

## Cross-Cultural Agenda

### Natural Law and Human Rights in Cross-Cultural Context

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**Abstract:** British sociologist and author, writing in his book, *THE GLOBAL PUBLIC SQUARE: RELIGIOUS FREEDOM AND THE MAKING OF THE WORLD SAFE FOR DIVERSITY*, wrote, “We are now seven billion people jostling together on our tiny planet earth.” He then raises the significant and profound challenge we face: “*How do we live with our deepest differences, especially those differences that are religious and ideological, and especially when those differences concern matters of our public life? How do we create a global public square and make the world safe for diversity?*”

This challenge requires us to answer three prior questions. First, do we have reason to believe in the measureless dignity and worth of each of us? Second, do we know how to live with our deepest differences that divide us? And third, how are we to settle our deliberations and debates in public life through reasoned persuasion rather than force, intimidation, and violence, even in the age of new media, new technology, and a global resurgence of religion. As Os Guinness puts it, “indispensable to solving these challenges is the extension of soul freedom for all.” What we mean by soul freedom is that inviolable freedom of thought, conscience, religion and belief that alone does full justice to the dictates of our humanity. It expresses human dignity; it promotes freedom and justice for all; it fosters healthy giving, caring, and peaceful and stable societies as bulwarks against the countless abuses of power and equally oppression of human dignity.

C. S. Lewis wrote in his book, *THE ABOLITION OF MAN: HOW EDUCATION DEVELOPS MAN’S SENSE OF MORALITY*, that when we appear to be saying something important about something, we are actually only saying something about our own feelings. Until modern times, all humanity believed the universe to be such that certain emotional reactions on our part could be either congruous or incongruous to it – believed that objects did not merely receive, but could merit our approval or disapproval, our reverence or our contempt.

This paper explores these ideas in the context of meaning, natural law, human rights, and Chinese traditional culture. It also represents a mental, spiritual, and intellectual journey as I have explored these subjects, and more recently in the context of my research in China. It is a journey, and I simply do not have all of the answers to the questions.

**Keywords:** worldview, *a priori* Truth, metaphysics, epistemology, axiology, rule of law, justice, natural law, human rights, religion, speech, assembly, property.

## INTRODUCTION

There was a recent *New York Times* article in which the author, a U.S. citizen living on American soil awoke one morning to discover that he was a fugitive from justice because Hong Kong authorities had issued a warrant for his arrest because he promoted democracy in Hong Kong. The charges were inciting secession, colluding with foreign powers, which were part of the newly enacted National Security Law imposed by the Chinese Communist Party. Both of these crimes were punishable by up to life in prison. It did not matter that he was an American citizen for 25 years, having left Hong Kong in 1990 to live in the United States. According to Hong Kong authorities, he had violated Article 38 of the new law which stated: “This Law shall apply to offenses

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under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.” As I read these stories, I wondered about the extraterritorial reach of Chinese law to non-Chinese citizens, for that matter, the reach of any national law beyond the reach of its sovereignty under international law.

The famous African American social reformer, orator, abolitionist, statesman, and writer, Frederick Douglass, after escaping slavery in Maryland U.S.A., called freedom of speech “the dread of tyrants. It is the right which they first strike down. They know its power.” Tyrants knew that they could gag those they ruled, but in free nations people were free and their rights were protected. As reflected above, China is increasing its reach, attempting not without some successes, to restrict speech everywhere and to impose consequences on those who speak contrary to the Party line. But, China is not the only country where this is the case. For example, the government in Tehran announced sanctions against Richard Goldberg, a staff member at the Foundation for Defense of Democracy (FDD) for his pressure for sanctions against the Islamic Republic of Iran in response to its “illicit nuclear weapons program” and sponsorship of terrorism and domestic oppression. According to the U.S. State Department, the theocratic regime’s “overseas campaign of terror has included as many as 360 targeted assassinations in more than 40 countries.” Iran leverages its well-earned reputation for extrajudicial killings to try to silence civil society through death threats against activists, dissidents, and journalists.

British author Os Guinness writes in one of his books of prisoner 174517 who was thirsty.<sup>1</sup> Seeing an icicle hanging just outside his prison hut in the Auschwitz extermination camp, he reached up and broke it off hoping to quench his thirst. Before he had the chance to lick the icicle, the guard snatched the icicle from his hand and dashed it to pieces on the filthy ground. The prisoner burst out instinctively, “Why?” The guard answered him, saying “Here there is no why.” As Os Guinness wrote: “That, for Primo Levy, the Italian Jewish scientist and writer was the essence of the death camps – places not only of unchallenged arbitrary authority but of absolute evil that defied all explanation.” But for the humanities, and soft sciences, such as sociology and psychology, or economics, all of the possible explanations were pathetic in their inadequacy. As many who survived these death camps, they could only shoulder the weight of such an experience and bear witness to the world. Primo Levy survived the death camps, one of only three returning survivors out of 650 Italian Jews transported to Poland. He ultimately got married, had children, and lived a full life writing books and winning literary prizes. As Os Guinness wrote, “Never again” was too confident in its assertion. For over 40 years Primo Levy gave the impression that he had survived Auschwitz and come to terms with the nightmare experience of so many, including himself. However, in 1987, he plunged himself down a stairwell to his death. He could no longer be a witness to what happened in the death camps.

Wang Zhongfang, writing in the preface of his book, FORGED IN PURGATORY:

From 1967 to 1972, during the unprecedented chaos of the “Cultural Revolution”, Lin Biao and the Gang of Four imprisoned me for more than five years. July of 2002 marked 30 years since my release from prison. Memories of the past fade over time and I fear that one day these events will be forgotten. Whenever I open the gate to my memories, however, history appears right in front of my eyes, one scene after another, as if the events of three decades ago just happened yesterday. The troubled times are etched deeply in my memory

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<sup>1</sup> Os Guinness, Ed., UNRIDDLING OUR TIMES: REFLECTIONS ON THE GATHERING CULTURAL CRISIS (Grand Rapids: Baker Books, 1999).

and eventually I couldn't help but put my thoughts in writing. After much reflection, countless struggles over editing, and many revisions, all geared towards evoking the lessons of the past, this book was created.<sup>1</sup>

FORGED IN PURGATORY is the memoir of Wang Zhongfang. He had held senior positions in China's Ministry of Public Security, Ministry of Justice, the Chinese Communist Party, and the Qinghai Provincial Government. He worked in close proximity with Chairman Mao Zedong until the purges of the Cultural Revolution, when he was imprisoned in Qinghai's maximum security prison. He was later rehabilitated and dedicated his life to building a legal system and institutions that promoted the rule of law. In his Preface, he wrote: In the Great Dictionary of the Chinese Language, "purgatory" is described as a tough environment that makes humans experience great suffering. It is important to me that the ordeals people have undergone amid particular circumstances are recorded for history. Prison, like a steel-making furnace, is truly a form of purgatory.

What follows in this paper is an invitation to encourage reflection on where we are today, and especially where China is today.

I write as an American lawyer, a visitor to China, and one who is most interested in China's global position, as well as with Sino-US relationships. I also write as a Christian and follower of Jesus Christ. As one who has spent most of his life in the practice of law, it may be asserted that I am not well equipped to address jurisprudence, which after all is the topic of this paper. However, my interest goes well beyond Sino-US relationships to China's position in the world. As a result, I write as one looking from both the outside into China and within China, trying to understand its long history, the history of the ideas that drive China's outlook and position in the world. Yet, I am realistic and realize that very little has been settled for a long time, and the same uncertainty, and same potential for change and surprise will continue well into the 21<sup>st</sup> century. Seldom does a day go by that China is not in the news, either in print or on television.

Having said that, I have written on the subject of natural law previously with a responsive article by Professor Zhang Shoudong of China University of Political Science and Law, whom I admire greatly.<sup>2</sup> Few people have influenced my thinking on this subject more than Professors John Finnis, Robert George, Brian Bix, and Ronald Dworkin, all of whom I have written about previously and whom I have admired. My approach here will be different. My interest in jurisprudence is practical because it allows me to read and participate in discussions developing the analytical skills to think critically and creatively about law. As Professor Bix wrote: "jurisprudence is the way lawyers and judges reflect on what they do and what their role is within society."<sup>3</sup> Although Professor Bix went beyond the idea of a learned profession or trade to the intellectual pursuit of reflective thinking about law, its source and nature, and its role in society. My interest goes deeper to reflective thinking about my faith and how it relates to jurisprudence as described by Professor Bix. Thus, I start with the importance of worldviews in how we think about the world, nature, society, government, and law.

There is probably no greater need for thinking about our worldviews and how they affect our ethics. I draw my philosophy of law largely from the Holy Scriptures, and to a lesser degree from

<sup>1</sup> Wang Zhongfang, FORGED IN PURGATORY (Create Space Independent Publishing Platform, 2011), 1.

<sup>2</sup> Rollin A. Van Broekhoven, "Morality and Law in a Global Society: A Place for Natural Law Theory," *Frontiers of Law in China* (Beijing: Remnin University of China Law School, December 2017, Vol. 12, No. 2), 626-672; Zhang Shoudong, "Chinese Natural Law Tradition and its Modern Application: A Response to Hon. Rollin A. Van Broekhoven," *Frontiers of Law in China* (Beijing: Remnin University of China Law School, March 2018, Vol. 13, No. 1), 86-114.

<sup>3</sup> Brian Bix, JURISPRUDENCE: THEORY AND CONTEXT, Second Edition (London: Sweet & Maxwell, 1999) ix.

St. Thomas Aquinas. When other writers proudly proclaim themselves as Kantian, Hegelians, Marxist, Benthamites, Platonists, Confucianists, Darwinians, Spinozoists, etc., why should I be ashamed of being a Christian philosopher of law, which, in fact, I am not really a philosopher of law?

Several years ago, I heard a friend from Oxford professor said that there are three great questions facing the world today. The first is what will be the outcome of terrorism and the spread of Islam in its most violent form? The second is what will be the future of the West, primarily Europe and North America as it loses its foundations and roots as it grows increasingly secular. The third may surprise you: What is the future of China, and the growth of the Christian church in China, to the extent that some are saying that China may become the largest Christian nation in our lifetime? All of these questions are political and cultural, but what is interesting is that they all have a religious component with tremendous implications. This is what I will try to address today in this paper.

One of the greatest unresolved questions posed by the materialistic worldview is the question of a beginning; the beginning of the universe, the beginning of life as we know it, and if in the Christian view, God created the universe, then there is the question of whether there cannot be an uncaused cause who created God. This question rules out the only true explanation to the beginning of the universe and of life as we know it. According to Augustine, God was and is outside time and space.<sup>1</sup> But, that concept is hard for us to grasp. Many of these kinds of questions are simply answered by saying it is a mystery. But, if one asks the question about who created God, by logical implication God was created, and that drives one back to who was the god or force that created God, and one cannot stop there. The question keeps going back further and further to first creator which one can never answer. Yet, this is the basic thesis of Professor Richard Dawkins in *THE GOD DELUSION*.<sup>2</sup> As Professor Alister McGrath writes, if religion were thought to have disappeared years ago, why was such a book as Richard Dawkins even necessary?<sup>3</sup>

While it may be true that few think of worldviews and how they affect legal thought, few think that there is such a thing as *a priori* Truth with an upper case T (or the absolute Truth). Indeed few think of law in metaphysical, epistemological, or axiological terms. Yet there are few expressions, such as the rule of law, natural law, and human rights that are more often used without understanding and carelessly used in the news and in general conversation. Professor John Finnis has been a central figure in the reshaping of legal philosophy, including my own, over the past half century. His book, *NATURAL LAW AND NATURAL RIGHTS*,<sup>4</sup> although historically grounded in Aristotelian thought and the contributions of St. Thomas Aquinas in his *SUMMA THEOLOGICA*,<sup>5</sup> represented a sea-change in the extant philosophy of law taught around the world, and certainly in America and Britain. His critiques of H. L. A. Hart's jurisprudence (who incidentally was his tutor at the University of Oxford), and his engagement with figures such as Ronald Dworkin, Joseph Raz, Aquinas, Max Weber, Richard A. Posner, and Hans Kelsen, to name a few, demonstrates the extent of facility with many facets of law and legal philosophy.

Professor Finnis best expresses my interest in this subject (although my interest tends to be

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<sup>1</sup> Augustine, *The Confessions, Book XIII, Chapter XXIX*, BASIC WRITINGS OF SAINT AUGUSTINE, edited with introduction and notes by Whitney J. Oates, Vol. 1 (Grand Rapids, MI: Baker Book House, 1948), 251.

<sup>2</sup> Richard Dawkins, *THE GOD DELUSION* (Boston: Houghton Mifflin, 2006).

<sup>3</sup> Alister McGrath and Joanna Collicutt McGrath, *THE DAWKINS DELUSION? ATHEIST FUNDAMENTALISM AND THE DENIAL OF THE DIVINE* (Downers Grove, IL: IVP Books), 8.

<sup>4</sup> John Finnis, *NATURAL LAW AND NATURAL RIGHTS* (Oxford: Oxford University Press, 1980).

<sup>5</sup> Thomas Aquinas, *SUMMA THEOLOGICA*, translated by the Fathers of the English Dominican Province (London: reprinted by Christian Classics, 1981).

toward the influence of worldviews on legal thought) in his Introduction to his collected essays on the philosophy of law when he writes:

Making, acknowledging, and complying with law involves acts of rational judgment. The reasonableness and justification of these acts cannot be assessed without premises about true human goods, the nature of persons and their acts, and the contours of common good and human rights. So a volume on the philosophy of law fittingly comes fourth. Issues of legal doctrine and interpretation resolvable by technique usually have some intellectual appeal. But legal studies are really attractive and worthwhile because law, and juristic argumentation, is an arena where themes and theses of ethics, political theory, and related philosophical domains all come to bear on –and crystallize out in – legislating and adjudicating to make a difference to human persons.<sup>1</sup>

In his article in the *Frontiers of Law in China*, in response to my article on Natural Law, Professor Zhang, based on his reading between the lines of my article, that I could be identified as a Thomist.<sup>2</sup> I would not dispute him on that point, but as I have reflected on both of our articles, my point goes deeper than that. The point in my article went further than simply a connection between law and morality, which I agree is the case. Rather, failing to explain myself with sufficient clarity, my point is that where we start is where we end up on our analysis of law. As I have thought of our two articles, I have come to the conclusion that there is more than simply a connection between morality and law going on. This has been the focus of my interest and research. What has interested me is how worldviews shape our understanding and application of law. It is here where I will start my reflection on natural law, human rights, and Chinese traditional culture. I come to my position on law, human rights, and Chinese traditional culture from a position that Christianity is divine and greater than all other worldviews.<sup>3</sup> John C. H. Wu wrote about the three great religions of China: Buddhism, Taoism, and Confucianism, and that these came together to serve as his spiritual nurses. Although he profited from all of them, the light he finally saw was the *Logos*, that enlightens every person coming into the world. Notwithstanding the current situation in China, it is a mistake to regard Christianity as Western. The West may be Christian and have a Christian history, but Christianity is not Western. It is beyond East and West, beyond the old and the new. As John C. H. Wu wrote:

It is older than the old, newer than the new. It is more native to me than the Confucianism, Taoism, and Buddhism in whose milieu I was born. I am grateful to them, because they served as pedagogues to lead me to Christ. Christ constitutes the unity of my life. It is thanks to this unity that I can rejoice in being yellow and educated white.<sup>4</sup>

### WORLDVIEW THINKING

As John C. H. Wu wrote many years ago, when we speak of law, we ordinarily mean human law, the law that regulates transactions and the rights and obligations, civil and criminal responsibility, and prescribes remedies for wrongdoing.<sup>5</sup> Therefore, why should we bring such things as theology, philosophy, ethics, sociology, and economic theories into the mix? For one thing, law is not simply a craft or business for making a living like too many lawyers and laymen think. For

<sup>1</sup> John Finnis, *PHILOSOPHY OF LAW: COLLECTED ESSAYS: VOLUME IV* (Oxford: Oxford University Press, 2011), 1.

