

James Wilson, Necessary Truths, and the Foundations of Law

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I. INTRODUCTION

When James Wilson composed his lectures on law in the early 1790s, Americans were not yet living in Charles Taylor’s secular age, a time in which citizens in the Atlantic world could “engage fully in politics without ever encountering God, that is, coming to a point where the crucial importance of the God of Abraham for this whole enterprise is brought home forcefully and unmistakably.”¹ Wilson was writing nearly a century before Friedrich Nietzsche first declared, through the mouth of a madman, that God is dead. Even then, the madman’s announcement turned out to be premature, for as he realized, “[t]his tremendous event is still on its way, wandering; it has not yet reached the ears of men.”² The event still on its way was not so much the death of God as the death of the theological tradition that underpinned core liberal concepts we often take for granted, such as basic human dignity, natural rights,

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1. CHARLES TAYLOR, *A SECULAR AGE* 1 (2007).

2. FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 120 (Bernard Williams ed., Josefine Nauckhoff trans., Cambridge Univ. Press 2001).

and moral agency grounded in free will. The classicist Kyle Harper noted in a 2015 talk on these themes that the full realization of this tremendous event “would unravel in future time, and its consequences would be unsettling.”³

Wilson, an Associate Justice on the first United States Supreme Court and one of only six men to sign both the Declaration of Independence and the U.S. Constitution, seemed to understand the implications this event would have, should it ever reach men’s ears, and he endeavored in his lectures at the College of Philadelphia to shore up the theoretical foundations of American law. Though not an original thinker, Wilson did labor to consolidate and preserve the tradition of Anglo-American jurisprudence, and adapt that tradition to the new circumstances in the post-revolutionary United States. He wanted, his biographers have noted, to be the American Blackstone, and, like Blackstone, he located the basic concepts of the law within a broader theological framework.⁴ In this essay, I revisit the moral anthropology of Wilson’s *Lectures on Law*, which offers a window into the theoretical foundations of one major strand of American jurisprudence associated with the perennial natural-law tradition. That strand of jurisprudence provided an account of law that took very seriously the claims of both truth and reason.⁵ Before we consider—as we are in this symposium—whether “these bones shall live,” it is worth first recalling how they came to the valley of dry bones and what they looked like when they were alive.⁶

3. Kyle Harper, “Human Rights and Human Dignity: The Long View,” Lecture at the Kinder Institute on Constitutional Democracy, University of Missouri (Feb. 19, 2015); see also Kyle Harper, *Christianity and the Roots of Human Dignity in Late Antiquity*, in 1 CHRISTIANITY AND FREEDOM 123-48 (Timothy Samuel Shah & Allen D. Hertzke eds., 2016).

4. See generally 1 JAMES WILSON, THE COLLECTED WORKS OF JAMES WILSON, at xiv, xxiv (Mark David Hall & Kermit L. Hall eds., 2007). In his preface to the volume, Kermit Hall notes Wilson’s lectures on law were “intended to make him the American equivalent of Sir Edward Blackstone, the great English legal commentator” and that his “ambition was entirely in keeping with his goal of becoming the American Blackstone.” Wilson was, however, quite critical of Blackstone precisely where he thought Blackstone’s philosophy and theology might inadvertently imply the modern view that sovereignty is merely about power divorced from considerations of transcendent goodness – something discussed later in this essay.

5. See generally James R. Stoner, *Common Law and the Law of Reason*, in FOUNDATIONS OF LAW 284-88 (Adam J. MacLeod & Robert L. McFarland eds., 2017) (explaining common law, natural law, and natural theology are separate but related concepts).

6. The title of the symposium – “Resurrecting Truth in American Law and Public Discourse: Shall These Bones Live?” – is an allusion to Ezekiel 37:5, where the Hebrew prophet Ezekiel has a vision of standing in a valley of dry bones. Yahweh then asks Ezekiel whether these bones can live. The prophet’s uncertain answer is, “O Lord GOD, you know.”

II. LOSING SIGHT OF THE PRIMARY THINGS

Hadley Arkes, an emeritus professor of jurisprudence who now directs the James Wilson Institute for Natural Rights and the American Founding, once observed that it “has taken generations of lawyers to make obscure and to forget the most obvious things around us – or within us.”⁷ From a different angle, however, we might say the framing assumptions of our public culture no longer give an adequate account of the primary things we see around us and within us, leaving us uncertain and anxious about what to do with this tension. The primary things I have in mind are basic and foundational: the value of individuals, the human capacity for choice, the reliability of reason, and the reality of goodness. This is not an exhaustive list, but these are the kinds of taken-for-granted concepts that the reductive materialistic assumptions of our secular age routinely call into question.

One example of the discrepancy between the framing assumptions of our age and a concept we take for granted was provided by a recent story in *The Atlantic* entitled, “There’s No Such Thing as Free Will.”⁸ Philosophers and theologians, of course, have debated the question of free will for millennia. What was new was the confidence with which the article pronounced that neuroscience had settled the debate. Chemistry and physics, according to the author, can explain every thought, every hope, and every dream (and this would of course include our thoughts about determinism, or free will, or anything else). This is an old assertion, purportedly supported by new evidence from neuroscience, and the implications are indeed unsettling, for it would make freedom and moral responsibility illusory. As a character in C.S. Lewis’ *That Hideous Strength* contends, after thinking this through, such a state of affairs would mean that “[s]ocial relations are chemical relations.”⁹ On this view, politics and law are, and can only be, applied chemistry. One implication is that the analytic distinction between freedom and tyranny, consent and coercion, persuasion and propaganda, and ultimately sanity and insanity, begins to break down.

These dire implications do not necessarily make the view false; Nietzsche might have been right when he asserted that free will is

7. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS 78 (2010).

8. Stephen Cave, *There’s No Such Thing as Free Will*, ATLANTIC (June 2016), <https://www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing-as-free-will/480750/>.

