given to us; it is not something we come to know objectively but rather it is given to us already interpreted by language.

As a result, Gadamer attempts an unfashionable and controversial rehabilitation of the concept of prejudice.

It is not so much our judgments as our prejudices that constitute our being. This is a provocative formulation, for I am using it to restore to its rightful place a positive concept of prejudice that was driven out of our linguistic usage by the French and the English Enlightenment. . . . Prejudices are not necessarily unjustified, and erroneous, so that they inevitably distort the truth. In fact, the historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us.<sup>74</sup>

*Objectivity is an illusion; truth is not.*

Nor can reflection or critique "free" us from these prejudices or provide an objective basis for understanding, for this would require the person reflecting to remain entirely separate from the prejudice or tradition as he reflects upon it. But a world without prejudice is impossible. This is not to say that we cannot examine or even reject our prior prejudices and traditions. But the evaluation of prejudice can only be done from within our concrete existence, where we will still remain con-

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<sup>72</sup> "Man and Language," 64.

<sup>73</sup> "On the Scope and Function of Hermeneutical Reflection," 29.

<sup>74</sup> "The Universality of the Hermeneutical Problem," 9.

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strained by our particular historical and linguistic experience. Objectivity is an illusion; truth is not. Our prejudices can be changed for the better (and worse), but not from the outside, from an ideal or objective God's-eye view.

Our pre-understanding is changed from within existence, and, a Christian would add, through the grace of God speaking to us in our particular situation and through inter-subjective communication and interpretation.

### *Toward a new understanding of natural law*

Understanding the historically given (or conditioned) and inter-subjective nature of our existence allows a way forward for natural law theory. This approach to natural law would not be objective and reifying, but neither would it be relativistic. Rather, it would acknowledge that truth and goodness are real, and are particular and communicative, realized within historical circumstance. Such an approach would agree with Finnis, when, finally discussing the role of the divine in the natural law theory of Aquinas, he writes that "the plan of divine providence must extend to all things and all events in the entire history of the universe, in all their particularity, and—without subtracting from the strong freedom that persons can have in choosing—must shape them all to the common good of the universe." But it would consider Finnis to have gone wrong when he continues, "But we understand only certain general truths about the universe (and particular events only to the extent that they instantiate those general truths) and certain principles of practical reason picking out the basic human goods."<sup>75</sup> Rather, the opposite is true. We understand particular truths as they are subjectively accessible within our existence or communicatively conveyed to us. This tradition-sensitive view of natural law would not reject general statements or principles, but it would recognize them as the communicative tools they are, meant to convey no more than subjective truth to individual men and women in their particular circumstances. It would not reify them into everlasting formulas. Truth must always be spoken into particular circumstances, which means it must constantly be

*Truth and goodness are real, and are particular and communicative, realized within historical circumstance.*

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<sup>75</sup> Aquinas, 308.

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renewed by reinterpretation and restatement.

This approach to natural law theory would also recognize the role of imagination and feeling in recognizing and instantiating the natural law in particular historical circumstances. As Kierkegaard observed, communication cannot be merely objective, but must be subjective if it is to spark the imaginative apprehension of the possibility of a good becoming instantiated in a particular instance. As he put it, "In existence all the factors must be co-present. In existence thought is by no means higher than imagination and feeling, but coordinate."<sup>76</sup> As Gadamer states, "It is imagination that is the decisive function of the scholar. Imagination naturally has a hermeneutical function and serves the sense for what is questionable. It serves the ability to expose real, productive questions."<sup>77</sup> This function is not limited to scholarship, for imagination of the right sort will allow men to envision new instantiations of the good or innovative ways to restrict and ameliorate the bad.

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Such an imagination, which Edmund Burke called the moral imagination,<sup>78</sup> is not a vehicle for ahistorical flights of fancy, but rather it enables us to see possibilities within our circumstances. Nor is it unemotional or without passion. Even Finnis asserts that "Emotions enhance the goodness of good choices and actions. Any ideal of passionless, unemotional rational action is constantly repudiated by Aquinas."<sup>79</sup> The imagination is susceptible to temptation and corruption (a Christian like Kierkegaard would even say that this is its base, unregenerate state), but it is indispensable to the realization of the good.

The communicative aspect of this approach to natural law theory can hardly be overstated. From a Christian perspective it would recognize the divine communication intrinsic to natural law, which, while hardly unrecognized in the past, has often been misunderstood. For example, Finnis comments that,

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<sup>76</sup> *Postscript*, 310.