<sup>2</sup> Zhang Shoudong, note 3, 89.

<sup>3</sup> John C. H. Wu, *BEYOND EAST AND WEST* (New York: Sheed and Ward, 1951), 12.

<sup>4</sup> *Ibid.*

<sup>5</sup> John C. H. Wu, *FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW* (New York: Sheed and Ward, 1955), 4.

an intellect great enough to win a good living or a prize in finding success, however it may be defined, the remoter and general aspects of law are those which give universal interest. "It is through them that you not only become a great master of your calling, but connect your subject to the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."<sup>1</sup>

What we call worldview, comes from the German world, *Weltanschauungen*. It defines our perception or lens through which we see the world. It is basic to the philosophy of metaphysics, epistemology, and axiology. But it begins with wonder. What make things the way they are? This is where I started more than 50 years ago. What makes things work? Is there a hint of order in the universe, and if so, what do we think about it. But it also has to do with attitudes and purpose of life, and values that guide our activities. Worldviews may be optimistic or deeply pessimistic, they may be profoundly moral or ethical, or only marginally so. But, on certain anniversaries they "can set off a spiritual awakening for the Chinese." "We forget that there was this . . . moment of hope, but also the future of China, it is so important to remember."

When we think or speak about worldviews, what are we thinking about? Or, what is the focus of someone's worldview concerns? Does it, or how does it concern itself with "unifying the highest good?" I would argue that there is a three-fold concept of worldview thought: (1) *Weltbild* or a world picture; (2) *Lebenswelt*, or life world, and (3) *Weltanschauungen*, or worldview. These three basic types of worldviews correspond generally to three basic psychological parts. Herman Dooyeweerd argues that there are two basic types of worldviews, and that the essential components determine the difference.<sup>2</sup> These are covenantal and non-covenantal. The quest for a worldview has to do with reality, with how we know things, with the purpose in life, with values and attitudes, and with guidance of thought.

Worldviews do a number of things relevant to law. They ground life in a confessed ultimate reality. They relate life to the universal order of existence. They serve as an interpretative/integrative framework for all of life. They are stored and expressed in symbols. They evoke emotional attitudes and moods of deep satisfaction, joy, and inner peace. They induce intellectual assent and deepen conceptual reflection. We come at our worldviews from a lot of different ways. Most of the time, we don't even think about them or the force they have in our lives. But, when they are challenged, no matter what the worldview may be, the challenge can be very frightening and threatening to the very core of our beings. How and why does this happen?

The questions that rise in my mind as I think about this topic, and about natural law and human rights in Chinese traditional culture are how the civil war of the 1940s in China and the present political and economic philosophies and practice in China relate to natural law and human rights. As I reflect upon Marxism as adopted by Maoism to the Chinese condition, I wonder how the traditional Chinese worldviews are challenged by this movement. Moreover, I wonder whether the fall of the last imperial Chinese dynasty marked the final failure of Confucianism.

The deeper I got into the practice of law and indeed in living a life of law, I noticed the importance of presuppositions and worldviews, or as it was known in German, *Weltanschauungen*. Indeed, much of my reason for graduate school and research since then has been to understand and

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<sup>1</sup> *Ibid.*, at 5.

<sup>2</sup> Herman Dooyeweerd, *ENCYCLOPEDIA OF THE SCIENCE OF LAW, FROM THE COLLECT WORKS, SERIES A.-VOLUME 8*, Translated by Robert D. Knudsen (Grand Rapids, MI: Paideia Press, 2012), 21-85; *ROOTS OF WESTERN CULTURE: PAGAN, SECULAR, AND CHRISTIAN OPTIONS, FROM THE COLLECTED WORKS SERIES B.-VOLUME 15* Translated by John Kraay (Grand Rapids, MI: Paideia Press, 2012), 7-25.

test my presuppositions, both as they affected my practice of law and my life and relationships in general. Our world today, whether in the East or the West, is “ravaged by dehumanizing barbarism and torn by ideological conflict.”<sup>1</sup> There is outrageous violence, terrifying nuclear standoff, extreme poverty, abuse of natural resources, and usurpation of power for sectarian ends. Our ideologies are partly to blame. But they come from both the East and the West where the dominant ideology is secular, naturalistic humanism, and materialism upon which there is no basis for human values on which both the East and West were built.

Noted historian and author, George Marsden at Notre Dame University, revealed the influence of secularism as all-inclusive and proposed that a Christian perspective should be acceptable in a pluralistic society.<sup>2</sup> Marsden essentially called into question the Enlightenment myth of a worldview neutral reasoning. As I have researched natural law theory, and more recently human rights thinking in the West, I have come to the same conclusion where reason became a complete substitute for authority, principally divine authority, and where there was no consensus on what reason required both in terms of legal thought and in terms of values that guide a nation in its development of law, whether in the legislature or in the courts.

What Christian academics have long asserted is that biblical religion is not inimical to serious scholarship but motivates it, illumines the mind, opens up new avenues for inquiry, and draws things together in a meaningful whole. All truth in the final analysis is about the ways and works of God. But the secular academy under the spell of modernity found it outrageous that a place should be given to scholarship from a religious point of view: the rule of “reason alone” excludes it.

Christians are by no means alone in rejecting modernity’s claim to intellectual neutrality. The postmodern mind defines itself over against the modern, and claims a place at the table for a plurality of perspectives, be they gender-based, ethnic, or whatever. But the Christian objection is more premodern than postmodern; it is basically Augustinian in that faith seeks understanding and wisdom of God is both the objective locus of truth and the ultimate sources for all human knowledge.<sup>3</sup>

With the advent of postmodernity, there has been an increased curiosity and scholarship regarding the concept of worldviews. People, and certainly some Christian circles, are discovering that overt human beliefs and behaviors, as well as sociocultural phenomena, are consciously or not, often rooted in and expressions of some deeper, underlying principle or concept of life. Furthermore, worldviews have a hermeneutic purpose by helping people understand the cosmic dimensions and all-encompassing implications of Biblical revelation. This more generous interpretation has enabled people to cast away reductionist versions of life and of faith that kept them from blossoming into full bloom.

There is probably no greater need for thinking about our worldviews and how they affect our ethic. Indeed, as you look around the world today, and especially for our purposes, China, you find the lack of ethics imbedded into every sector of society, government, industry, education, and NGO sector, and indeed in the church. For the last six years or more, China’s President and Party’s General Secretary has focused on corruption in government, industry, and the nongovernment sector. I

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<sup>1</sup> Arthur F. Holmes, *CONTOURS OF A WORLD VIEW* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 1983), vii.

<sup>2</sup> George M. Marsden, *THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF* (Oxford: Oxford University Press, 1994); George M. Marsden, *THE OUTRAGEOUS IDEA OF CHRISTIAN SCHOLARSHIP* (Oxford: Oxford University Press, 1997).

<sup>3</sup> David K. Naugle, *WORLDVIEW: THE HISTORY OF A CONCEPT* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 2002), xiii-xiv (Forward by Arthur F. Holmes).

became interested in both of these topics about 40 years ago, at a time when all I knew was my Christian heritage.

There are three trends we ought to hold in our minds. The first is the modernity focuses on choice rather than content or substance of the choice. As a result, most of the case law dealing with abortion or same sex relationships or marriage for example deal with choice rather than the choice that is being made.<sup>1</sup>The second trend we need to keep in mind is that modernity moves us from unity to fragmentation. Here, reason takes over from authority and tradition, and leads to specialization. The third trend is that post-modernity shifts from the natural to the supernatural. Although this is becoming more common in the West, it has always been a part of the Eastern thought.

I must admit at the beginning that I am not capable of presenting the teachings, developments, and history of Confucianism, Taoism, Islam, Buddhism, folk religions, and Marxism/Maoism and how they contribute specifically to worldview thinking in China. This is important for your own engagement with the culture. But, by outlining what I think is a Christian worldview as contrasted with non-Christian worldviews, you should have some of the intellectual tools to deal with this. There is one profound question though that remains: What is the reason for the overarching objection to Christianity in China? As I have often been reminded in my classes China University of Political Science and Law in Beijing on jurisprudence, China is an atheistic country. It is important to remember that all worldviews, by definition, are belief systems, even atheism. Since we are all limited in knowledge and restrained by our inability to be everywhere (omnipresent) and know everything (omniscient), an atheist puts forward the claim that God does not exist in terms of a faith commitment. Once a person rejects Christianity, he or she has not set himself or herself free from the concept of faith. Rather, he or she has only transferred his or her faith to something or someone else. And I guess that the answer will have some import to my third observation that China may become the largest Christian nation in the world in our lifetimes.

In worldview thinking, as in jurisprudence, it seems that everything is thrown open to discussion and in the belief that they cover the entire field. Lord Patrick Devlin, a Fellow in the British Academy, posed three questions that may be open-ended, but that point to the value of worldviews and first principles. The first is: Does society have the right to pass judgment at all on matters of morals? Ought there, in other words, to be a public morality, or are morals always a matter of private judgment? Second, if society does have that right to pass judgment on matters of morality, does it also have the right to use the weapon of law to enforce that judgment? Third, if so, ought it to use that weapon in all cases or only in some, and if only in some, what principles should be used to distinguish when society should enforce some judgment of morals and not others?<sup>2</sup>But Lord Devlin does not address a more fundamental question that may or may not be answerable by worldview thinking. That question is what is moral knowledge on which society should or should not make its moral judgments, and how is it acquired?

Essentially, what worldviews provide are theories of metaphysics, epistemology, and axiology. This was preceded by *Wortgeschichte* (or the history of words) and *Begriffsgeschichte* (or the history of ideas), both I think essential in any evaluation of worldviews and cultures. My thesis is that any theory regarding the relationship between law and morals and any issue involving human

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<sup>1</sup> See for example, *Roe v. Wade*, 410 U.S. 113 (1973) ; *Planned Parenthood of Pennsylvania v. Casey*, 505 U.S. 833 (1992) ; *Obergefell v. Hodges*, 576 U.S. \_\_\_\_ (2015)

<sup>2</sup> Patrick Devlin, *THE ENFORCEMENT OF MORALS* (Oxford: Oxford University Press, 1965), 7-8.



rights cannot be resolved absent some foundation in metaphysics, epistemology, and axiology; in other words, without some worldview analysis of the matter to be decided.

### *Metaphysics*

Simply stated, *metaphysics* deals with the features of ultimate reality, what really exists and what it is that distinguishes that and makes it possible.<sup>1</sup> The idea of ultimate reality and fundamentality as used in metaphysics aims to capture the idea that there is something basic in the world.<sup>2</sup> For our purposes, philosophically, it means that there is something which is ontologically independent or that there is an ungroundedness. There is a kind of dependent fundamentality where there is a notion of metaphysical dependence. For example, an absolute independent metaphysical fundamentality would be God. Every non-fundamental metaphysical entity is dependent upon some fundamental ontological independent entity. The idea of universal truth, including that which underlies law, would be an example.

Philosophy at its very beginning was pre-Socratic. We are really speaking of ultimate Truth, and what is understood to exist notwithstanding the changes in nature and events, or ideas around us. By the time of Plato, his theory of true reality took the nature of Forms (or Ideas), which were abstract paradigms of sensible things of which we only had copies. These had to have been dependent fundamental metaphysical entities. The fact is that these ideas were quite distinct from the world with which physics became clear, since these realities were distinct from the world in which we live. In other words, the arguments concerned the status of “universals, or something that existed and gone on ever since. Aristotle’s *Metaphysics* has come down to us in a form that simply described the notion of being. Aristotle believed in universals in which the purist Form was God, whose nature was in Aristotle’s view, the highest kind of being, the prime mover, the so-called “final cause of the movements of the heavenly bodies.” Post-Aristotelian philosophy saw the world organized under different principles, although the influence of Aristotle was strong. Thomas Aquinas took a more Aristotelian line on the arguments for God’s existence, relying principally on considerations which point to the need to assume the existence of a deity.

Genesis 1:1 states “In the beginning [and the Bible does not state how long ago that beginning was] God created the heaven and the earth.” This is not a philosophical argument for the existence of God or for his creative activities described in Genesis 1. In Genesis 1:26, God said: “Let us make man in our image, after our likeness; and let him have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over the earth, and over every creeping thing that creepeth upon the earth.” So God created man in His own image, and created male and female. Thus, man was created, not evolved. Moreover, if this is true, then the ideas of gender being culturally constructed cannot be true. This is later affirmed in the New Testament. This image was that human beings are personal, rational, and moral. Humans had power or dominion over the earth. But, in Genesis 3, we read of human moral consciousness, for when they disobeyed God’s command, their eyes were open and they knew that they were naked and were ashamed as they tried to hide from God. None of this is philosophically abstract. Rather it is the metaphysical foundation for a worldview on which we understand law.

The question may be raised as to how this relates to China and its history. Quoting from DAO

<sup>1</sup> *Metaphysics, history of, and metaphysics, problems of*, Ted Honderich, ed., OXFORD COMPANION TO PHILOSOPHY (Oxford: Oxford University Press, 1995), 556-563.

<sup>2</sup> Thuomas E. Tahko, *Fundamentality*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (New York: Macmillan/Collier, July 21, 2018); www.ttahko.net

DE JING: THE UNITED VERSION, The 道 (*Dao*) (pinyin) refers to the original source and creator of all things, the source of the natural law of checks and balances, and the power that gives and supports life. However, most English translations translate 道(*Dao*) as the “Way.” This is inappropriate for the following reasons.

In Chapter 25 of the *Dao De Jing*, Laozi states: . . . [Chinese characters] (“I do not know its name and therefore I name it the Dao. I force myself to give it the name Great”). Laozi used the name 道 (*Dao*) and the word 大 (Great) to describe the original source and the natural order of the universe. Chapter 25 expresses the relationship between language and reality in Laozi’s philosophy of language. Names and words have no essence on their own; rather, they are guides point to reality.<sup>1</sup>

So, these words point only to the self-existent being, which is infinite and cannot be described. According to Yang Peng, *Dao* has no essence of its own and that we should not attempt to give it an existential meaning, such as the “Way,” or “Way-making.” There is also a relationship between 天 (Tian) and 道 (Dao). 天 (Tian) has two meanings in *Dao De Jing*: One is the sky and the other is the divine source and highest power. Thus, in the religious traditions of China’s Shang dynasty (1556-1046 BCE), the highest sovereign power was called Shangdi. This was also true in the religious traditions of the Eastern Zhou dynasty (1046-771 BCE). In Chinese religious tradition, “Tian” is the sovereign divine being, which is the creator of all things and is, above all, natural deities and ancestral spirits.