9. C.S. LEWIS, THAT HIDEOUS STRENGTH 252 (HarperOne ed. 2003).

the “foulest of all theologians’ artifices.”¹⁰ Indeed, it could be the case that the foundational beliefs of civilization are all illusory – that the truth is a poison pill that eventually will lead to our ruin. Perhaps, to borrow that famous line from the movie *A Few Good Men*, we simply cannot handle the truth. The really interesting part of the *Atlantic* article pronouncing that free will does not exist, then, was its subtitle: “But we’re better off believing in it anyway.”¹¹ Within a discussion of philosopher Saul Smilansky’s contention that we should embrace the illusion, the article explains (perhaps with a sense of irony), “if the *choice* is between the true and the good, then for the sake of society, the true must go.”¹²

According to Smilansky, the truth is that there is an unbroken chain of physical cause and effect from which we cannot escape and which determines all that is or will be; but belief in this truth of the human condition is contrary to our good. The truth, as Smilansky sees it, is contrary to our good, because it empties the world of purpose and meaning, which provide the crucial motivation for individuals to carry on the project of civilization. The cold reality, on this view, is that the same physical laws that determine the course of our lives, actions, and thoughts will lead eventually to our physical entropy and decay. As that other philosopher, Jim Carrey, said recently on the red carpet at an awards ceremony, “[w]e’re going nowhere. It is a big pageant of nothing, rising out of nothing, and happening for no one.”¹³ From this vantage point, moral nihilism seems to be a reasonable conclusion as we look into the abyss of death, but the author of the *Atlantic* article highlights the worry that the nihilistic outgrowth of materialism will undermine the good of society.

Setting aside whether the concept of good is meaningful in this context, let us note that the problem was acknowledged in Western theology and jurisprudence before neuroscientists began studying the brain. Biblical commentators, for example, have long interpreted one of the consequences of the fall of man to be humanity’s tendency to elevate material reality as the ultimate or highest source of meaning. As R.R. Reno writes in his recent commentary on Genesis, synthesizing the insights of classical Jewish, Catholic,

10. FRIEDRICH NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 499 (Walter Kaufmann ed., 1977).

11. Cave, *supra* note 8.

12. *Id.* (emphasis added).

13. Rai, *Venezia 74 – Il Red Carpet di Jim Carrey*, YOUTUBE (Sept. 6, 2017), <https://www.youtube.com/watch?v=CxF6IRSuDCA>.

and Protestant interpreters, “When the eye of the soul becomes carnal, taking the physical and finite as the measure of all things, the testimony of creation awakens a sense of shame. We know ourselves pursuing a futile life-project—even as we commit ourselves to its futility.”¹⁴ Smilansky and others, of course, might see this tradition as useful nonsense. Tabling that question, we can say that people have long been aware of the disheartening implications of a worldview that makes the physical and finite the measure of all things, and it arguably is our deep longing for the infinite and immortal that leads us to be disheartened.¹⁵

III. RETHINKING THE CONSTITUTION’S HIGHER-LAW BACKGROUND

Alongside the conversation about free will, there has been a related debate going on for some years in the United States about whether what Edward Corwin called the “higher law” background of American constitutionalism is actually backed up by a higher law, or whether natural law is just the foulest of all political theorists’ artifices.¹⁶ Writing around the same time Corwin was teaching at Princeton and leading the American Political Science Association, Columbia University psychologist Edward Thorndike drew out the full logic of the modern materialistic outlook, which poses a unique challenge to the natural-law tradition. “The life of a dog or a cat or a chicken . . . consists largely of and is determined by appetites, cravings, desires and their gratification . . . So also does the life of man, though the appetites and desires are more numerous, subtle, and complicated.”¹⁷ If Thorndike was right – if our lives are determined entirely by our appetites, cravings, and desires – then there seems no way for us to speak intelligibly about making choices, or about being morally responsible for our actions in any meaningful sense. Our lives and identities could then be reduced to our biochemical composition, as we have already seen, and we would at any moment be the obedient servants of our passions and appetites, since it could not be otherwise. Reason, accordingly, would not be the rightful ruler of our desires but would, as Hobbes

14. R.R. RENO, *GENESIS 92* (Brazos Press 2010).

15. See, e.g., Sarah Beth V. Kitch, *The Immovable Foundations of the Infinite and Immortal: Tocqueville’s Philosophical Anthropology*, 60 *AM. J. POL. SCI.* 947-57 (2016) (making a similar argument as an interpretation of Tocqueville).

16. See EDWARD S. CORWIN, *THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Liberty Fund 2008).

17. MICHAEL SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 47 (2010) (citing EDWARD THORNDIKE, *HUMAN NATURE AND THE SOCIAL ORDER* 43 (1940)).

maintained, simply serve as “[s]couts and [s]pies” to “find the way to the things [d]esired.”¹⁸ This grim modern outlook makes its own claim to truth, but the truth is human beings are not so special, and human reason can never know or discern what are good or choice-worthy or rightful ways of living.

Public discourse is impoverished by such an outlook, since the purpose of debate about public affairs and the law could not be to reason together about how we ought to live, but rather strategically to negotiate the terms of our common life in a way that allows us to satisfy our desires. This is the view Oliver Wendell Holmes seemed to take in his famous 1918 *Harvard Law Review* article on natural law, where he insisted that “[d]eep-seated preferences cannot be argued about” since reason does not disclose “what we should want to want.”¹⁹ *Want* is the foundation of human behavior, Holmes suggested, and our wants do not take their orders from reason. When we, like Holmes, dispense with the rational *ought*, however, the a-rational will is all that remains. And if it is true that practical reason can ever only be a foot soldier taking marching orders from appetites and passions, then at the bottom of every argument is simply a deep but rationally inscrutable preference. About this outlook, we can say, at least, that it rejects root and branch the foundational anthropology of American jurisprudence and undermines the cogency of many basic legal concepts still scattered throughout the law.