<sup>77</sup> "The Universality of the Hermeneutical Problem," 12.

<sup>78</sup> Burke's term has been adopted by a wide variety of philosophers and writers. A recent example is Gertrude Himmelfarb's *The Moral Imagination* (Chicago: Ivan R. Dee, 2006), which is a collection of brief essays on various luminaries, beginning with Burke himself. A more scholarly and philosophically ambitious study of this sort of imagination is Claes Ryn's *Will, Imagination, and Reason* (New Brunswick and London: Transaction Publishers, 1997; 1986).

<sup>79</sup> *Aquinas*, 75.

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“when developing his ideas more philosophically and without the pressure to make use of every traditional theological form of speech, Aquinas strongly insists that law is something addressed by one mind and will to others—by one freely choosing person to other freely choosing persons.”<sup>80</sup> Yet too often this communication has been reified or expressed by Finnis and scholastics in ostensibly final formulations that ignore the reality of language. Thus, Gadamer observes that for Christianity

Proclaiming the message does not mean merely repeating it. Anyone who proclaims the message in a senseless way, that is, in a literal way that is unrelated to concrete context so that it receives a false interpretation in a given situation, is not really proclaiming it at all. Proclaiming the message requires that we understand what it means and whom it is addressed to. . . . Thus understanding belongs essentially to the communication of the message and gives rise to intelligent transmission. In the last analysis that means that it requires translation. Thus, universal translation belongs to the essence of the Christian message.<sup>81</sup>

There is, in natural law theories, a tendency to ignore the very metaphor from which they take their name. A law is never able to fully comprehend all the particulars that it seeks to govern, and the immediate presence and rule of the statesman is always preferable in a given instance. It is the impracticality of the statesman’s attending to every circumstance that necessitates the law as an approximation of his wisdom and rule. But with regard to natural law, a Christian should recognize that the absolute ruler or statesman (God) is capable of being present in every circumstance and that statements of the natural law are pedagogical rules of thumb meant to alert others to possibilities of instantiating the good in their own particular circumstances. God’s general grace speaks to man in his concrete existence.

*God’s general grace speaks to man in his concrete existence.*

However, this understanding of natural law need not be specifically Christian. The emphasis on the experiential nature of the good and inter-subjective communication about it is not intrinsically Christian. Recognition of the moral grounding of our being can be had without appeal to a personal God, for it

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<sup>80</sup> Aquinas, 307.

<sup>81</sup> Hans-George Gadamer, “Aesthetic and Religious Experience,” in *The Relevance of the Beautiful and other Essays*, translated by Nicholas Walker (Cambridge: Cambridge University Press, 1998), 148.

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is experiential, though a Christian would add that revelation and the relationship it provides to God allow a more complete knowledge.

For the Christian, the fullness of the natural law is seen in the personal nature of God, who is a subject, not an object, and who communicates to men not only through commandments but through history, experience, communication with other men, and finally the experience of Himself. As Kierkegaard put it, "But more concrete than all other understanding, the only absolutely concrete understanding there is, is the understanding by which the individual comprehends himself in comparison with God."<sup>82</sup> Christianity would not deny that God may speak in the quietly whispered theophanies of moral realization in everyday life, even to those who do not know Him.

Such an approach to natural law could prove valuable for Christian and non-Christian alike by providing common ground for many different philosophic schools.<sup>83</sup> One exemplary model of this understanding of natural law is Edmund Burke. Though he was not a philosopher, one can glimpse in his writings and actions the presence of a historical and experiential understanding of natural law. At the height of Enlightenment rationalism and the beginning of the crisis that the rise of the historical consciousness forced upon it, he had an understanding that was capable of countering the excesses of both abstract rationality and relativistic nihilism.<sup>84</sup> A study that examines the historical and experiential nature of the natural law through his life and writings could be just what the new natural law theory needs.

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<sup>82</sup> *Postscript*, 420.

<sup>83</sup> Elements congenial to this understanding of natural law can be found in philosophical approaches as diverse as post-foundational liberalism and orthodox Catholic teaching, though such rapprochements as have been made tend to speak in terms other than those of natural law. See, for example, David Walsh's *The Growth of the Liberal Soul* (Columbia: University of Missouri Press, 1997) or Claes Ryn's *A Common Human Ground* (Columbia: University of Missouri Press, 2003).

<sup>84</sup> This has been touched on, but insufficiently developed in various studies such as Peter Stanlis's excellent *Edmund Burke and the Natural Law*.