As I read Yang Peng’s translation of Laozi’s, I am struck by the idea that what is being expressed here is a metaphysical concept of ultimate reality. In his introduction, Yang Peng speaks of the religious rituals when a new king ascends to the throne and appoints ministers, at which time it was customary for him to offer sacrifices on the altar to Tian and to implore Tian to absolve him of his sins and bless his kingship. In essence, the king was to treat others in the same way he wanted Tian to treat him. It is interesting how the *Dao De Jing* begins:

The Dao that can be spoken is not the eternal Dao.

The Name that can be named is not the eternal name.

The Nonbeing which cannot be named is the origin of creation.

The Being which can be named is the mother of all things.

Being absent of desire we see the essence of the mystery.

Being full of desire, we see the boundaries of its manifestations.

These two come forth simultaneously but they are given different names.

The different names point to the same reality.

Oh mystery of mysteries the door to all wonders.<sup>2</sup>

In the Forward to John C. H. Wu’s translation of Lao Tzu’s TAO TEH CHING, Arthur Hummel, the former head of the Division of Orientalia in the U.S. Library of Congress wrote that it would be

<sup>1</sup> Laozi, *DAO DE JING: THE UNITED VERSION*, A new translation by Yang Peng (Woodstock, NY: Wapner & Brent Books, 2016), x. In my conversations with Yang Peng, he explains it this way: *Jing* has the characteristics of the God of the Bible, whereas *Dao* is similar to the *Logos* of the Bible. So *Jing* is the original Creator of all things, the First Cause and *Dao* is the power in the laws of the Creator. *Dao and Jing* are one and cannot be separated. So, he explains it as *Jing* is the sun, and *Dao* is like the sunlight. That is the relationship. He also draws analogy to natural law in ancient Greek thought, where the *Dao* would be similar to natural law.

<sup>2</sup> *Ibid.* See also Lao Tzu, *TAO TE CHING*, translated and introduction by D. C. Lau (London: Penguin Books, 1963), with a different translation of *DAO DE JING* and a different meaning to the more recent translation and notes by Yang Peng; Lao Tzu, *TAO THE CHING*, translated by John C. H. Wu (Boulder, CO: Shambhala Publications, Inc, 2006) with a translation closer to that of Yang Peng.

a vain hope for a definitive translation rendering of the Tao Teh Ching.<sup>1</sup> However, John C. H. Wu had two endowments necessary to a translation in addition to competence in Chinese, a practical understanding of men and institutions in ancient China, and an appreciation of the mysticism in the highest and best sense. The sense that this translation gives to the *Dao* is the identification of the *Logos* as we find in the Bible in John 1:1 (“In the beginning was the Word or *Logos*, and the Word was with God, and the Word was God.”).

The principal contemporary philosophical problem with metaphysics often takes the form of a trilemma concerning the large and important feature of our lives or discourse, whose terms are illusion, well-founded appearance, and fundamental reality.<sup>2</sup> In recent decades, these problems arise against the backdrop of naturalism, and often, scientific realism. The basic questions are how are norms and values possible in a world of facts, and how are minds and mental phenomenon possible in a world in motion? How is freedom of action possible in a world of scientific law?

From Descartes on after the Renaissance philosophy took a more epistemological turn, based in part on empiricism.

Lord Patrick Devlin, in his book, *THE ENFORCEMENT OF MORALS*, implicitly raises the epistemological question raised long ago by Descartes and in the consideration of the trilemma common to our culture. The questions are: what is knowledge and how is it attained? We never get to the first two questions Lord Devlin raised without some consideration of these last two that are implicit in his book. Indeed, Lord Devlin states that both as a judge and as a jurist:

As a judge who administers criminal law and who often has to pass a sentence in a criminal court, I would feel handicapped in my task if I thought I was addressing an audience which had no sense of sin or which thought of crime as something quite different. . . . I must admit that I begin with feeling that a complete separation of crime from sin . . . would not be good for the moral law and might be disastrous for the criminal.<sup>3</sup>

The distinction between private morality and public morality can be justified on *a priori* argument, which takes us back to our understanding of metaphysics. What makes society of any sort is a community of ideas, not just political ideas, but also ideas about the way its members should behave and govern their lives. As a matter of personal distinction, except during my tenure as a criminal trial lawyer, all of my practice has been in civil law. The principles advanced by Lord Devlin reflect my experience in all areas of law, not simply criminal cases. It is also the area of jurisprudence and judicial practice in which most questions seem to arise.

### *Epistemology*

As we read in Psalm 19:1-3, 7-8:

The heavens are telling of the glory of God; and their expanse is declaring the work of His hands.

Day to day pours forth speech, and night to night reveals his knowledge.

There is no speech nor are there words; their voice is not heard.

\* \* \*

The law of the LORD is perfect restoring the soul; the testimony of the LORD is sure, making wise the simple. The statutes of the LORD are right, rejoicing the heart; the commandment of the

<sup>1</sup> Lao Tzu, *TAO TEH CHING*, translated by John C. H. Wu, note 25, *supra*.

<sup>2</sup> Note 22, *supra*, 559-63.

<sup>3</sup> See Note 21, at 4.

LORD is pure, enlightening the eyes.

As one can see from the writings of Lord Devlin, epistemology is the theory of knowledge and is the branch of philosophy concerned with the nature of knowledge, its possibilities, its scope, and its general basis. It is sometimes said that the Enlightenment was the age of epistemology as Descartes introduced what was sometimes known as the “search for certainty” in which he was seeking a sure foundation for knowledge.<sup>1</sup> There was in Descartes, a method of doubt or skepticism, founded on his famous proposition, “*Cogito ergo sum*” (I think, therefore I am) which he thought established himself as the thinking self external world as it came to be called from which he could derive the existence of God. Plato seemed to be more interested in what distinguished knowledge from belief, and was influenced by metaphysical considerations. For Aristotle, knowledge properly entailed bringing the object within the context of explanatory and reason-giving propositions. Thomas Aquinas, the medieval Aristotelian thought that all materials for knowledge came from experience, but he certainly did not claim that all knowledge came from experience as his theological concerns indicate. Apart from what they may have thought about the ideas, none of these philosophers thought that all knowledge of *Truth* was derived solely from experience.

Perhaps one way to understand this is to imagine a spider web, with its spokes held together by strands of circles, as each spoke in the web moves from the outside toward the middle. What does it tell us about worldviews and how they are formed? While your eye may focus on the spider, you see all these spokes coming from the outside of the web in toward the middle. These represent what we learn from our teachers and professors throughout all of our schooling, from our parents and friends in our communities and apartment compounds, and all of the things we experience in life that give some direction to how we think and act. But, like life itself, there are these strands that circle the web and hold the individual strands of beliefs, experiences, environment together. What is it that holds everything you have learned in your life together in one coherent whole?

The noetic structure of our minds holds all the thoughts and beliefs that we have held in our past but may have faded from our memories. They may differ in degree of importance or certainty. So, within this noetic structure are all the presuppositions we have held in the past. For a Christian, one of these may be that God does in fact exist, that He created the universe and all that exists therein, and that He created man in His image. We cannot prove or disapprove many of these beliefs. Now the control beliefs are those circles closest to the center of the web. They are beliefs that you don't have to prove but are necessary to make sense of the rest of your beliefs. Whether we realize it or not, all of us have control beliefs that help us make sense of our world and experience in life. My control beliefs are important in my understanding of natural law and its history, in human rights, and in our cultures.

The Christian understanding of creation leads directly to the conclusion that there is a correspondence between the Works of God and the Being of God.<sup>2</sup> As Professor Alister McGrath of the University of Oxford points out, “Creation and redemption are not merely interconnected within the economy of salvation; they can be argued to embody the character of God.”<sup>3</sup> This ties both the epistemological and axiological elements together. Moreover, it is important to note the implications on creation *ex nihilo*, which include four distinct characteristics: (1) the god who creates is affirmed to be all-powerful; neither this power nor the work of creation is assigned to an inferior being; (2)

<sup>1</sup> *Epistemology, history of*, note 23, 242-245.

<sup>2</sup> Alister E. McGrath, *A SCIENTIFIC THEOLOGY VOL 1: NATURE* (Grand Rapids, MI: Wm B. Eerdmans Publishing Company, under license from T&T Clark, Ltd, 2001), 193-204.

<sup>3</sup> *Ibid*, at 193.

God exists prior to the creation itself and there is no other being, power, or created entity which exists before God; (3) the mode of creation is considered as conscious, ordered, and deliberate, thus revealing a purposeful and directed action or a “plan of action;” and (4) the creator is to be regarded as free of limitations imposed by the inertia of prior reality.<sup>1</sup> Understanding the importance of these points requires the consideration of a cosmogony that declines to regard God as the creator and entrusts this task to some lower creature.

Closely related to this is the concept of justification and how we distinguish between two sorts of belief; those that are mediated, that is, beliefs that we reach by some strategy from other beliefs; and those which are unmediated, or beliefs that we adopt without moving from beliefs we already have. The focus on justification is one way of expressing the idea that epistemology is normative. A belief may be justified because it is the result of a reliable process or provides a coherent answer. Logic would therefore require that our answer not violate the law of non-contradiction. In other words, opposites on the same claim cannot both be true. One other form of justified belief is the classic foundationalist claim that takes any regress of mediated beliefs seriously to the point that there are basic beliefs that cannot be mediated.

Professor Hadley Arkes wrote that: When we contemplate those things that stand, universally as good or bad, justified or unjustified, we are in the domain of morals (or ethics); and as Aristotle understood, the matter of ethics is irreducibly, a *practical* concern: ethics involves an understanding of the standards that ultimately guide our practice or the activities of our daily lives. Those standards, of necessity, are abstract; if they are not, they could not be universal in their application. There is nothing “empirical” about them.

The act of legislating [or judicial decision-making] would stand out as a massive act of presumption unless it were understood that there are in fact propositions with universal reach, which define what is good or bad, just or unjust, for people in general.<sup>2</sup>

Judgments on law, whether in the academy, the legal profession, or the public in general, seem to imply the existence of moral principles on which moral judgments are founded and justified if they were regarded to be valid and comprehensive. However, they have not taken as their mission or concern the task of actually making clear the nature of the principles on which their judgments rest. Yet, in the circles in which such things are considered and discussed, the most widely expressed fallacy is the notion that the presence of disagreement on matters of morals must indicate the absence of universal truths. What we are left with is the arbitrary action of executives, legislators, Party members, or judges. At the same time, although there may be disagreements between mathematicians over proofs or conclusions, there is nothing in their disagreements to challenge the foundation of mathematical truths or to call into question the possibility of knowing mathematical truths.

If one’s scientific view prevails or is predominant, one starts with the scientific explanation of reality, and that is the starting point. Such a person tends to be reductionistic and naturalistic. All one sees and feels and hears with one’s natural senses is all one gets. If one’s worldview is based on feelings, one might end up with some ideals that are universal, and might follow Plato’s perspective on the world and on what might be universal reality that may turn out to be so basic that the beliefs cannot be derived from any further reduction. Psychologists point out that these are the basic choices

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<sup>1</sup> *Ibid*, at 194-95.

<sup>2</sup> Hadley Arkes, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (Princeton: Princeton University Press, 1986), 3-4.

we face, and from which we get our perspective on how to live our lives. The reason this seems to work so well is that we are dealing with reason, emotion, and will. It is in the mind that we find unity in what we see around us. It is in our emotions where we find our pre-theoretical ideas from which we make choices, and it is in the emotion where we find our will, our freedom, or our autonomy.

Dutch theologian, philosopher, and writer, Herman Dooyeweerd, argued that there were only two pre-theoretical models of a worldview. The first was what he wrote came from being a covenant keeper. So one's worldview is his or her expression of obedience to God. The second is pre-theoretical view of apostasy, that is, rebellion against God. Such a person is cognitively or mentally, emotionally, and volitionally, against God. So here, such a person rejects God's self-revelation through nature, through His Son, and through His Word, the Scripture. This raises the question why a Christian is predisposed to a worldview that is Christian and Biblical in orientation, and why the non-Christian is bound to a naturalistic and materialistic worldview? What this suggests is that it might not be so hard to work with organizing principles and pre-theoretical models.

Dooyeweerd suggest that this binding nature of the pre-theoretical models, whether naturalistic and scientific, or based on some feelings or ideals, can be thought of in terms of the original Latin word, from which we get our word religion. This would apply to the covenant keeper or to the apostate as well. The word from which we get our word religion, is "*relegare*," which means to bind together. So, if one takes these three elements together, they do tend to bind that person to a sense of reality and direction in what that person believes, accepts, and acts in a certain way. Dooyeweerd, argued that even without a religious belief grounding, one would still be bound (*relegare*) to a naturalistic perspective. To the covenant keeper in relationship with God, that pre-theoretical predisposition would bind the covenant keeper to a worldview that is Christian and Biblical in its orientation. It would not be possible in this small space to identify and catalogue all the possible worldviews that are out in the world, because that would be too exhaustive and take too much time. It does seem to me that the difference is between those who are in rebellion against God and those who are covenant keepers and in relationship with God.

Inasmuch as our attention is focused on this subject in the context of traditional Chinese Culture, we cannot ignore the worldview of Marxism and Maoism, as well as the effect of the civil war in China in the 1940s. Five principles of Marxism include (1) a theory of equality which generally implies uprooting of economic classes; (2) a theory of freedom in which real freedom necessitates equality and prosperity in society, where freedom is the basic pillar of morality; (3) a theory of progress of industry and technology and increase in productive energy, which includes community control or authority over all conditions of production and distribution and overall economic relations; (4) a theory of unity of ends and means, or as Lenin put it, "Communist morality is that which is useful in class antagonism, which ties laborers in a bond of unity against exploiters."; and (5) the approximation of armed revolt, in which Marx looked upon violent means as a right which was indispensable.

Maoism is a variety of Marxism-Leninism as developed by Mao Zedong for realizing a socialist revolution in the agricultural and pre-industrial society of China. It is the updating and adaptation of Marxism-Leninism where the peasantry are the revolutionary vanguard in pre-industrial societies rather than the proletariat in urban societies. By the turn of the 20<sup>th</sup> century, a small but significant cross-section of the traditional elite had found themselves increasingly skeptical of the efficacy and morality of Confucianism. The fall of the last imperial Chinese dynasty in 1911 marked the final

failure of Confucian moral order and to make it irrelevant in the minds of Chinese intellectuals.<sup>1</sup> Yet as we examine the May Fourth Movement of 1915-1923, we note that the intellectuals of that period loomed large during the transformative period for China in a global context and the political transition from empires and colonies to nation-state struggling for sovereignty and statehood as the harbingers of ideas that shaped the polity and culture.<sup>2</sup> The May Fourth Movement and the turbulent politics that followed it are commonly associated with people, such as Mao Zedong, Chen Duxiu, and Hu Shi and the discussions that took place in Beijing and Shanghai.