James Wilson’s account of the law, grounded ultimately in theology, exemplifies this foundational anthropology of American jurisprudence. The very first line in his first substantive lecture begins with the observation that “[o]rder, proportion, and fitness pervade the universe. Around us, we see; within us, we feel; above us, we admire a rule, from which a deviation cannot, or should not, or will not be made.”²⁰ This rule that we admire applies to everything in existence, including the “great and incomprehensible Author, and Preserver, and Ruler of all things” – the God who “himself works not without an eternal decree.”²¹ With this beginning lecture, Wilson dives right into a complex philosophical and theological dispute about the relationship between goodness and power that ultimately traces back to Plato’s *Euthyphro*. Wilson’s answer to that question

18. THOMAS HOBBS, *LEVIATHAN* 45 (A. R. Waller ed., Cambridge Univ. Press 1904) (internal punctuation omitted).

19. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 40-44 (1918).

20. WILSON, *supra* note 4, at 464.

21. *Id.*

– that “from almighty power infinite goodness can never be disjoined”²² – is a direct critique of Blackstone’s definition of law as a “rule of action, which is prescribed by some superiour, and which the inferiour is bound to obey.”²³ Wilson’s insistence on the unity of goodness and divine power provides a crucial underpinning for his later accounts of natural law, the defining characteristics of sovereign power, and the legitimacy of rooting political obligation in the consent of the governed. I will eventually return to these weighty topics, but let me pause to note that Wilson’s lectures begin by highlighting several important strands of thought from the perennial natural-law tradition, which he understands to be woven into the new constitutional and legal fabric of the young United States. Knowing something about the broad contours of the natural-law tradition, then, is an essential prerequisite to evaluating the significance of Wilson’s lectures.

IV. THE PERENNIAL NATURAL-LAW TRADITION

At a basic level, the law of human nature is a standard of right and wrong behavior that we know and that we can expect other people to know as well. It is “law” because it imposes itself on us as obligation, and it is “natural” because it belongs to that part of our nature that is distinctively human, our reason. At times our moral duties under the natural law will require us to suppress or redirect our passions and appetites. To put it another way, the rational part of our nature is the rightful ruler of those parts of our nature we share with other organisms. As Aristotle noted, animals make noises to communicate pleasure and pain, but human beings reason with each other about what is just or unjust.²⁴ As rational animals, it is uniquely in the nature of human beings to reason about justice, but in order to do so there must be something – some transcendent standard or grounding of right – for us to reason about.

My own introduction to some of these ideas, like so many others in the twentieth-century, came from reading C.S. Lewis’ *Mere Christianity*, the published version of a series of broadcast talks he delivered for the BBC during World War II. Lewis, then teaching English literature at Oxford’s Magdalen College, had become a recognized public intellectual, and the BBC asked him to deliver a se-

22. *Id.* at 503.

23. *Id.* at 471.

24. ARISTOTLE, *POLITICS* 5 (Benjamin Jowett trans., Batoche Books 1999).

ries of talks reintroducing Britons to the basic tenets of Christianity.²⁵ Rather than beginning with Christianity's core doctrines as outlined in the ancient creeds of the church, however, Lewis began his first talk by describing what he called the law of human nature. Starting with our lived moral experiences, Lewis then pushed his audience to consider the consequences of abandoning the idea that such a transcendent standard does in fact exist. If there is no natural law, he insisted, "then all the things we said about the war were nonsense. What was the sense in saying the enemy were in the wrong unless Right is a real thing which the Nazis at bottom knew as well as we did and ought to have practiced it?"²⁶ Pivoting from the reality of evil – as it was laid bare by Nazism's political project – Lewis insisted that *we* also do not behave as we ought. "None of us are really keeping the Law of Nature," Lewis concluded, and these two facts—there is a law of nature and we do not keep it—are, Lewis asserted, "the foundation of all clear thinking about ourselves and the universe we live in."²⁷

These seemed to me at the time – and still seem – to be some pretty big claims with profound implications for political life. The claims are also consistent with the way many people experience the world. As Paul reflected on his own moral experience in his epistle to the Romans, "I do not do the good I want to do, but the evil I do not want to do – this I keep on doing." Later, he wrote, "Although I want to do the good, evil is right there with me."²⁸ One does not have to be a Christian to understand the experience Paul described here. Lincoln once quipped in a debate that we would have discovered that men are desperately selfish even without the Bible, and I think we also would have discovered that we do not always do the things we know we ought to do.²⁹ This is a fact of the world as we experience it. We long for righteousness and justice, but our world is corrupt, because we are corrupt. Our experience of the world as somehow less than what it ought to be is a fact of our existence, and natural-law theory tries to make sense of the fact.

As a natural-law theorist, Lewis was, as Ayn Rand contended, "a pick-pocket of concepts."³⁰ His strength was not in originality but

25. See generally GEORGE M. MARSDEN, C.S. LEWIS'S "MERE CHRISTIANITY": A BIOGRAPHY (Princeton Univ. Press 2016).

26. C.S. LEWIS, MERE CHRISTIANITY 5 (HarperOne 2001).

27. *Id.* at 7-8.

28. Romans 7:15.

29. 3 ABRAHAM LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 310 (Roy P. Basler ed., 1953).

30. AYN RAND, AYN RAND'S MARGINALIA: HER CRITICAL COMMENTS ON THE WRITINGS OF OVER 20 AUTHORS 92 (Robert Mayhew ed., 1995).

rather in synthesizing and communicating a corpus of knowledge. Lewis was well-versed in the classical theory of natural law, as it had been developed by the ancient Greeks and Romans, and the early Christians. The citations in his famous book *The Abolition of Man*—listed as the seventh best book of the twentieth century by *National Review* magazine³¹—include Plato, Aristotle, Jesus, Paul, Augustine, Aquinas, and the 17th Century Anglican theologian Richard Hooker. As ecumenical as Lewis tried to be, he was in fact aligning himself with a distinct tradition of thought. In his academic magnum opus, *English Literature in the Sixteenth Century*, Lewis described the twists and turns of modern political philosophy and theology, and wrote that with Hooker “the medieval conception of Natural Law” had “reached its fullest and most beautiful expression.”³² Hooker, in turn, is a connecting link from the classical natural-law tradition to many of the American founders such as James Wilson, who read Hooker and cited him approvingly.

Beginning with Aristotle, that tradition taught there is a purposeful order to the world. Nature is imbued with purposes, and to act in accordance with our nature means to act consistently with the way we are designed to function. It is proper to human nature to act according to reason, that is, for reason to guide our passions and appetites to appropriate ends and objects. When reason rules, it does so by identifying what is good according to our nature (i.e., the kind of thing we are and are designed to be) and pursuing it. These, then, are the foundational questions of ethics: What kinds of things are good? How do we attain these goods through our actions? That some things are good, and that we ought to pursue what is good in our day-to-day lives, is axiomatic. It is foundational to practical reason in the way that axioms are foundational to mathematics. This is what we mean by “self-evident.” If you know what it means to be parallel, then you will agree that parallel lines do not touch. If you don’t see it, however, I will not be able to prove it to you. In the same way, ethics will rest on some very basic axioms that are indemonstrable and underived. From those axioms we reason about how to live well, but in order to see the axioms—to understand what is noble and just, as Aristotle says—we must first be

31. *The Non-Fiction 100*, NAT’L REV. (Mar. 3, 1999), <http://www.nationalreview.com/articles/21571/non-fiction-100>.

32. C.S. LEWIS, *ENGLISH LITERATURE IN THE SIXTEENTH CENTURY, EXCLUDING DRAMA* 50 (1954).

brought up in good habits, since vice mars our moral vision.³³ Happiness is the term Aristotle used to describe a life well lived, but we cannot achieve happiness on our own. This is why Aristotle famously said that man is by nature a political animal – not because we spontaneously engage in politics, but because living well as human beings requires that we live in political communities. A man who can flourish on his own, Aristotle thought, would be either a beast or a god.³⁴

With Aristotle, we are not yet at the natural-law tradition, but we are close. Other theorists soon identified the principles that lead to human happiness with law. As the Roman statesman and philosopher Cicero wrote, in the voice of Laelius, “[t]here is a true law, a right reason, conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil.”³⁵ There is nothing distinctly Christian about what the ancient tradition taught, but many Christians have thought it was for the most part correct: our universe *is* imbued with purposes; human beings *should* act according to reason; we *are* by nature political animals; these principles *do* impose themselves on us as law. Christians, however, have qualified or at least emphasized a few things about the ancient tradition. First, the natural law has a law giver. It is the product of the mind of God, part of the divine reason, or what Aquinas, Hooker, and James Wilson each called the eternal law. Second, law is an ordinance of reason made for the common good by someone with authority, and it is made known to those who are morally obligated to obey.³⁶ Natural law fits this description. It is an ordinance of reason made by God for the care of the human community and promulgated through the deep structure of the human psyche. Human law, to be truly law (and not simply an act of violence or coercion), must also fit this description; it must be reasonable, made for the common good by someone with authority to make law, and made known. If it is not, then it is defective as law to the degree that it deviates from the archetype.

33. See ARISTOTLE, NICOMACHEAN ETHICS 6 (Roger Crisp ed. & trans., Cambridge Univ. Press 2000).

34. ARISTOTLE, *supra* note 24, at 6.

35. MARCUS TULLIUS CICERO, *The Treatise on the Republic*, in 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO bk. 3, para. 36 (Francis Barnam trans., Edmund Spettigue 1841-42), <http://oll.libertyfund.org/titles/cicero-treatise-on-the-commonwealth--5>.

36. See, e.g., 2 THOMAS AQUINAS, SUMMA THEOLOGICA pt. I-II, question 90, art. 4 (Fathers of the English Dominican Province trans., Daniel J. Sullish rev., Encyclopedia Britannica, Inc. 1952).

V. NATURAL LAW AND THE AMERICAN FOUNDING

These broad claims informed the Anglo-American legal tradition and influenced the way the American founders thought about law. To take just one example, consider the often-cited excerpt from nineteen-year-old Alexander Hamilton's defense of the American revolution against criticism from the royalist Episcopalian Bishop Samuel Seabury. Drawing his argument largely from Blackstone's *Commentaries*, the young Hamilton asserted:

Good and wise men, in all ages, have . . . supposed that the deity, from the relations we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever.

This is what is called the law of nature, 'which, being coeval with mankind, and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original.' BLACKSTONE.³⁷

This was as true for the future Republicans as it was for the future Federalists. It was Thomas Jefferson, after all, who in the first draft of the Declaration of Independence appealed to the "laws of nature & of nature's god" and affirmed the "sacred & undeniable" truth that "all men are created equal" and "from that equal creation they derive rights inherent & inalienable among which are the preservation of life, & liberty, & the pursuit of happiness."³⁸

Although he was not personally fond of Blackstone, whom he later called a "honied" Tory,³⁹ the first two paragraphs of the Declaration of Independence echoed some of the major theoretical themes in Blackstone's *Commentaries*. As Carli Conklin notes, "Blackstone's discussion of the pursuit of happiness was both preceded by, and informed by, his discussion of the laws of nature and

37. 1 ALEXANDER HAMILTON, THE WORKS OF ALEXANDER HAMILTON 62-63 (Henry Cabot Lodge ed., G. P. Putnam's Sons const. ed. 1904).

38. Thomas Jefferson, *Rough Draft of the Declaration of Independence* (1776), in AMERICAN SOUL: THE CONTESTED LEGACY OF THE DECLARATION OF INDEPENDENCE 7 (Justin Buckley Dyer ed., 2012).