As Shakhar Rahav asserts, the May Fourth Movement has often been associated with the Chinese Communist Party as its seedbed. But, beyond the emergence of ideology, it is a transition to forms of political engagement and to mass politics. It changed the way politics were practiced. Although this provides interesting background to the Chinese Communist Party, the question that comes to my mind is how this relates to the current situation in China, at least over the last five years. Because of my involvement with many academics and intellectuals in China, the subject interests me a great deal.

If one believes that all that is real belongs in space and time, with appropriate causal structures in a closed system, then one has to believe that all knowledge must start with what one observes and experiences from one's sense perceptions, and with those forces that have a causal connection to what one discovers. So, the idea is that we start with empty minds and we all get all of our knowledge from what we observe and experience in the created environment. This means that anything one cannot achieve through empirical experience cannot be known. This way, you will never know of moral demands or of values, because they don't begin with sense perception. In this case, the moral domain is of personal preference, not of knowledge.

On the opposite side are the rationalists. The rationalists would argue that there are two domains of the real, the immaterial and universal real, and the material "real," which is discoverable by sense perception. We as humans participate in both realms. In the internal, immaterial universal realm, one has some ideas that are independent of experience. These universals are categories of knowledge. So to sum up, there are two basic theories regarding the origin of knowledge. These are similar to the two basic theories we covered in our consideration of metaphysics. The first is naturalism with its empirical experience and data collection. Our conclusions are derived *a posteriori*, based on the data collected and our experiences. The second is idealism, where the mind has a set of *a priori* ideas, that is, ideas that are self-evident, intuitively known. They are universal and unchanging. If you are a rationalist, you will have something in your mind independent of experience. In other words, the mind is pre-structured with certain universals, and it organizes all the experiences in light of these universals. Although the rationalist model of idealism traces its history to Plato and has been the majority view throughout most of history, we are more comfortable with the empirical, naturalistic model because it is closest to what we are accustomed with in science. This is the foundation of technology and medicine, etc., and all of the advances that have contributed to the quality of our lives. This then is the debate in philosophy. But, we don't know just what science contributes to our worldview.

The central problem thus involves the ground upon which we claim to "know" the truth or the existence of morals, or indeed, any truth or moral understanding. The question is posed most

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<sup>1</sup> Maurice Meisner, *MAO'S CHINA AND AFTER* (New York: Free Press, 1999), 14.

<sup>2</sup> Shakhar Rahav, *THE RISE OF POLITICAL INTELLECTUALS IN MODERN CHINA: MAY FOURTH SOCIETIES AND THE ROOTS OF MASS-PARTY POLITICS* (Oxford: Oxford University Press, 2015), 3-4.

dramatically in politics and law because people are being committed through the exercise of law and authority, and are being obligated to obey and respect the law which may include policies with which they disagree. There is always the possibility of a tension between self-interest and morality, between those things that give us pleasure and the things that we are obligated to do out of respect for the commands of moral reason. In fact, there would be no real meaning for morality in our language and lives if morals were reduced simply to those things that are in accord to our own self-interest.

Since neither naturalism with its empirically based data or idealism or rationalism with its universal ideals that are imbedded in our minds can admit that the knowledge is composed only of one thing or actually comes from one source, this is where pragmatism tries to assert itself. And I think that we like to admit that we are all pragmatic in a way. We like things to work, and we don't like to think about how sure we are of what we believe or think we know. So there is a third way at looking at the question of the origin of knowledge, and that is pragmatism and skepticism. Pragmatism comes to us as the flow between two things, the experience derived from sense perception, and the rational. Pragmatism breaks up this flow so that it can find utility in things and actions. Charles Darwin and his theory of evolution was first to apply pragmatism to epistemology and this led to further refinement of the theory to biological idealism. Pragmatism was a form of subjectivism and idealism. Beliefs were believed to be true if they were practical and succeeded in the struggle between naturalism and idealism. Ideas or beliefs could be true at one point of time and not true at a later time. The central idea of pragmatism was practice. From the beginning, pragmatists wanted to bring philosophy more in line with the scientific method, as they understood it. You will never get to the God of the Bible or any moral code or value system. The only question is one of practicality. In skepticism, we really do not accept anything as true. It has to be proven to be true, and then we aren't sure. Since one cannot prove with absolute certainty that God exists, much less His character, for all practical purposes that person is a practical atheist or agnostic. And one will never be sure of any moral theory when you run it out to its logical extreme.

So these are the three answers to how we know things. And each is unsatisfactory. Therefore, it seems that the answer to the question of the origin of knowledge comes from our own controlling basic belief in the noetic structure of the mind. This is where we get into tacit knowledge. According to Michael Polanyi, a well-known scientist long before he explored philosophy, his idea of tacit knowledge was an attempt to tackle the paradox discussed by Plato known as "Meno's paradox."<sup>1</sup> Meno starts the dialogue, with a question:

Can you tell me, Socrates, whether virtue is taught [here the word translated "taught" is *didakton*, a first verbal adjective which may also mean "teachable"]? Or is it not taught, but acquired by practice? Or is it neither acquired by practice nor learnt, but present in men by nature or some other way?

The Meno paradox thus dealt with the view that the search for knowledge is an absurdity, since you either have it already or you do not know what you are looking for and therefore, cannot expect to find it. Polanyi argued that:

[I]f tacit knowledge is a central part of knowledge in general, then we can both (1) know what to look for, and (2) have some idea about what else we want to know. One implication Polanyi draws from this perspective is that "the process of formalizing all knowledge to the

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<sup>1</sup> Plato, *Meno*, THE DIALOGUES OF PLATO, Vol. 1, translated with analysis by R. E. Allen (New Haven: Yale University Press, 1984), 70a-73c, 87c-89e.



exclusion of tacit knowledge is self-defeating.”<sup>1</sup>

Polanyi first met questions of philosophy when he came up against Soviet ideology under Stalin under which Stalin denied justification for the pursuit of science. During a conversation Polanyi had with a fellow scientist in Moscow in 1935, he was told that the pursuit of pure science in the Soviet Russia was a morbid symptom of a class society under which pure scientific research would disappear. According to Polanyi, the denial of the very existence of scientific thought came from the socialist theory that appeared to produce a mechanical conception of man and history in which there was no place for science. “This conception denied altogether any intrinsic power of thought and thus denied also any grounds for claiming freedom of thought.”<sup>2</sup>

Polanyi starts with the idea that we know more than we can tell. For example, we know a person’s face and can recognize it among thousands or millions of faces, but we cannot tell how we recognize that face we know. Governments and police departments now have technology to match facial features with what they have in data banks. So, there is a functional relationship between the two terms of tacit knowing; we know the first term only by relying on our awareness of it before attending to the second term. This is how we come to know particulars without becoming able to identify them. Polanyi continues:

We meet with another indication of the wide functions of indwelling when we find acceptance to moral teachings described in their *interiorization*. To interiorize is to identify ourselves with the teachings in question, by making them function as the proximal term of a tacit moral knowledge, as applied in practice. This establishes the tacit framework for our moral acts and judgments. And we can trace this kind of indwelling to logically similar acts in the practice of science. To rely on a theory for understanding from the theory to things seen in its light, and are aware of the theory, while thus using it, in terms of the spectacle that it serves to explain. This is why mathematical theory can be learned only by practicing its application: its true knowledge lies in our ability to use it.<sup>3</sup>

There is a certain epistemological element in the *Dao De Jing*.<sup>4</sup> As in the Old Testament of the Bible, the sage in the *Dao De Jing*, has a role in wisdom and advice. But, it goes beyond that. Throughout the *Dao De Jing*, one reads of what can be observed and known and what cannot be known. For example, “Use today’s Dao to govern today’s reality to know the original beginning. This is the law of the Dao.”

Romans 1 and Romans 2 in the New Testament of the Bible are quite clear that the universe is a revelation of the power and deity of God. Thus, from Romans 1: For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men who suppress the truth in unrighteousness, because that which is known about God is evident within them; for God made it evident to them. But since the creation of the world, His invisible attributes, His eternal power and divine nature, have been clearly seen, being understood through what was made, so that they are without excuse.

But, it is more than that, for as we read in Romans 2:14, “the Gentiles who do not have the Law do instinctively the things of the law, . . .” The use of the word, “instinctively,” suggests that by natural impulse without external constraints of the Mosaic Law, they fulfill the practices of the Law

<sup>1</sup> Michael Polanyi, *THE TACIT DIMENSION* (Chicago: University of Chicago Press, 1966, with a new Forward by Amartya Sen), xi.

<sup>2</sup> *Ibid.*, 3-4.

<sup>3</sup> *Ibid.*, 17.

<sup>4</sup> Note 24, *supra*.

that agreed with the Law. As Romans 1:24 states: “Wherefore God also gave them up to uncleanness through the lusts of their own hearts, to dishonor their own bodies between themselves; who changed the truth of God into a lie, and worshipped and served the creature more than the Creator, . . .” But the text continuing in Romans 1:28-32 states:

And just as they did not see fit to acknowledge God any longer, God gave them over to a depraved mind, to do those things which are not proper, being filled with all unrighteousness, wickedness, greed, evil; full of envy, murder, strife, deceit, malice; they are gossips, slanderers, haters of God, insolent, arrogant, boastful, inventors of evil, disobedient to parents, without understanding, untrustworthy, unloving, unmerciful; and though they know the ordinance of God, that those who practice such things are worthy of death, they not only do the same, but also give hearty approval to those who practice them.

This is not written only for the benefit of or criticism of the Jews. It was written to all people. It is clear that corruption is not a unique phenomenon in China, or indeed in the world, whether in the East or in the West. Moreover, it is clear that the corruption described may be in violation of the epistemological nature of one’s worldview as well as one’s metaphysics and axiology.

### *Axiology*

Axiology is basically the science of value, or is what we think of as value theory. It is under these values that all theories of obligation fall which follow. This third component of a worldview addresses the question of value and morality. There are two kinds of values: intrinsic values that are valuable in and of themselves, and extrinsic or instrumental values that depend on some external values. As you think about it, there are very few intrinsic values compared to instrumental values. Axiology first asks the question of what is the ultimate value, or *summa bonum*, to which we direct our lives. This is the highest good to which I may direct my life. There is nothing Eastern or Western about this question or its answer. Whether we admit or not, we are all guided by certain value preferences and judgments, such as happiness, pleasure, wealth, justice, the common good, or love. As you will notice, some or most of these are dependent upon other values for them to have any value at all. There may be things of course that may increase your love, goodness, happiness, or pleasure, but those are what we call instrumental values. So, money in the bank or in my pocket may be a value, but it has no value in and of itself unless it increases my intrinsic values, whether they are love, goodness, happiness, or pleasure. I can buy things that will allow me to show love, or to increase my own sense of goodness, happiness, or pleasure, but money itself is worthless unless I use it for something else. Not only that, to be instrumental, it must be productive. I cannot just leave it in the bank. I have to use it. But, if my pleasure depends on other things, such as what I can buy with my money, then pleasure in that case cannot be an intrinsic value. And what is the intrinsic value? If my value is love, and I need others to love me and to pay attention to me so that I can experience that love, then love in that case is extrinsic. So, as a Christian, I might say that the highest value is to glorify God and enjoy him forever.<sup>1</sup> We might express this as a mathematical formula as follows: “x is good = x is willed by God.”

The moral element asks three basic questions. These address what is known as the theory of obligation. That is, are there certain things that one must do or ought to do that are right? And, are

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<sup>1</sup> “Westminster Confession of Faith and Larger Catechism,” (1647), *THE CREEDS OF CHRISTENDOM WITH HISTORY AND CRITICAL NOTES*, Edited by Philip Schaff, Revised by David S. Schaff, Vol. 3 (Grand Rapids, MI: Baker Book House, 1985), 675, 676.

there certain things one must refrain from doing, that is, that I must not do, which I did would be wrong. Everyone's basic theory of obligation answers these questions. The third element is motivation. What motivates me to act or do certain things? This is not something that we talk about very often.

Now these basic questions regarding the theory of obligation, that is, what I ought to do or refrain from doing, are divided into two categories. The first is deontology. Here, the question of the rightness or wrongness of the act or rule is internal to the act or rule. In other words, the act or rule must have the moral code or theory of obligation as an essential or total part of it. One does not look to the consequences of the act or rule to determine if the act or rule is right. The second is consequentialism. Here, whether an act or rule is right or wrong is dependent entirely on the consequences that result from that act or rule.

Joseph Fletcher, a well-known theologian and ethicist of the last century was a consequentialist, and his standard was that an act or rule was good if it promoted and maximized love. That sounds pretty good. So in every act you need to ask yourself what should I do, or refrain from doing that will bring the most love to the most people that will be affected by my act. This may also include the most love to me, in addition to all others.

Now, I realize that we don't have the time or interest in what I might call "cloud computing" to try to figure out whether what we do or do not do will maximize a certain value before every time we act. That is, in the philosophy of Fletcher, we maximize love for the most people possible, including ourselves and minimize hate or indifference for the fewest people possible. Life is not that way, and we would be paralyzed if we had to do that every time we acted. But, this is the theory. Now, I am not suggesting that consequentialism does not have any moral absolute. It does, and that moral absolute is based on the intrinsic value that you are trying to maximize by your act. Thus, the moral absolute might be happiness, pleasure, or some similar value.

There is one other point we need to consider here, and that is that the rightness or wrongness of the act or rule is based on maximizing a value or in minimizing or eliminating a value. In other words, what values do we seek to maximize when we act in a certain way?

With that brief introduction, I would like to address the major theories of obligation, that its, what ought I to do, or what ought I not to do. There are variations, but all philosophical questions of ethics fall in these two general categories. Deontology comes from the Greek and it is the science of what ought to be, i.e., what one ought to do. Consequentialism addresses the question of whether the rightness or wrongness of an act is wholly dependent on the consequences of the act or rule. There are two forms of deontology. One in which the act or failure to act is right or wrong in of itself without regard to the consequences of that act or failure to act. The second is rule deontology, which means that the rightness or wrongness of the act or failure to act is dependent upon a rule that specifies the act or that prohibits the act. We might express this mathematically as follows: "x is right = x is willed by God."

Essentially, what Hadley Arkes writes deals with metaphysics, or absolute truth, epistemology, and axiology that address the capacity for morals and the origins of law.<sup>1</sup> It is the attribute of law that it binds. Thus a rule will become obligatory and compulsory to all who come within its jurisdiction. This obligation traces its root to the Latin *ligare* (or to bind), and that is why the notion of obligation conveys a sense of moral stakes that are bound up in the very nature of law. The logic of law is its moral commitment even if it runs counter to one's private notion of good or bad.

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<sup>1</sup> Note 33, *supra*.

Aristotle observed in the opening section of his *Politics* that polity is a “natural” association for human beings because it is evident “the polis [or polity] belongs to the class of things that exist by nature and that man is by nature an animal intended to live in a polis.”<sup>1</sup>

As Christians, we understand that there are three types of revelation: natural revelation, or that which we can observe from nature that can only be explained in terms of God’s creation; special revelation, or that which is revealed by God in the Bible; and revelation through the incarnate God, Jesus Christ. Where the difference between those who are members of the Roman Catholic faith and those whose tradition is in Protestantism, relates almost entirely to the early rejection of or lack of emphasis on natural revelation at, or immediately following the Reformation.