39. Letter from Jefferson to Madison (Feb. 17, 1826), <https://founders.archives.gov/documents/Jefferson/98-01-02-5912>. For discussion and sources, see Carli Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 201 n.21 (2015).

of nature's God."⁴⁰ The various strands of the natural-law tradition come together in Blackstone's pithy account of God's one paternal precept: "that man should pursue his own true and substantial happiness."⁴¹ James Wilson, following Blackstone, also insisted that God's "will is graciously comprised in this one paternal precept – Let man pursue his happiness and perfection."⁴² This comment makes sense within the larger theological and philosophical framework of Wilson's lectures. As noted above, Wilson began his first lecture by observing the pervasive order, proportion, and fitness of the universe. Everything, including God, is governed by law, Wilson insisted. The study of law, then, as a discipline, is the study of an enduring and fundamental feature of the universe we live in.

For human beings, law presupposes freedom and the possibility of choice governed by reason. In practical affairs, we "propose an end," that is, a purpose, for our actions in light of some good we want to attain. The "brute creation," by contrast, "act not from design."⁴³ Animals are still governed by law, but the law that governs them is sub-rational. Human beings, still subject to sub-rational appetites and passions, also exhibit the rational capacities that make it possible to choose against appetite and passion for the sake of a good discerned by reason. This is why natural-law thinkers have so closely connected reason and law. The typology of law that James Wilson develops makes the first classification of law either divine or human. Under the heading of divine law, Wilson includes the revealed law (i.e., Scripture); eternal law (i.e., law internal to and governing God's character); laws of nature (i.e., laws governing irrational and inanimate creation); law celestial (i.e., laws of angels and spirits made just); and the natural law (i.e., the moral law known to human beings by reason and the moral sense). The last category of natural law is further subdivided into the law of nature (when addressed to human beings as such) and the law of nations (when addressed to societies of human beings as such). Human law is what other natural-law theorists call positive law, or the law posited in a particular community, and it is further divided into the

40. Conklin, *supra* note 39, at 201 n.22; cf. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 28-43 (George Sharswood ed., 1893), <http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-vol-1>. Conklin notes that Blackstone uses the phrase "the law of nature and the law of revelation" and later "the law of nature, and the law of God."

41. BLACKSTONE, *supra* note 40, at 41.

42. WILSON, *supra* note 4, at 523.

43. *Id.* at 468.

municipal law (i.e., positive law within a single commonwealth) and the voluntary law of nations (i.e., international positive law).⁴⁴

Natural law, in Wilson's schema, is truly law. It has an authoritative source, and it is known to us by reason and the moral sense. The first principles of natural law are themselves "engraven by God on the hearts of men" and "in this manner, [God] is the promulgator as well as the author of the natural law."⁴⁵ Yet it is important to recognize that the authority of the natural law does not come from God's superior physical strength. Power, by itself, is neither necessary nor sufficient to establish legitimate authority; it must also be connected with goodness. This is why Wilson begins his lecture on natural law with an attack on theological voluntarism, or the theory that God's authority derives from his superior strength. This is crucial for Wilson, because there is an analogy between God's rule and our own. Power, wisdom, and goodness, are united and inseparable in the "incomprehensible Archetype."⁴⁶ Both God's authority and our obligation flow from this fact. God is powerful, yes. But He is also wise and good, and the rules He promulgates are for our own good. His one paternal precept can be reduced to the command that we pursue our own happiness, because his commands are *all* designed to direct us to our proper end, which is our happiness or flourishing.

VI. AXIOMS AND THE MORAL SENSE

Within this broader discussion, asking whether we have good reasons to obey God is akin to asking whether we are obliged to obey God's one paternal command; must we pursue our own happiness? Wilson offers an answer that shows his indebtedness to the school of Scottish moral sense philosophy: "I can only say, I *feel* that such is my duty. Here investigation must stop; reasoning can go no farther."⁴⁷ The term "feel" is equivocal here. Wilson's Scottish contemporaries such as David Hume, Adam Smith, and Thomas Reid debated whether moral obligations are known through the intellect or through sentiment.⁴⁸ Mark David Hall notes that Wilson rejected the school associated with Hume and Smith and followed the school associated with Reid, which maintained the broader natural-law tradition's tenet that human reason apprehends the moral law.

44. *Id.* at 497-98.

45. *Id.* at 470.

46. *Id.* at 503.

47. *Id.* at 508.

48. MARK DAVID HALL, *THE POLITICAL AND LEGAL PHILOSOPHY OF JAMES WILSON* 68-72 (1997).

Reid, in particular, “contended that the first principles of morality are known through common sense, which is a degree of reason.”⁴⁹ Interestingly, the Oxford English Dictionary includes as an entry for the word “feel” a chiefly Scottish and now obsolete meaning that indicates “mental perception or apprehension; understanding, comprehension; knowledge.”⁵⁰ This is foreign to how we often talk about sense perception today, but “sense” and “feel” are equivocal terms in their eighteenth-century usage that may indicate knowledge held by the intellect rather than an emotion or sentiment. In context, what Reid and Wilson have in mind when they talk about the moral sense is something very similar to what classical natural lawyers call the first principles of practical reason, that is, the indemonstrable and underived axioms that are at the foundation of every body of knowledge, including morality and law. “The science of morals, as well as other sciences,” Wilson insists, “is founded on truths, that cannot be discovered or proved by reasoning.”⁵¹ These truths provide the foundation for our reasoning, but they are known intuitively. There can be no further demonstration or proof, for on them demonstrations and proofs depend.

The point is that moral reasoning begins with an intuitive grasp of basic moral categories. Those first principles might indeed be very basic. Aquinas boiled down the first principle of practical reason to the proposition that “good is to be done and pursued, and evil is to be avoided.”⁵² Blackstone and Wilson reduce the first precept to pursuing our own happiness and perfection. Philosophers might find subtle distinctions between these different ways of thinking about the foundational axiom of practical reason, but both of these formulas develop from the same tradition, and they both operate at a high level of generality. Neither tells us what is good, or evil, or what contributes to our happiness. Yet neither does the principle of non-contradiction tell us the answer to any particular math problem. It is a principle that exists at a level of abstraction, but it is one that is foundational to the entire enterprise that comes after. If a person did not feel or intuit the basic moral categories, “it would not be in the power of arguments, to give him any conception of right and wrong. These terms would be to him equally unintelligible, as the term colour to one who was born and continued blind.”⁵³

49. *Id.* at 71.

50. *Feel*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

51. WILSON, *supra* note 4, at 508.

52. AQUINAS, *supra* note 36, at question 94, art. 2.

53. WILSON, *supra* note 4, at 509.

Moral ignorance might be theoretically possible, but it is empirically rare, according to Wilson. Languages, “not invented by philosophers,” testify to the universality of the moral sense, since every language has words to denote right and wrong, praiseworthy, detestable, etc.⁵⁴ This does not mean that every culture is equally advanced in the science of morality, however. Appealing to Aristotle explicitly, Wilson insists that to “ascertain moral principles, we appeal not to the common sense of savages, but of men in their most perfect state.”⁵⁵ According to Wilson, human beings gain, and develop, human knowledge in three principal ways. First, they encounter and gain knowledge of moral reality through conscience and the moral sense.⁵⁶ Next, reason interrogates and corrects the moral sense about the goodness of certain ends and the most prudent means of achieving those ends in practice. Reason, he insists, “contributes to ascertain the exactness, as to discover and correct the mistakes, of the moral sense.”⁵⁷ The third, and final, source of moral knowledge, according to Wilson, is Holy Writ, which refines and exalts the moral knowledge known already through conscience and reason. The writers of the Bible, as he notes, “generally presuppose a knowledge of the principles of morality” and the Scriptures are “addressed to rational and moral agents, capable of previously knowing the rights of man, and the tendencies of actions; of approving what is good, and disapproving what is evil.”⁵⁸

VII. RETURNING TO THE PRIMARY THINGS

After this discussion, what then can we say about the law of nature? According to Wilson, we can say that it is immutable, universal, and progressive. It is immutable because “it has its foundation in the nature, constitution, and mutual relations of men and things.”⁵⁹ It is universal because “having its foundation in the constitution and the state of man, [it] has an essential fitness for all mankind and binds them without distinction.”⁶⁰ Finally, it is progressive in that “morals are undoubtedly capable of being carried to a much higher degree of excellence than the sciences, excellent as they are.”⁶¹ Even beyond its theological underpinnings, however,

54. *Id.* at 511.

55. *Id.* at 516.

56. *Id.* at 513-14.

57. *Id.* at 515.

58. *Id.* at 522.

59. *Id.* at 523.

60. *Id.*

61. *Id.* at 525.

Wilson's natural-law theory presumes basic things about reality that are contested and frequently denied. The first basic claim about reality is that there is such a thing as the self. (Odd as it sounds, some philosophers such as David Hume, and, more recently, James Giles, do deny that the individual self exists, insisting instead that personal identity is a fiction.)⁶² Second, these individuals have a rational nature. They are not simply a mass of tissue or a lump of cells, and this matters. In John Quincy Adams' 1841 *Amistad* argument, for example, he distinguished between merchandise and enslaved human beings, including "infant females, with flesh, and blood, and nerves and sinews."⁶³ He emphasized their embodied nature to underscore their humanity, and he underscored their humanity to insist they were rational creatures who were qualitatively different than merchandise – not that they were merely, or only, or reducibly, flesh and blood, nerves and sinews. Finally, practical reason discloses what is good for human beings, or what kind of life is choice-worthy. Living well, or achieving this good, requires all sorts of personal and communal virtues, and the preeminent political virtue is justice.

Natural rights are an aspect of natural justice, but the founders' natural rights theory is only a slice of a larger moral vision that includes duties and virtues as well as rights. James Wilson's lectures on law bring together these strands from the broader natural-law tradition, and the lectures modify and apply that tradition to the peculiar circumstances in the United States. Among the things he retains from the classical tradition is a certain understanding of human nature as somewhere between the nature of beasts and gods. What makes human beings unique is that they can give and understand reasons for action, and the language of practical reason employs normative terms such as right and wrong, just and unjust. Justice, in its classical definition, is the constant and perpetual will to render to each his own right. All justice, in an important sense, is social justice. The way we do acts of justice is by rendering to others what is owed to them, what is their own right. Justice, then, entails a relationship between individual duties and individual rights. The objective duty and the subjective right are therefore two sides of the same coin, and the same word can be used to describe both; it is right for me to render to another what is his right. Wilson

62. JAMES GILES, *NO SELF TO BE FOUND: THE SEARCH FOR PERSONAL IDENTITY* 1 (Univ. Press of America 1997).

63. Transcript of Oral Argument at 40, *United States v. Libellants of the Schooner Amistad*, 40 U.S. 518 (1841), http://avalon.law.yale.edu/19th_century/amistad_002.asp (argument by John Quincy Adams on Feb. 24, 1841).

thus does not take the modern path, cut by Hobbes and others, that begins with individual rights unbounded by morality, leads quickly to a war of all against all, and then prompts men to construct minimal duties designed to maintain peace.⁶⁴

One implication of this otherwise academic discussion is that natural rights and duties are in harmony, and deciding what justice requires in any particular case demands individual judgment. Because justice is rationally scrutable, our judgment about what justice requires is a rational judgment, even if it is informed, at the root, by an axiom known to the morally mature individual by intuition. Another implication is that there is a qualitative difference between human beings and what James Madison in *Federalist* no. 54 calls the “irrational creation.”⁶⁵ In contrast to domesticated animals, whom we rule rightfully for their own good without asking their permission, it is an injustice to govern a rational being without his consent. This is because human beings are naturally equal in the very limited sense that no one has a right by nature to rule another. Parents, of course, do rule children without their consent, but the goal of that relationship is the maturation of the child into an independent rational adult. There *is* a natural inequality between parent and child, but as James Stoner has explained, “Precisely what [the American revolutionaries] objected to in Tory political theory was *political* patriarchalism, the effort to form the state on analogy to the family. Natural equality meant that the king was not to act as father in relation to his people—not that fathers were not kings in their own homes.”⁶⁶

The family has, of course, largely been reconceived along liberal lines, but even now we do recognize a difference between the authority of a parent over a child, on the one hand, and the authority of one rational adult over another. Take the television show *Lost* as an example. Airing first in 2004, the hit ABC drama began in its pilot episode with a commercial jet liner crashing on an apparently deserted island in the South Pacific Ocean. The survivors quickly had to confront, through practical action, some of the core questions of political theory: who should rule, on what basis, and for what ends? The answer is intuitively different for parents and children, on the one hand, and free and equal adults, on the other. The answer James Wilson and most of the founders would have given to

64. Justin Dyer, *Natural Justice and the Amistad*, STARTING POINTS J. (Aug. 28, 2017), <http://startingpointjournal.com/natural-justice-amistad/>.