Since we are interested in Chinese culture, we cannot omit any consideration of Confucius. I have long thought that notwithstanding the presence, power, and authority of the Chinese Communist Party, there is something in the DNA of the Chinese people that includes Daoism and Confucianism. The study of Confucius and his writings raise interesting questions. As an introduction to Confucius’ *THE ANALECTS* states, philosophers who study Confucius are of two minds.<sup>2</sup> On the one hand, Confucius was interested in morals from a moral character perspective. Confucius certainly had more to say about moral character than about moral acts, but that does not mean that the rightness or wrongness of acts were unimportant to his thinking and philosophy. Indeed, Confucius speaks about the *Dao* (or Way) and about *te* (virtue). The way he used *Dao*, it seemed to cover the sum total of truths about the universe and man, and not only the individual but also the state is said to either possess or not possess the Way. The Way is a highly emotive term and comes very close to “Truth” as found in philosophical and religious writings in the West. The word, *te*, or virtue is an endowment humans get from Heaven. Even in the writing of Confucius, there is a metaphysical element that cannot be ignored. However, as I read the *ANALECTS BY CONFUCIUS*, it seems to me that there is a certain parallel from an axiological perspective with the book of *Proverbs* in the Bible that we cannot ignore if we are to engage China culturally, and certainly from a natural law perspective.

In *FAITH OF OUR FATHERS*, the authors draw a parallel between the two oldest civilizations in the world, China and the Hebrew nation.<sup>3</sup> As the authors wrote:

The material on which our study is based are the historical records of two of the oldest civilizations in the world; in both these cultures – that is, personal integrity and personal character – is emphasized over external standards of outward behavior. It is generally accepted that the Bible provides a standard of morality. The Chinese *Classics* present a remarkably similar standard of right and wrong, and demand that readers live by those standards. For example, the *Classic of History* [Chinese Source] places the blame for the

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<sup>1</sup> Aristotle, *Politics*, *THE COMPLETE WORKS OF ARISTOTLE, THE REVISED OXFORD TRANSLATION*, ed. Jonathan Barnes, Vol II (Princeton: Princeton University Press, 1984), 1253a.

<sup>2</sup> Confucius, *THE ANALECTS*, translated with introduction by D. C. Lau (London: Penguin Books, 1979). Too often we think of Confucianism in competition with Christianity. That is not my purpose or view here. Rather, I think of Confucianism as wisdom literature as we think of Plato or Aristotle, and from which we can gain much as we explore the possibility of integrating this deep and powerful tradition of life into our following of Jesus. Gregg A. Ten Elshof, *CONFUCIUS FOR CHRISTIANS: WHAT AN ANCIENT CHINESE WORLDVIEW CAN TEACH US ABOUT LIFE IN CHRIST* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 2015).

<sup>3</sup> Chang Kei Thong and Charlene L. Fu, *FAITH OF OUR FATHERS: FINDING GOD IN ANCIENT CHINA* (Shanghai: China Publishing Group, Orient Publishing Center, 2007). See also, K. K. Yeo, *MUSING WITH CONFUCIUS AND PAUL: TOWARD A CHINESE CHRISTIAN THEOLOGY* (Eugene, OR: Cascade Books, 2008). This book is important because it seeks to articulate how it is possible to maintain a Christian identity without capitulating to some Western assumptions and cultural models of Christian identity. Also of note is that Paul’s letter to the Galatians, the earliest of his letters, was introduced to the Chinese by the Nestorians.

collapse of the Shang Dynasty on the last Shang ruler, who is described as oppressive, murderous, extravagant, and lustful. On the other hand, it highly exalts the virtues and reverential attitude of emperors, such as Yao, Shun, and Yu.

The great 6<sup>th</sup> century BC philosopher, Lao Zi teaches about morals in his immensely influential *Dao De Jing (Tao-te Ching)*.<sup>1</sup> Although *Shang Di* and *Tian*, are used for personal names of God, whereas *shen* is given to god (lower case), *Shang Di* is always thought of God as the creator and ruler of the universe, the same Creator God worshipped by the Hebrews as Yahwey and by the Christians as Jesus.<sup>2</sup> When one compares *Shang Di's* attributes as recorded in *Chinese Classics* with the Biblical revelation of God's attributes, the distinguishing characteristic of both is His divine nature and how that forms the interaction with humankind. Moreover, as one reads *The ANALECTS OF CONFUCIUS*, it is almost impossible to come away with the impression that Confucius was not aware of these things, notwithstanding the fact that he did not focus on eternal punishment, eternal weal, or salvation apart from obedience with the law and good works.

As a common law lawyer and judge, I found John C. H. Wu, writing in *FOUNTAIN OF JUSTICE*, perceptive in this regard when he wrote:

Christ does not enter into the courtroom as the Lawgiver whose words are legally binding on the judges. No, His kingdom does not belong to this world. The common-law judges have quoted his words as the judges of ancient China would quote the words of Confucius. But it is impossible to understand the old Chinese jurisprudence without a knowledge of Confucianism, so it is impossible to grasp the spirit of common law without taking account of the permeating influence of Christianity.

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In some cases, the Christian influence is so subtle that you cannot put your finger on any specific precept which the Court is applying and yet you feel a Christian atmosphere diffused throughout the opinion.<sup>3</sup>

In a post-modern American culture characterized by secularism, pluralism, and privatization, it is increasingly difficult to find consistency in Court's opinions and decisions that conform to this observation of John C. H. Wu, particularly with respect to race, abortion, and same sex relations. Whereas *Brown v. Board of Education of Topeka*,<sup>4</sup> would be consistent with Biblical and theological teaching, U.S. Supreme Court decisions, such as *Roe v. Wade*,<sup>5</sup> *Lawrence v. Texas*,<sup>6</sup> and *Obergefell v. Hodges*,<sup>7</sup> it would be impossible to read these as conforming to Biblical and theological precepts, or even most theories of natural law. They would not, in my view, represent classical natural law thinking.

Mencius, a disciple and interpreter of Confucianism, was an itinerant sage and thought to be a pupil of Confucius's grandson. While we as Christians would disagree with Mencius with respect to human nature, because of our understanding of the fall and original sin, Mencius, unlike Confucius who did not focus on human nature, asserted the innate goodness of the individual believing that it was society's influence or lack of positive cultivating influence, that caused bad moral character. Accordingly, he said: "He who exerts his mind to the utmost knows his nature" and

<sup>1</sup> Ibid, at 27.

<sup>2</sup> Ibid, 84-86.

<sup>3</sup> Note 14, *supra*, at 174-175.

<sup>4</sup> 347 U.S. 483 (1953).

<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> 539 U.S. 557 (2003).

<sup>7</sup> 576 U.S. \_\_\_\_ (2015).

that “the way of learning is none other than finding the lost mind.”<sup>1</sup>In order to illustrate his point, he identified what he called Four Beginnings:

The feeling of commiseration is the beginning of humanity; the feeling of shame and dislike is the beginning of righteousness; the feeling of deference and compliance is the beginning of propriety; and the feeling of right and wrong is the beginning of wisdom.<sup>2</sup>

However, if we are to engage Chinese culture with natural law theory, we need to consider the current situation in China. We come at our worldviews from a lot of different ways. Most of the time, we don’t even think about them or the force they have in our lives. But, when they are challenged, no matter what the worldview may be, the challenge can be very frightening and threatening to the very core of our beings. How and why does this happen? It happens, in part, because we are bound to what we have been taught all of our lives and what we have experienced in our homes, communities, and life generally. Some would argue that it takes a major intellectual revolution to reverse the predominant worldview. The question arises in my mind as to whether the teachings of Lao Zi, Confucius, and Mencius, for example, are part of the DNA of Chinese society, or if China no longer represents what it represented for 4000 years. That is not to say that the Revolution of 1949, the rule of the Communist Party of China, and the Governmental structure and rule have been all bad. The question in my mind as a foreign lawyer who has visited China many times and lectured in universities and public gatherings is whether there is anything left over in Chinese thinking and society from its 4000 year history, and particularly its religious traditions, whether Taoism as its really only internal religion, or Buddhism, Christianity that came to China first along the Silk Road in the form of Nestorianism, Judaism and Islam, also from the Middle East, or Confucianism, which is more a philosophy than religion. Officially, China is atheistic. The question arises as to whether any form of natural law can exist in that environment.

Following the 18<sup>th</sup> Party Congress in 2012 and the 19<sup>th</sup> Party Congress in 2017, the Communist Party of China articulated core socialist values. When I arrived in Beijing in October 2017, I saw signs that had appeared all over China, and on every bridge and postal monument in Beijing declaring the Core Socialist Values. Although many of these values have been declared by the Communist Party of China since the 18<sup>th</sup> Party Congress, and amended at the 19<sup>th</sup> Party Congress, as well as expressed by President Xi Jinping on 25 February 2014 to the study group of the Political Bureau of the CCP Central Committee, they did not appear out of thin air. These Core Socialist Values include a set of “moral principles” which were summarized by central authorities as “prosperity, democracy, civility, harmony, equality, justice, the rule of law, patriotism, dedication, integrity, and friendliness.” The *China Daily* reported that this “doctrine” has “evolved into a national campaign to rebuild faith amid concerns that the world’s second-largest economy has lost its moral compass during its three-decade economic miracle.”<sup>3</sup>

Whether or not these are all “moral principles” may be up to debate. Prosperity, democracy, patriotism, and friendliness may not be “moral principles” as such, although those of us in the West would probably agree with them as principles worthy of advancing in any society. But, even if we were to assume that they are “moral principles,” the cause that China seeks to advance with them is largely economic and “to rebuild faith” in China as the “world’s second largest economy that has lost its moral compass during its three-decade economic miracle.” In other words, are these “core

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<sup>1</sup> Chan, Wing-tsit (trans), *The Mencius 7:A1 and The Mencius 6:A11*, A SOURCE BOOK IN CHINESE PHILOSOPHY (Princeton: Princeton University Press, 1963), 78, 58.

<sup>2</sup> Ibid, *The Mencius 2A:6*, at 65.

<sup>3</sup> *China Daily*, [chinadaily.com.cn/updated/2017-10-12](http://chinadaily.com.cn/updated/2017-10-12), Source *Xinhua*.

socialist values” more directed to Party and central government control, or do they actually reflect “moral principles?” What is the source of these “moral principles?” Are they pre-political, built into the fabric of humankind and society, or are they given or proclaimed by an atheistic government that can grant or revoke them at will? Moreover, as we see below in the discussion of natural law and natural rights, there are universal moral principles that are universal that are not stated in this list of Core Socialist Values.

What needs to be said, however, is that in Romans 13:1-8:

Every person is to be in subjection to the governing authorities. For there is no authority except from God, and those which exist are established by God. Therefore, whoever resists authority has opposed the ordinance of God; and they who have opposed will receive condemnation upon themselves. For rulers are not a cause of fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same; for it is a minister of God to you for good. But, if you do what is evil, be afraid for it does not bear the sword for nothing; for it is a minister of God, an avenger who brings wrath on the one who practices evil. Therefore, it is necessary to be in subjection, not only because of wrath, but also for conscience sake. For because of this you also pay taxes for *rulers* are servants of God, devoting themselves to this very thing. Render to all what is due them, tax to whom tax is *due*, custom to whom custom; fear to whom fear; honor to whom honor.

The text continues with a list of evil acts that repeat essentially the second table of the Decalogue, the opposite of which reflects moral principles.

### NATURAL LAW REVISITED

This leads to the issue of the source and nature of law, and its role in society. Since I have written on the subject of natural law, this section will be brief and additive to what I have already written.<sup>1</sup>

Three professors in my life have influenced my thinking about this subject more than anyone else: Professor John Finnis, Professor Ronald Dworkin, with whom I frequently disagreed, and Professor Robert George. As I wrote earlier, my struggle with jurisprudence has lasted more than 50 years, in part because I embraced certain elements of natural law theory and rejected positive law, analytical law, and legal realism theories.

The term, “natural law” is ambiguous for a number of reasons that led to some of my reluctant to commit to this theory of legal philosophy. It can refer to the scientific laws of nature, such as gravity or the regularity of the seasons, and it can refer to a type of moral theory as well as a type of legal theory. Although I do think that there might be some relevance to the laws of nature, and as stated in the U.S. Declaration of Independence, which provides, in part:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

This appears to be consistent with the ancient thinking of Athens as it thought of Forms or ideals upon which so much of the legal thought was based in ancient times. But, according to natural law

<sup>1</sup> Note 3, *supra*.

moral theory, the moral standards that governed human behavior are in some sense derived from the nature of human beings and the nature of the world. So, while they may be logically independent of natural law legal theory, the two theories intersect.<sup>1</sup> According to natural law legal theory, the authority of legal standards is necessarily derived from considerations having to do with the morality of those standards.

It is a longstanding commonplace in Christian thought that Protestant distinguishes its moral theology from that of Roman Catholicism by its rejection of natural law. The idea of natural law has long formed the spinal column of Catholic social teaching. Modern Protestantism, by contrast, has no comparable coherent framework for grounding its social thought. As long ago as 1891, on the occasion of one of the great documents of Catholic social teaching, *Rerum Novarum*, the Dutch Reformed theologian conceded the Protestant disadvantage: “It must be admitted to our shame that the Roman Catholics are far ahead of us in their study of the social question. . . . The Encyclical of Leo XIII gives the principles which are common to all Christians, and which we share with our Roman Catholic compatriots. The idea of natural law embodied in the *Rerum Novarum* assumes that there is a universal law to which all people of all races, classes, cultures, and religion have access to by their natural reason. Natural law thus serves as a bridge category on ethical and social questions between the church and the world, between those with *a priori* commitment to sacred Scripture and the Christian creed and those outside the community of faith.”<sup>2</sup>

It is important to distinguish between two kinds of theories that go by the name of natural law. The first is where morality is characterized by certain themes, such as, moral propositions that have objective standards and that can be objectively true or false. The second thesis constituting the core of natural law moral theory is one that claims that standards of morality are sometimes derived from the nature of the world and the nature of human beings. Thus, St. Thomas Aquinas argued that at creation, God produced the soul of man and woman and that a rational soul could not be produced except by God at creation.<sup>3</sup> Since human beings are by nature rational, it would be morally appropriate for them to behave in a manner consistent with their rational nature.

Another kind of natural law theory having to do with the relationship between morality and law, suggests that there is no clean division between morality and law. As ambiguous as the term “natural law” may be and as many versions of natural law theory, all of them subscribe to a thesis that there are at least some that depend for their “authority” not on pre-existing human convention, but on the logical relationship in which they stand to moral standards. Yet, as we see, that some can hold to a natural law theory of morality, but deny a natural law theory of law, such as espoused by John Austin who clearly was a positivist. Indeed, Austin inherited his utilitarianism from J. S. Mill and Jeremy Bentham.