65. THE FEDERALIST NO. 54 (James Madison) (Clinton Rossiter ed., 2003).

66. James R. Stoner, *Is There a Political Philosophy in the Declaration of Independence?*, 40 INTERCOLLEGIATE REV. 7 (2005).

this question as it applies to free and equal adults is: we do, together, by mutual consent for the common good. But consent is bounded by moral limits; we must not consent to irrational or morally vicious things, and legitimate consent presumes some rational understanding of our own good.

Our own good is comprised of a right ordering of multiple goods, each of which is self-evidently good and intrinsically choice-worthy to the morally mature individual. Wilson does not attempt an exhaustive list, but these basic good things include life, knowledge, religion, and friendship. The aim of rationally ordering our lives around these goods is to flourish as human beings, that is, to be happy. Happiness is not whatever we happen to desire or will, however. We can be mistaken about what will make us happy, and we often are led astray by those worse angels of our nature. Natural rights therefore take their bearings from what leads to our flourishing by nature. It is thus intelligible both to think about individuals having natural rights, and to include among these rights the right to pursue happiness. The things we have a right to are things that are good for ourselves and others. As Lincoln would later say, there is no “right to do wrong.”⁶⁷ This, of course, does not mean that every wrong must be criminalized or brought within the purview of the state, but it does mean that the entire theory of natural rights rests on a thick moral framework. When we come together to create and consent to a government, we do so for the ultimate purpose of living well. Justice is simply one prerequisite for our flourishing, but not the whole of it.

VIII. THE FOUNDATIONS OF AMERICAN LAW

This theory of natural law and natural rights—seen as mutually compatible and working toward our individual and common good—gives a coherent foundation to our system of law and governance. As Paul DeHart has persuasively argued, the Constitution’s provisions and institutional arrangements (whatever the subjective intentions of its drafters) seem to presuppose a classical theory of sovereignty, the common good, and natural law and natural rights.⁶⁸ At the bottom of all of this are certain axiomatic propositions, what Alexander Hamilton described in the *Federalist* as “primary truths, or first principles, upon which all subsequent reasonings must depend.”⁶⁹ Consider Hamilton’s further elaboration of this concept:

67. LINCOLN, *supra* note 29, at 226.

68. PAUL R. DEHART, UNCOVERING THE CONSTITUTION’S MORAL DESIGN (2007).

69. THE FEDERALIST NO. 31 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

These contain an internal evidence which, antecedent to all reflection or combination, commands the assent of the mind. Where it produces not this effect, it must proceed either from some defect or disorder in the organs of perception, or from the influence of some strong interest, or passion, or prejudice. Of this nature are the maxims in geometry, that “the whole is greater than its part; things equal to the same are equal to one another; two straight lines cannot enclose a space; and all right angles are equal to each other.” Of the same nature are these other maxims in ethics and politics, that there cannot be an effect without a cause; that the means ought to be proportioned to the end; that every power ought to be commensurate with its object; that there ought to be no limitation of a power destined to effect a purpose which is itself incapable of limitation. And there are other truths in the two latter sciences which, if they cannot pretend to rank in the class of axioms, are yet such direct inferences from them, and so obvious in themselves, and so agreeable to the natural and unsophisticated dictates of common-sense, that they challenge the assent of a sound and unbiassed mind, with a degree of force and conviction almost equally irresistible.⁷⁰

The problem that Hamilton identified, however, and that still bedevils us today, is the tendency for self-interested passions and malformed moral character to lead our practical reasoning astray. This is what the political philosopher J. Budziszewski refers to as the problem of moral self-deception.⁷¹ Our personal interests or passions may not often lead us to deny the abstract axioms of geometry, although they might give us a personal incentive to deny the wrongness of an activity we want to engage in or deny the implications of empirical findings that cut against our preferred policy objectives. In the realm of practical reason, our own vices and base passions often pose obstacles that they do not pose for theoretical reason.

At a very foundational level, we might add the existence of truth to the list of primary truths Hamilton identifies. There is no way to deny that truth exists without falling into contradiction since the statement *there is no truth* is a claim that it is true that there is no truth. That, of course, is absurd, but seeing its absurdity relies on

70. *Id.*

71. J. BUDZISZEWSKI, *THE LINE THROUGH THE HEART: NATURAL LAW AS FACT, THEORY, AND SIGN OF CONTRADICTION* (2011).

other primary truths: of being (things exist), identity (things maintain identity through time), and non-contradiction (that things cannot be and not be at the same time and in the same respect). In the world of politics and ethics, there are other propositions with similarly axiomatic qualities that all build upon these other primary truths and introduce new ones. It is wrong to punish the innocent, for example – an axiom that presumes we are moral agents who choose courses of action for which we are morally responsible. The category of innocence implies that individuals are not blameworthy for things that they were powerless to effect. This is why deliberately driving a car into a crowd to murder innocent bystanders is qualitatively different than having a heart attack at the wheel and accidentally driving into a group of people, even if the consequences (in terms of damage to life and property) are the same. We hold someone morally responsible for the first action, but not the second, on the premise that human beings make choices, and these choices are morally meaningful. As Arkes observes, “we cast judgments only on those acts that take place in the domain of freedom, where people are free to choose one course of action over another.”⁷²

This whole body of primary truths and moral axioms cannot be proven or demonstrated. It simply has to be seen or apprehended or (to use James Wilson’s language) *felt*, which is another way of saying we know the truth of these things prior to applied moral reasoning, and these truths in fact provide the foundation of our moral reasoning. This is why the classic teachers of jurisprudence in our tradition used the terms law of nature and law of reason interchangeably. Locke in the *Second Treatise* says simply, “reason, which is that law . . .”⁷³ This understanding both provides the moral foundation of law and guides our interpretation of law. Written law does not free us from the law of reason; the written law itself rests on a mountain of moral assumptions, and at the base of that mountain are the axioms of practical reason. In interpreting and applying written law, we will be forced to make interpretive choices that depend at every turn on some conception of what is good or choice-worthy or authoritative, and in our legal and moral disquisitions, just like “disquisitions of every kind,” as Hamilton reminds us,

72. HADLEY ARKES, CONSTITUTIONAL ILLUSIONS AND ANCHORING TRUTHS: THE TOUCHSTONE OF THE NATURAL LAW 52 (2010).

73. JOHN LOCKE, THE TWO TREATISES OF CIVIL GOVERNMENT ch. 2, § 6 (Thomas Hollis ed., London: A. Millar et al. 1764), <http://oll.libertyfund.org/titles/locke-the-two-treatises-of-civil-government-hollis-ed>.

there will be “certain primary truths, or first principles, upon which all subsequent reasonings must depend.”⁷⁴

IX. RESURRECTING TRUTH

Returning now to the question that began our symposium: Shall these bones live? Can we resurrect truth in American law and public discourse? The practical question is what it would take for the people who control the key institutions in our society to embrace the old idea that the axioms of practical reason are objective rational truths, and not merely the subjective byproducts of our bio-chemistry. In our modern world, there seem to be three main hurdles that we must get over, as a society, before returning to the idea that statements about what *ought* to be can be as true or false as what *is*. The first is physical determinism. So long as our choices are entirely determined by physical causes, freedom is an illusion. If freedom is an illusion, then nothing is right or wrong, since unavoidable necessity is not a moral category. Second, and relatedly, is the general philosophy of materialistic evolutionism, which reduces all of reality to its material components and depicts life as emerging from the blind and purposeless process of natural selection. (Note this philosophy is different than the biological theory of evolution by natural selection, which is reconcilable with the larger theological and jurisprudential natural-law tradition if it does not already begin with the philosophical premise of reductive materialism.) Arguably, such a philosophy does not provide an adequate account of why reason is reliable in the first place⁷⁵ or even how there can exist such things as minds, consciousness, values, and intentions.⁷⁶ Finally, theological voluntarism – which understands moral norms to be derived from the arbitrary will and power of God rather than the reason and goodness of God – denies the existence of rationally-discernible moral truths just as much as determinism or materialistic evolutionism.⁷⁷

74. THE FEDERALIST NO. 31 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

75. See ALVIN PLANTINGA, WHERE THE CONFLICT REALLY LIES: SCIENCE, RELIGION, AND NATURALISM (2011).

76. These are controversial assertions, of course, but see THE WANING OF MATERIALISM (Robert C. Koons & George Bealer eds., 2010) and THOMAS NAGEL, MIND AND COSMOS (2012).

77. This was the basic thesis of Pope Benedict’s controversial 2006 address at the University of Regensburg titled “Faith, Reason, and the University – Memories and Reflections.” See Benedict XVI, Address at the University of Regensburg (Sept. 12, 2006), https://w2.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg.html.

The stakes for how we answer these questions are high. In one of his best and most reflective essays on this topic, C.S. Lewis observed that:

[t]he very idea of freedom presupposes some objective moral law which overarches rulers and ruled alike. Subjectivism about values is eternally incompatible with democracy. We and our rulers are of one kind only so long as we are subject to one law. But if there is no Law of Nature, the ethos of any society is the creation of its rulers, educators and conditioners; and every creator stands above and outside his own creation.⁷⁸

Lewis' observation does not mean the natural law exists (although he of course thought it did). His narrower point is that the idea of natural law is essential to the idea of freedom, because, as he wrote elsewhere, it provides the foundation of "a rule which is not tyranny or an obedience which is not slavery."⁷⁹ In the modern world, some have been tempted to dispense with the metaphysical baggage of the natural-law tradition, but without metaphysics we are left simply with physics, and physics is about power, leverage, and force. If power is all there is, then everything is about power, including the arguments we engage in as academics.

The alternative to reason is strength: it has always been the alternative. In the reigning worldview of many intellectuals, material nature in an endless chain of cause-and-effect necessitates all human action. The strong rule, as must be the case, but strong can also mean clever if cleverness helps one gain power. For this reason, many academics see law and public discourse as little more than linguistic power struggles, necessitated in advance by the course of matter. It is a grim worldview that cannot give a coherent account of many of the fundamental concepts at the base of our law and politics, and cannot account for our actual lived experiences in the world. "Everyone knows," as the late Peter Lawler wrote, "that physics can't explain the physicist."⁸⁰ Physics, by itself, simply explains *away* the physicist – and much else. The older theological and metaphysical view gave us two basic things that so far we have not been able to recover: a confidence in practical reason and a be-

78. C.S. LEWIS, *The Poison of Subjectivism*, in *THE SEEING EYE* 111 (Walter Hooper ed., 1967).

79. C.S. LEWIS, *THE ABOLITION OF MAN* 74 (1943).

80. PETER AUGUSTINE LAWLER, *Defending the Personal Logos Today*, in *REASON, REVELATION, AND THE CIVIC ORDER: POLITICAL PHILOSOPHY AND THE CLAIMS OF FAITH* 104 (Paul R. DeHart & Carson Holloway eds., 2014).

lief in freedom. Both grew out of a deeper philosophical anthropology that understood human beings as rational animals unique in their capacity to deliberate about the standards of justice rooted in human nature. We must recover that understanding, and a broader worldview that makes it possible, if the bones of truth are to live on in our politics and our law.