### ***Conceptual Naturalism and Conceptual Jurisprudence***

My first interest in jurisprudence was 54 years ago in an honors jurisprudence course in law school was conceptual or analytical jurisprudence that was thought to provide an account of what distinguishes law as a system of norms from other systems of norms, such as morality, customs, or religion. In other words, what distinguishes law from non-law in the world? In any event, the conceptual analysis project of law remains important.

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<sup>1</sup> “Natural Law,” *Internet Encyclopedia of Philosophy*, <http://www.iep.utm.edu/natlaw>.

<sup>2</sup> Carl E. Braaten, “Protestants and Natural Law,” *First Things*, (January 1992)

<sup>3</sup> Note 9, *supra*, vol. I, Q 90, Art. 1 and Art. 3.



It must be acknowledged that classical naturalism is consistent with allowing a substantial role to human beings in the manufacture of law. As a judge in a common law system, that is what I did. At the same time, this claim that naturalism seems to necessarily incorporate all moral principles, it does not imply that the law is exhausted by a set of moral principles. The idea that concepts of law and morality intersecting is called the Overlap Thesis. There is a theory of morality that morals are bearers of objective Truth. It seems to me that this is the Biblical basis for my thinking, but was for many years also an area that troubled me. Metaphysically, a belief in God and in God's creation represented objective truth. I have not heard any reasonable rebuttal to this. Similarly, epistemologically, God revealed himself to humans through natural theology, through His divine Revelation, and through Jesus. The reason that natural law has been so well developed in Roman Catholic literature, but not in Protestant literature deals with the lack of Protestant serious engagement with natural theology, which serves as a bridge to those who are unbelievers in Biblical Revelation and in Jesus Christ.<sup>1</sup>

There are some objections to conceptual naturalism. First, contrary to Augustine, unjust laws are all too frequently enforced against persons.<sup>2</sup> While John Austin endorsed the view that it was not necessarily true that the legal validity of a norm depended upon whether its content conformed to morality, he denied the Overlap Thesis while accepting an objectivist moral theory.

All forms of natural law theory subscribe in some way to the Overlap Thesis where there is some relation between law and morality. According to this view, the notion of law cannot be fully articulated without some reference to morality. However, there are different ways in which the Overlap Thesis can be interpreted. The strongest articulation of the Overlap theory is the classical naturalism of Aquinas and Blackstone. But, anyone familiar with Aquinas understands that he distinguishes between four types of law: eternal law; natural law, human law, and divine law.<sup>3</sup> Without going through the details of each of these elements of law, we understand that divine law is concerned with the standards that must be satisfied by individuals to achieve eternal salvation. It is at this point where Protestants and Roman Catholics might disagree, although we would all agree that divine laws are only disclosed through divine special revelation.

But, Aquinas and many who follow him, just as Martin Luther King in his *Letter From a Birmingham Jail* argued that human law, that is, promulgated by governments, is valid only if it conforms to the content of natural law. Natural law, according to Aquinas, is comprised of the precepts of eternal law that govern the behavior of beings possessing reason and free will. The issue here is related to the fall and original sin and the extent to which the fall affected reason and free will.

Blackstone argued that the idea of a norm that does not conform to the natural law cannot be legally valid, since the law of nature being dictated by God himself is superior in obligation to any law made by man, at all times and in all places around the globe.<sup>4</sup>

Classical naturalism is consistent with allowing a substantial role to humans in the promulgation of law. While naturalist seem committed to the claim that the law necessarily incorporates all moral principles, this claim does not imply that the law is exhausted by the set of moral principles. There

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<sup>1</sup> Thomas K. Johnson, "The Rejection of God's Natural Moral Law: Losing the Soul of Western Civilization." *Evangelical Review of Theology* (2019) 240-252.

<sup>2</sup> See for example, John Austin, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Cambridge: Cambridge University Press, 1995).

<sup>3</sup> Note 9, *supra*.

<sup>4</sup> Sir William Blackstone, *COMMENTARIES ON THE LAW OF ENGLAND, EHRlich's BLACKSTONE* (San Carlos, CA: Nourse Publishing Company, 1959), 7-8.

will still be coordination problems, and of course we have the distinction between *malum in se*, and *malum prohibitum* in criminal law. Legal norms are promulgated by human beings and are valid only if they are consistent with morality.

Polanyi sets the stage for our thinking of both natural law and of human rights, whether or not we are thinking in a Western or Eastern context. The application of universals may not be as regional as one would surmise. According to Polanyi:

I have given you an account of the way we exercise our tacit powers of knowing. The things that we know in this way include problems and hunches, physiognomies and skills, the use of tools and probes, and denotative language, and my list extended all the way to include primitive knowledge of external objects perceived by our senses. Indeed, the structure of perception throws light on all of the rest. Because our body is involved in the perception of objects, it participates thereby in our knowing of all other things outside. Moreover, we keep expanding our body into the world, by assimilating to it set of particulars which we integrate into reasonable entities. Thus do we form, intellectually and practically, an interpretive universe populated by entities, the particulars of which we have interiorized for the sake of comprehending their meaning in the shape of coherent entities.<sup>1</sup>

The question arises as to where we get this tacit knowledge. John C. H. Wu writes in his book on justice that we may be allowed to go further than Justice Oliver Wendell Holmes was willing to go with regard to success as a lawyer and “observe that the law, even in its every-day characteristics, necessarily contains ‘an echo of the infinite’ and ‘a hint of the universal law.’”<sup>2</sup> Indeed, as Professor Wu wrote, “in order to understand human law, we must have some notion of eternal law, and particularly of natural law, which is not only the origin from which human law is derived, but constitutes the essential part of it.”<sup>3</sup> He further writes that “The human sovereign is, indeed subject to God and to the law, because it is from them that he derives his authority.”<sup>4</sup> What we have summed up by Professor Wu is a metaphysical, epistemological, and axiological basis for a concept of law. As I read him, and particularly his *FOUNTAIN OF JUSTICE*, I get the sense that accepts the Overlap Theory, and specifically, that he is Thomistic in his thinking about law.

Professors John Finnis and Robert George have had a great deal of influence on my thinking as I struggled with natural law, and with jurisprudence in general. I know both of them and have read much of what they have written. Since they have written extensively on the topic, I will not try to repeat or summarize their thinking here. As Professor Finnis points out in his book, *NATURAL LAW AND NATURAL RIGHTS*,<sup>5</sup> Bentham, Austin, Kelsen, Weber, Hart, and Raz all published stern repudiations of what they understood to be the theory of natural law. Having spoken with both H. L. A. Hart and Joseph Raz, I agree with Professor Finnis. Professor Finnis further states:

A theory of natural law need not be undertaken primarily for the purpose of thus providing a justified conceptual framework for descriptive social science. It may be undertaken, as this book is, primarily to assist the practical reflection of those concerned to act, whether as judges or as statesmen or as citizens. But in any case, the undertaking cannot proceed securely without a knowledge of a whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and

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<sup>1</sup> Note 37, *supra*, 29.

<sup>2</sup> Note 14, *supra*, 5.

<sup>3</sup> *Ibid*, 7.

<sup>4</sup> *Ibid*.

<sup>5</sup> Note 8, *supra*, 18.

analytical social science.<sup>1</sup>

In Chapter 2, Professor Finnis sets out the theory of natural law and the objections to it. As I understand him, there are a set of practical principles which indicated the basic forms of human flourishing as goods to be pursued and realized. As I understand this, he is speaking both of the *summum bonum* and the common good that is so prevalent in Christian thinking. At the beginning of Christianity there were a set of moral principles but moral philosophy as we would think of it today. This was developed by St. Augustine of Hippo (354-450) in which he developed the idea of a rational soul, somewhat consistent with Plato's philosophy. Secondly, according to Finnis, there is a set of basic methodological requirements of practical reasonableness that include human flourishing. The issue I had with the theory was both the definition of *summum bonum* and the effect of the Fall or original sin described in Genesis 3 on the power to reason rightly. In my earlier paper, I have come to terms with both of these concerns.<sup>2</sup> Further, Finnis asserts more particularly that the principles of natural law explain the obligatory force of positive laws, even when those laws cannot be deduced from those principles.<sup>3</sup>

Finnis, in describing Thomas Aquinas' tackling the question of the extent of human recognition of natural law, opined that Aquinas is working with a threefold categorization of principles or precepts of natural law. First, there are most general principles which state basic forms of human good, and are recognized by anyone who reaches the age of reason and had enough experience to know to what they refer. They cannot be eliminated from the heart. Second, even the most elementary and easily recognizable moral implications of those first principles are capable of being obscured or distorted for some people, whether by prejudice, convention, oversight, or desire for immediate gratification. Third, there are many moral questions which can be answered by someone who is wise, and who considers them searchingly.<sup>4</sup>

In response to the question as to whether natural lawyers have shown that they can derive ethical norms from facts, Finnis quickly replies that they have not, nor do they need to, nor did the early proponents of natural law theory attempt to find such derivation. However, he continues:

Thus it is simply not true than 'any form of natural-law theory of morals entails the belief that propositions about man's duties and obligations can be inferred from propositions about his nature.' Nor is it true that for Aquinas 'good and evil are concepts analyzed and fixed in metaphysics before they are applied in morals.' On the contrary, Aquinas asserts as plainly as possible that the first principles of natural law, which specify the basic forms of good and evil and which can be adequately grasped by anyone of the age of reason (and not just metaphysicians), are *per se nota* (self-evident) and indemonstrable. They are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions, or about the nature of god and evil, or about the function of a human being, nor are they inferred from a teleological conception of nature, or any other conception of natures.<sup>5</sup>

While I am not prepared to debate this point that Finnis makes, as I wrote at the beginning, where our theory of law and our theory of justice take us, it must have a beginning in our worldviews. While philosophical understanding of metaphysics, epistemology, and axiology help, they do not

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<sup>1</sup> Ibid, 18-19.

<sup>2</sup> Note 3, *supra*.

<sup>3</sup> Note 8, *supra*, 23-24.

<sup>4</sup> Ibid, 30.

<sup>5</sup> Ibid. 33 (citations omitted).

require philosophical speculation; simply worldview thinking which may be intuitive. I am not a Thomistic scholar and have no claim to the expertise, both in Aristotle's thinking or the writings of St. Thomas Aquinas, reflected in the writings of Professor Finnis. Finnis does identify one of the primary objections to Aquinas's theory of natural law, specifically that "Aquinas fails to explain just how specific moral rules which we need to guide our conduct can be shown to be connected with self-evident principles."<sup>1</sup> He has three answers to this objection. First, the very phrase, "natural law," can lead one to assume that there are norms referred to in any theory of natural law, which are based upon some judgments about nature (human or otherwise). Secondly, this assumption is in fact substantially correct in relation to Stoic theory of natural law. But, I would add that according to my understanding, Aquinas brought Stoic philosophy of natural law from Athens together with the Christian teaching out of Jerusalem. Third, Aquinas himself was a writer, not on ethics alone, but on the whole of theology. As Finnis wrote: "He [Aquinas] was keen to show the relationship between his ethics of natural law and his general theory of metaphysics and the world-order."<sup>2</sup> It seems that this could be argued to reflect the Overlap Theory discussed above.

As I read Germain Grisez, and those who developed and defended his thinking over the past fifty years, such as John Finnis, Joseph Boyle, William May, and Patrick Lee, among others, there are critics who suggest that Grisez's view of the relationship between morality and nature disqualifies his theory of natural law.<sup>3</sup> According to Professor George, Russell Hittinger and others understand Germain Grisez's theory as failing to interrelate systematically practical reason with a philosophy of nature. Professor George continues asserting that a problem with the criticism of Lloyd Weinreb is that he argues that Grisez and his collaborators, including Finnis, rely on implausible claims that certain propositions in normative ethics and political theory are self-evidently true.<sup>4</sup> Professor George mentions another critic of Grisez and his collaborators as erecting a wall of separation between practical reason and theoretical reason, between ethics and metaphysics, between nature and morals, between "is" and "ought," arguing that Grisez and Finnis, among others, "maintain the absolute independence of ethics over against metaphysics, or of morals with respect to knowledge of nature." As a result, principles of morals and of ethics are not thought of as being principles of being or of nature at all.<sup>5</sup> However, as I read Professor George's thinking, I understand him to argue that the theory's denial that practical knowledge (including knowledge of moral norms) can be inferred from methodologically antecedent knowledge of human nature does not entail the proposition that moral norms are unrooted in human nature.<sup>6</sup>

John C. H. Wu wrote about the common law as a Cradle Christian.<sup>7</sup> Paraphrasing Justice Benjamin Cardozo, he wrote:

In fact, Justice Cardozo and Sir Frederick Pollock have used the beautiful expression "our lady of the common law." I do not know whether either of them fully realized the implications of this title. To a Catholic, it is likely to suggest the image of Our Lady tenderly holding the Divine Infant in her embrace. If the common law is Our Lady, then the natural

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<sup>1</sup> Ibid. 34.

<sup>2</sup> Ibid. 35.

<sup>3</sup> Robert P. George, *Natural Law and Human Nature*, NATURAL LAW THEORY: CONTEMPORARY ESSAYS, Robert P. George, ed. (Oxford: Clarendon Press, 1992), 31.

<sup>4</sup> Ibid, 31-32, citing Lloyd Weinreb, NATURAL LAW AND JUSTICE (CAMBRIDGE, MA: HARVARD UNIVERSITY PRESS, 1987), 112-13.

<sup>5</sup> Ibid, 32.

<sup>6</sup> Ibid, Chapter 2, 30-41, *Forward*, vii.

<sup>7</sup> John C. H. Wu, note 14, *supra*.

law is the Divine Infant that she holds in her embrace. In appearance, it is Our Lady who holds the Divine Infant. In reality, it is the Divine Infant who holds Our lady. We know that the Divine Infant is none other than the *Word*, Who “was in the beginning with God.” . . . This gives you an idea of how I am going to approach the subject which has been assigned to me: “Then Natural Law and Our Common Law.”

In comparing the natural law to the Word Incarnate, I am aware that Our Lord enters into humanity not as an Idea but as a Living Person. Similarly, in comparing the common law to Our Lady, I by no means forget that Our Lady is purity itself, while the common law, in the happy phrase of Lord Mansfield, “works itself pure by rules drawn from the fountain of justice.” Even this is true only when common law is at its best. When it is at its worst, it becomes, as Tennyson says, a “lawless science,” a “codeless myriad of precedent,” a “wilderness of single instances.”<sup>1</sup>

While there is much to be gained by this understanding of natural law, and of common law, from Wu’s description, as a Protestant I would not express myself quite the same way. John Fortescue, a disciple of St. Thomas Aquinas, described natural law as revealed in the Old Testament and in the Gospels of the Bible as supreme.<sup>2</sup> Indeed, the legal philosophy of the fifteenth century was deeply Christian. Sir Edward Coke identified the law of nature with eternal law, stating that the

[L]aw of nature is that which God at the time of creation and of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature.” And by this law written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world.<sup>3</sup>

As I read the magisterial reformers of the Protestant Reformation, this perspective of natural law appeared to be widely accepted at the time of the Reformation. Moreover, it answers the question I often pose as to whether the law was pre-political, or whether it is granted by government with all of its rights and obligations defined by government. We read in John 1:17 that “For the Law was given through Moses; grace and truth were realized through Jesus Christ.” The question then arises. If natural law is merely a body of precepts that are self-evident principles of justice written on the hearts of human beings, what then is its contribution to jurisprudence? Plato, Aristotle, and Cicero all expounded on natural law with varying degrees of success. But without Christianity, a philosophy of law based purely on natural reason might serve the purpose just as well. Although this is not a place to expound on Confucianism, and I am not the one to do so, one quotation from a Confucian classic, *The Golden Mean*, draws a valuable connection: “What is ordained by Heaven is called essential nature. Conformity to the essential nature is called natural law. The refinement of natural law is called culture.”<sup>4</sup>

It is remarkable how closely this statement of Confucius corresponds to the thinking of St. Thomas Aquinas which sees the eternal law, the natural law, and human law as forming a continuous series. What is ordained by Heaven is the plan of Divine Providence, which includes natural law. The refinement of the natural law is the task of culture, which includes human law and manners. Aquinas and Confucius both reached practically the same result about natural law based on natural reason as a bridge between eternal law and human law without the aid of revelation.

The essence of law is justice, which all existing laws should endeavor to embody as perfectly as

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<sup>1</sup> Ibid, 63-64.

<sup>2</sup> Ibid, 78.

<sup>3</sup> Ibid, 91.

<sup>4</sup> Ibid, 219.

possible. Aristotle said that justice is the most excellent of virtues. In Christian teaching, love is more noble than justice, but among the moral virtues, love is but a higher form of justice. Further, Wu addresses the issue of justice and Truth as follows:

Truth enters into the philosophy of law on two different planes. First, on the metaphysical plane, we must visualize the human law as a rivulet flowing from the natural law, which in turn, flows from the eternal law. The fountainhead of all law is God. If we do not realized this, then we are not true realists, but blind gropers in the realm of passing shadows. . . . Secondly, on the empirical plane, we must see law in its relation to the other sciences and actualities of life.

The first requisite of a just judgment is that it must be based upon the facts. In fact, the popular notion of justice is inseparably bound up with truth. Our imagination is excited and our hearts cheered up when, whenever we observed that truth is found out in a puzzling case.<sup>1</sup>

What we have seen since the Enlightenment is the substitution of reason for revelation with the resulting effect of a variety of theories on natural law, all of which affect the common good, however defined, and public as well as private morality. Modern philosophy which is thought to start with René Descarte (1596-1650) was primarily concerned with epistemology and the search for certainty and grounds for certainty as the driving force. There were four characteristics to this method of philosophy. The first was systematic doubt. Anything that could be doubted was logically unnecessary and ought to be rejected. The second was analysis. Each problem or issue ought to be analyzed in its smallest constituents. The third was rational reconstruction, where complex whole or issues could be logically reconstructed from their analyzed simple elements. And fourth, there was the recapitulation argument, where such reconstruction should be carefully composed and copied down like mathematical proofs. Whereas idealism and authority had shaped earlier views of natural law, now the source of law was reason. Principles were drawn from reasoning as to the nature of man in the abstract. The problem was that there was confusion and speculation as each philosopher and each jurist attempted to make law conform to each writer's sense of what it ought to be.

This gave rise to what I would call the Post-Enlightenment Modern Consciousness Challenge. The challenge was to provide for debate in the public realm, standards and methods of rational justification by which alternative courses of action could be judged just or unjust, rational or irrational, enlightened or unenlightened.<sup>2</sup>The idea was that reason would displace authority and tradition. Moreover, there was an obligatory nature to the Post-Enlightenment modern consciousness challenge. The assumption was that there was a connection between rationality and responsibility; that is, if a belief is not rational or reasonable, one is acting irresponsibly by holding on to such a belief. However, the challenge went further, for it stated that for a belief to be rational or reasonable, it must meet certain conditions of rationality. One such condition was that there must be adequate evidence to support the particular belief. However, to be adequate for this purpose, the challenge defined what kind of evidence was necessary and admissible. Reason, according to John Locke, consisted of two parts. The first involved an inquiry into things one knows for certain. Locke was an empiricist in the sense that he believed all material knowledge is supplied by sense-

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<sup>1</sup> Ibid, 240-41.

<sup>2</sup> This segment comes from discussions I have had over the last 40 years with Nicholas Wolterstorff, Noah Porter Professor Emeritus of Philosophical Theology at Yale University and Fellow in the American Academy of Arts and Sciences. See also an extended treatment of this subject in Nicholas Wolterstorff, *JUSTICE: RIGHTS AND WRONGS* (Princeton: Princeton University Press, 2008).

perception and introspection. The second involved an investigation of propositions which, according to Locke, were wise to accept in practice although they may have only a probability, not a certainty.

It becomes immediately apparent that any theory of natural law cannot face this challenge successfully because it cannot be established reasonably or rationally on the basis of adequate admissible evidence that supports the underlying belief. One cannot prove the existence of God, the universal and immutable character of norms or standards of morality on the basis of empirical evidence known only through the application of senses upon which law must be based. One cannot prove Truth or objective reality by reason or divine revelation on the basis of scientifically verifiable data upon which natural law is grounded.

No paper on natural law would be complete without some discussion of Professor Ronald Dworkin's contribution to jurisprudence. As a friend of many years and a reader of all he wrote, I probably am not the one to comment on his contributions to natural law, assuming for a moment, that he does espouse natural law theory. Perhaps, it is simply because he did not fit into my understanding of the topic, which may say more about me and my understanding about natural law than about him, and because we had significantly different political philosophies on a large number of issues. Nevertheless, he was always engaging, and tested his thinking in public forums before revising them for final publication. I first read Dworkin's writings in 1975 as a lawyer with an interest in jurisprudence and then as a federal trial judge.<sup>1</sup> Since then, I have read and studied all of his books, taken seminars under him at the University of Oxford, and had multiple discussions with him.

One way to start is to state his thesis, as he expressed it in 1977 in his book, *TAKING RIGHTS SERIOUSLY*.<sup>2</sup> It is generally clear from his writings, that he disagrees with legal positivists, who according to Dworkin, "generally assumed that the law of a political community comprised a set of rules whose primary function was to specify the forms of social behavior which were liable to coercive sanctions inflicted by the government authority."<sup>3</sup> According to Covell interpreting Dworkin, the positivist assumed that rules of law were always identifiable by certain criteria of legal validity, which stood as tests or standards concerned not with the substantive content of such rules, but with the manner in which they were proscribed or adopted by judicial and political institutions in the given community.<sup>4</sup>

As a judge, I was particularly interested in Dworkin's *LAW'S EMPIRE* in which he treated judges almost as philosopher rulers adjudicating hard cases according to some existing principles, rather than simply legal rules.<sup>5</sup> He sets out his thesis of the importance of law and why it matters in the first pages:

It matters how judges decide cases. It matters most to the people unlucky or the litigious or wicked or saintly enough to find themselves in court. . . . Criminal cases are the most frightening of all, and they are the most fascinating to the public. But civil suits, in which one person asks compensation or protection from another for some past or threatened harm,

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<sup>1</sup> Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review*, 35(1967)( revised in reprinted in Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (Cambridge: Harvard University Press, 1977), and Ronald Dworkin, "Hard Cases," *Harvard Law Review*, 88 (1975), revised and reprinted in Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* (Cambridge: Harvard University Press, 1977)

<sup>2</sup> Ronald Dworkin, *TAKING RIGHTS SERIOUSLY*, note 87, *supra*.

<sup>3</sup> Charles Covell, *THE DEFENSE OF NATURAL LAW: A STUDY OF THE IDEAS OF LAW AND JUSTICE IN THE WRITINGS OF LON L. FULLER, MICHAEL OAKESHOT, F. A. HAYEK, RONALD DWORIN, & JOHN FINNIS* (Houndsmill and London: MacMillan Press Ltd, 1992), 146-195.

<sup>4</sup> *Ibid*, at 146.

<sup>5</sup> Ronald Dworkin, *LAW'S EMPIRE* (Cambridge, MA: Harvard University Press, 1986).

are sometimes more consequential than all but the most momentous criminal trials. The difference between dignity and ruin may turn on a single argument that might have not struck another judge so forcefully, or even the same judge on another day. . . .

Lawsuits matter in another way that cannot be measured in money or even liberty. There is an inevitable moral dimension to an action at law, and so as standing risk of a distinct form of public injustice. A judge must decide not just who shall have what, but who has behaved well, who has met the responsibilities of citizenship, and who by design or greed or insensitivity has ignored his own responsibilities to others or exaggerated theirs to him. If this judgment is unfair, then the community has inflicted a moral injury on one of its members because it has stamped in some dimension an outlaw. The injury is gravest when an innocent person is convicted of a crime, but it is substantial enough when a plaintiff with a sound claim is turned away from court or a defendant leaves with an undeserved stigma.<sup>1</sup>

Thus, for Dworkin, the theory of adjudication implicit in the positivist model of law could not be reconciled with the legitimate role played by legal principles in the judicial decisions in “hard cases.” According to Professor George, Dworkin’s “rights theory” related to individual rights that constrained the government’s pursuit of collective interests.<sup>2</sup> It is clear that according to this thinking, individual rights will often be in conflict with community interests and the common good. In my reading of Dworkin’s writings and in countless discussions, Dworkin endorses what he understands as liberal positions which are often in conflict with traditional, historical, morality as understood generally universally, except in cases of extraordinary emergency. As a result, individual rights, as defined by Dworkin, almost always trump collective interests and what many have considered the common good.

The issues I have long had with Dworkin’s rights theories and which we have discussed are clearly stated by Professor George in *MAKING MEN MORAL*. From where do these individual rights come or how are they derived? My worldview thinking has clearly placed the source and nature of these rights and indeed, obligations, in God’s providence, in His creation of man and woman in his image, and the understanding of these rights and obligations for advancing the common good from natural revelation, Special revelation, and from Jesus Christ. Of course, not all will come to this conclusion, and because of the fall, or original sin, we are incapable of objective reason. As Professor George wrote:

Whether the specific political rights favored by Dworkin and other liberals can plausibly be derived from this abstract right is questionable. I challenge below Dworkin’s proposed derivation of one such right, namely the right of ‘privacy’ or ‘moral independence’ [the basic cause of original sin or the fall and ejection from the Garden of Eden]. For now, I simply wish to observed that the abstract right to equality appears foundational to Dworkin’s theory of political morality – he makes no effort to derive it from more fundamental principles. But this lack of a derivation is problematic in that the proposition appears to be neither a self-evident practical principle nor a necessary truth of any kind.<sup>3</sup>

Professor Dworkin raised a challenge in his *JUSTICE FOR HEDGEHOGS*.<sup>4</sup> He poses the question whether we can talk about values, such as how to treat other people, we must start with bigger

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<sup>1</sup> Ibid. at 1-2.

<sup>2</sup> Robert P. George, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (Oxford: Clarendon Press, 1993), 85.

<sup>3</sup> Ibid, 85-86.

<sup>4</sup> Ronald Dworkin, *JUSTICE FOR HEDGEHOGS* (Cambridge, MA: Harvard University Press, 2011).



philosophical issues. Thus, he poses the issue of whether we can think about honesty and equality as genuine values, we must first consider as a distinct threshold issue whether there are such things as values. “Can beliefs about value – that it is wrong to steal, for instance – actually be *true*? Or for that matter false.” “If so, what in the world can make such a belief true or false.” He then asks where the values come from. God? But what if there is no god. Can values just be out there, part of what there really, finally is? He points out that even friends disagree on what is right or wrong.<sup>1</sup> He argues that ancient moral philosophers, such as Plato and Aristotle, saw the human situation as one in which we have lives to live and want to live those lives well; where ethics commands us to seek happiness in the fulfillment of life conceived as a whole, and morality had commands that are captured in a set of virtues that include the virtue of justice. But he continues:

The god-intoxicated philosophers of the early Christian period and of the Middle Ages had the same goal, but they had been given – or so they thought – an obvious formula for achieving it. Living well means living in God’s grace, which in turn means following the moral law God had laid down as the law of nature. The formula was the happy consequence of fusing two conceptually distinct issues how people have come to hold their ethical and moral beliefs, and why those ethical and moral beliefs are correct. God’s power explains the genesis of the conviction; we believe what we do because God has revealed to us directly or through the powers of reason he created in us. . . . The formula did not make for entirely smooth sailing. The Christian philosophers were troubled above all by what they called the problem of evil. If God is all-powerful and the very measure of goodness, why is there so much suffering and injustice in the world?<sup>2</sup>

It is at this point that Dworkin picks up what I referred to earlier as the Post-Enlightenment Modern Consciousness Challenge. As Dworkin pointed out, the new epistemological regime posed an immediate problem for convictions about values.

One of the problems I have had with Dworkin’s thinking over the years has been that I have never been really convinced that he was an adherent of natural law. Of course, he passed away long ago and is in no position to defend himself, although all of his articles and books live on and he certainly attempted to address the very issues his critics have raised. As stated by Professor George, and others, his beliefs appear to result from a form of utilitarianism, which he calls, “neutral or collective utilitarianism” as a working conception of his collective interests in American politics. While I do not doubt that some legislators or judges appeal to utilitarianism and consequentialism, I agree with Professor George and others, including Professor Grisez and Finnis, that these attempts are futile.<sup>3</sup>

Nevertheless, American politically liberal thinkers have promoted the judicial action controversial claims opposed primarily by traditional conservative thinkers under the rubric of the right of privacy and equality. Most of these have involved campaigns through judicial action to the most controversial claims pertaining to human sexuality and “reproduction.” Typically, the argument is that the government violates fundamental human rights when it bans or unduly restricts such things as abortion, contraception, pornography, fornication, sodomy, and now same-sex marriage under the theories of equality and right of privacy.<sup>4</sup> Judges have been persuaded to

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<sup>1</sup> Ibid, 23.

<sup>2</sup> Ibid, 16.

<sup>3</sup> Note 93, *supra*, 88; Germain Grisez, “Against Consequentialism,” *American Journal of Jurisprudence*, 23 (1978); John Finnis, *FUNDAMENTALS OF ETHICS* (Oxford: Oxford University Press, 1983), 86-93.

<sup>4</sup> Rollin A. Van Broekhoven, note 3, *supra*, at notes 64-69 and accompanying text.

invalidate such statutes in which these bans or restrictions have been democratically enacted on the bases of judicial review and that these restrictions violate certain constitutional rights based on the right of privacy and equality created by the courts.

### HUMAN RIGHTS

Human rights -- *droits de l'homme*, *derechos humanos*, *Menschenrechte*, or “the rights of man” – are literally the rights one has because one is human.<sup>1</sup> Claiming a right may stop the conversation and increases and shifts the burden of proof to those who would that this asserted right is itself trumped by some other right, including the common good, which may be contrary to what Dworkin argued in TAKING RIGHTS SERIOUSLY.

As Professor Donnelly explains human rights:

Human rights are literally the rights that one has simply because one is a human being. . . .

Human rights are *equal* rights; one either is or is not a human being, and therefore has the same human rights as everyone else (or none at all). Human rights are also *inalienable* rights: one cannot stop being human, no matter how badly one behaves or how barbarously one is treated. And they are universal rights, in the sense that today we consider all members of the species *homo sapiens*, “human beings” and thus holders of human rights.<sup>2</sup>

If human rights are connected, as they are, to our humanity, as member of the human species, it seems to me that the Christian metaphysical Creator God cannot be ignored. Everything seems to flow from that reality, including the Dao in DAO DE JING, or as elsewhere translated “The Way,” Logos,” or even Heaven in the writings of Confucius. Moreover, as Professor Donnelly points out, human rights are not just abstract values. They are rights, particular social practices that realize those values. Thus, a human right should not confused with values or aspirations underlying those values or with the enjoyment of the object of the right.

John C. H. Wu, brings together the concepts of natural law, common law procedures, and human rights in his book, FOUNTAIN OF JUSTICE.<sup>3</sup> Like many jurisprudential thinkers and writers, Wu connects his theory of natural law and human rights within the content and context of *The Magna Carta*. As Wu writes, King John of Britain in 1215 AD pledged to secure certain rights of liberty and property from arbitrary invasion by the king. At its foundation, the king shall be below the law. As Wu wrote:

But if the king is below the law, nobody else, not even victorious barons, could be above it. This idea of supremacy of God and the law over all human beings was a powerful leaven which was bound in the course of time to permeate the whole mass of people, although it started from the upper levels. . . .

Of special importance for the cause of natural law are the guarantees of the rights and liberties of the Church and the free-men. I shall content myself with reproducing two of such provisions:

From Chapter I: “First, we have granted to God any by this our present charter have confirmed for us and our heirs for ever, that the English Church shall be free and shall have her rights and liberties whole and inviolable.” From Chapter 29: No freeman shall be taken

<sup>1</sup> Jack Donnelly, UNIVERSAL HUMAN RIGHTS IN THEORY AND IN PRACTICE (Ithaca, NY: Cornell University Press, 2013).

<sup>2</sup> Ibid., 7, 10.

<sup>3</sup> John C. H. Wu, note 14, *supra*.

or imprisoned or disseised of his free tenement, liberties or customs, or outlawed or exiled or in any wise destroyed, nor will be go upon him, nor send upon him, unless by lawful judgment of his peers, or by the law of the land. To none will we sell, deny, or delay right or justice.<sup>1</sup>

As Wu explains these chapters, the protective arm of *The Magna Carta* stretched not only over every Englishman, but over every human being who set foot on English soil.<sup>2</sup>

Although it might be impossible to trace the history of human rights law in the limited space allotted here, there are a few observations that can be made before looking at the United Nations Universal Declaration of Human Rights. From my perspective as an American judge, the Amendments to U.S. Constitution set forth some of the rights protected by the Constitution. Indeed, the Bill of Rights included in the First Ten Amendments forms the background for what is protected. The First Amendment protects freedom of religion, freedom of speech, freedom of people to assemble peacefully, and freedom to petition the government for redress of grievances. The Second Amendment protected the right to keep and bear arms. The Third Amendment provided that no soldier would be quartered or housed without the consent of the owner, and in a manner prescribed by law. The Fourth Amendment protected the right of people to be secure in their houses, papers, and effects against all unreasonable searches and seizures. This required a warrant duly sworn on an oath or affirmation before there was any search or seizure. The Fifth Amendment protected the right to life and liberty unless on presentment or indictment of a Grand Jury, subject to certain exceptions. Amendment Six provided for the right to a speedy and public trial in criminal prosecutions, and to confront witness against him, or obtain witnesses in his favor. The Seventh Amendment consisted with common law provided for trial by jury in case over a specified monetary amount. The Eighth Amendment prohibited excessive bail or fines imposed, and prohibited cruel and unusual punishment.

As is obvious from the study of America's founding and history, these Amendments only applied to property owners, primarily men, and excluded slaves. The Civil War was, in part, the response to this injustice. As a result, there were what were known as the Civil War Amendments, Amendments XIII, XIV, and XV, which granted these protections and rights to those previously denied those rights, including the right to vote.

Prior to the 1940s, there were few such documents as *The Magna Carta*, *The Bill of Rights* in the U.S. Constitution that advanced the recognition of human rights. Following World War II and the atrocities of the Nazi regime, the international community realized its need for human rights to be established as an international legal status.

The United Nations established the Commission on Human Rights that provided that all humans had the following *inter alia* rights: right to life; right to liberty; right to security of person; right to be free from slavery; right to be free from involuntary servitude; right to be free from torture; right to be free from cruel, inhuman, or degrading treatment or punishment; right to equal protection of the law; right to effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law; right to be free from arbitrary arrest, detention, or exile; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent until proven guilty; right to be free from arbitrary interference with one's privacy, family, home, or correspondence; right to freedom of expression and opinion; right to receive and

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<sup>1</sup> Ibid, 67-68.

<sup>2</sup> Ibid, 69.

impart information through the media; right to peacefully assemble and association; etc. Article 2 specifically provides that everyone is entitled to all of the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other such status. Article 18 specifically provides that everyone has the right to freedom of thought, conscience and religion, including the right to change religion or belief, and freedom, either alone or in community with others and in public or private to manifest or practice his religion, or belief in teaching, practice, worship and observance. The Preamble of the Declaration of Human Rights specifically states that “Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, the dignity and worth of the human person and in equal rights of men and women have determine to promote social progress and better standards of life in larger freedom, . . . [and] Whereas a common understanding of these rights and freedoms are of the greatest importance for the full realization of this pledge,” the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all people and all nations.

In many important respects, the Constitution of the People’s Republic of China mirrors some or many of these protections and rights. The Preamble to the Constitution of the People’s Republic of China is historical and aspirational. Indeed, many of the human rights contained in the Constitution itself are aspirational, such as the concept that all nationalities in the PRC are equal and that the state protects the lawful rights and interests of the minority nationalities, where discrimination and oppression against any nationality are prohibited, where regional autonomy is practiced in areas where people of minority nationalities live in compact communities, and where all people of all nationalities have the freedom to develop their own written and spoken languages, and preserve their own ways and customs (Article 4). Article 5 describes China as a socialist legal system under the rule of law. Article 13 provides, in part, the protection of private property (presumably except for intellectual property). Chapter Two of the Constitution sets forth the fundamental rights and duties of citizens, which include equality under law and the preservation of human rights (Article 33), freedom of religious belief and the protection of normal religious activities (Article 36), personal freedom and the freedom where no citizen may be subject to arrest except by approval or by the decision of a people’s procuratorate or decision of the people’s court (Article 37), where the home of citizens is inviolable and not subject to unlawful searches and seizures (Article 39), where freedom and privacy of correspondence of citizens are protected by law (Article 40), and freedom of speech, to criticize and make suggestions to state organs, and to receive compensation for losses through the infringement of these rights in accordance with the law (Article 41), just to name a few.

Unlike the United States and many advanced developed countries, the rights in the Constitution of the Republic of China are not self-executing. In other words, they require implementing statutes and primarily regulations. As a result, many Constitutional scholars in China are by necessity also administrative law scholars, for absent the existence of the implementing regulations issued by the appropriate organ of government, the rights and protections in the Constitution of the PRC are of little meaning. Moreover, Article 1 states that the PRC is a socialist state under the people’s democratic dictatorship led by working class and based on the alliance of workers and peasants. As I have traveled around China, I have seen little evidence of an alliance of working class and peasants leading the country, and no evidence of anything other than what might be regarded as a traditional dictatorship, subject, if at all, to Party accountability. Freedom of religion, whether Christian, Roman Catholic, Tibetan Buddhist, or Muslim, is strictly regulated and unless properly

registered under appropriate regulations, not recognized except with respect to persecution, demolition, and detention, often in secret locations without notice to family members. Theoretically, this is justified on the basis of Article 1 that specifies that the PRC is a socialist state under democratic dictatorship and that sabotage of the socialist system by any organization or individual is prohibited.

However some recent events have raised questions in my mind about China's commitment to human rights.<sup>1</sup> One example is the widely published treatment of the Uyghur population in the Xinjiang Regional Autonomous Zone (or Province), which China claims to be an internal matter. A second example is how China's new National Security Law imposed on Hong Kong reaches into the United States and other countries, and in particular into U.S. colleges and universities, extending from Harvard University and Princeton University to other university campuses around the United States. Classes at major universities in the United States carry a warning label to the effect that the course may cover material politically sensitive by China. Universities are weighing measures to try to shield students and faculty from prosecution by Chinese authorities. During this novel coronavirus or covid-19 period, this has become particularly pressing as students from China and Hong Kong connect with their classes online through video links. The magnitude of this is seen in the fact that almost 370,000 Chinese students and approximately 7,000 students from Hong Kong were enrolled classes in U.S. universities in 2018-2019, and professors in these universities say they often opt to take classes on Chinese law, culture, and politics. As one professor who teaches politics at Princeton University remarked, "We cannot be self-censors. If we, as Chinese teaching community, opt out of fear stop teaching things like Tiananmen or Xinjiang or whatever sensitive topic the Chinese government doesn't want us to teach about, if we cave, then we've lost." A Harvard Business School professor, discussing a required MBA program course discussed case studies which require students to read diaries from Uyghur Muslims held in camps in China's Xinjiang region, where Beijing is accused of large-scale human rights abuses, and also which cover Hong Kong and Taiwan, all of which China asserts are internal matters.

The new national-security law, which bars what is called sedition, subversion, terrorism, and colluding with foreign forces, allows China to pursue and prosecute people seen as violation of the law, even outside of Hong Kong. A naturalized U.S. citizen from Hong Kong, Samuel Chu, who has lived in the U.S. for 30 years and been an American citizen for 25 years was reported as being on the list of fugitives being sought under the law after he lobbied the U.S. Congress to punish China for eroding Hong Kong's autonomy.

Although the news media is filled with reports of protests and violence in major U.S. cities and it is clear that the United States has much to do to clean up its own problems, the question arises in my mind as to the justification for China to extend its jurisdiction, both with respect to laws and enforcement of those laws beyond its own territories. The same applies to both its activity in the South China Sea with respect to its construction of islands, primarily for military bases in international waters. What seems particularly inconsistent with the long history of China is its Belt and Road Initiative or BRI. Since its inception in 2013, 136 countries and 39 international organizations have signed on to BRI, receiving US\$90 billion in Chinese Foreign Direct Investment and exchanged US\$6 trillion in Trade with China. While China has failed to present a clear narrative for the initiative, social movements and affected communities and non-governmental organizations

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<sup>1</sup> WSJ News Exclusive/Business, *China's National-Security Law Reaches Into Harvard, Princeton Classrooms*, 19 August 2020.

around the world have criticized BRI for its harmful environment affects, social and economic impacts, and resisted their implementation. As an observer of BRI since its inception, I have often wondered whether the recipient countries will ever be able to pay China for the loans and investments, and the extent of Chinese economic and political influence in these countries. But further discussion of that is beyond the scope of this paper.

What, if anything has changed, in these last 10 years or maybe longer? Zheng Yongnian argues that the Chinese Communist Party is a cultural product unlike any other breed of political party. He argues that it is an organizational emperor, wielding power in a way similar to the emperors of the past.<sup>1</sup>Toh Han Shih, takes a slightly different approach, although he comes out in the end very close to Zheng Yongnian.<sup>2</sup>He writes of two superpowers, the United States and China, that possess some, but not all of the attributes of an empire. Although he speaks of China having some similarity to the 19<sup>th</sup> century British Empire, he distinguishes them with respect to their colonization, and writes of Chinese national investment through state-owned companies in building railways, roads, dams, power stations and other infrastructure in Latin America, Africa, Asia, and Europe. He argues that China has some, but not all of the features of Lenin's definition of an imperialistic power.

### CONCLUSION

I conclude where I started. I am an American lawyer, visitor to China, who is interested in China's global position as well as with Sino-American relationships. But it is more than that. I write as one looking from the outside into China trying to understand its long history, the history of the ideas that drive China's outlook and position in the world. I am neither an expert in jurisprudential thinking or in the history of China. I am simply an observer and recognize that the subjects touched in this paper affect all countries, including the United States of America, although the topic of the conference at which an earlier version of this paper was presented addressed *natural law theory, human rights, and the traditional Chinese cultural context*.

Regardless of the form of government and of law, there are certain principles that must be kept in mind. There is no doubt that Christianity, and perhaps natural law, are imperiled by two great and serious dangers.<sup>3</sup>Two worldviews are wrestling with each other in mortal combat. Modernism is bound to build a world of its own from the data of natural man. On the other hand, those who bend their knee in worship to Jesus Christ, as the Son of the living God, are bent to save the Christian heritage. Today, post-modernity plays a role in the sense that there is no truth and that all that counts is the experiences which we have from day to day. This has been the struggle in Europe, and now in America. Regardless of the particular form of government, in Calvin's view all subjects of the state are responsible for their own obedience.<sup>4</sup>Since the ruler's authority is from God, the citizens are obliged to obey the office, no matter the character of the ruler. Although the DAO DE JING and the ANALECTS OF CONFUCIUS are not as direct as Calvin in this regard, the implicit supremacy of God, or the Way or Logos, is clear and obedience to those in authority is part of the nature of character to which all are called. Even Nebuchadnezzar was still God's servant although he was an instrument of chastisement.

<sup>1</sup> Zheng Yongnian, *THE CHINESE COMMUNIST PARTY AS ORGANIZATIONAL EMPEROR: CULTURE, REPRODUCTION, AND TRANSFORMATION* (Oxfordshire: Routledge, 2010).

<sup>2</sup> Toh Han Shih, *IS CHINA AN EMPIRE?* (Singapore: World Scientific Publishing Co., Pte, Ltd. 2017).

<sup>3</sup> Abraham Kuyper, *LECTURES ON CALVINISM* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Company, 1931), 11.

<sup>4</sup> G. Joseph Gatis, "The Political Theory of John Calvin," *Bibliotheca Sacra*, 1953 (October-December 1996), 449, 459-60.

When considering political theory and natural law as part of systematic theology as I have tried to do here, one must do so with all of the subsets of theology, summarizing the entirety of the Biblical data, and organize one's findings in a systematic presentation. Calvin's exegesis inevitably leads to the question.<sup>1</sup> Do believers have the Biblical or theological justification to rebel against bad rulers because of their poor or evil leadership? Calvin recognized the nature of man to rebel against evil rulers. However, for Calvin, submission to governing authorities was non-negotiable. He insisted that that our respect for the word of God would require no less and would lead us to further be subject to their authority, as well as that of lower magistrates, who might honestly and faithfully perform their duties toward us. Of course, many in the time of Calvin, just as today, do not do so. Calvin had a response to that, arguing that we still owe the respect to office. For Calvin, a failure for a believer to submit to bad governments simply because they were bad could justify the destruction of other important societal structures.<sup>2</sup>

Beyond Calvin's argument for submission to tyrants, was his argument that the believer's submission to bad rulers and tyrants was practical because the right of government is ordained by God for the well-being of mankind and for the preservation of legitimate order and part of God's sovereign plan.<sup>3</sup> Again we see how the sovereignty of God was central to Calvin's thought. As a result, although tyrants may assume absolute authority, they still derive their authority and powers from God, and are ultimately accountable to Him. It seems clear from recent history in China, that the principles of natural law have not been adequately followed and that human rights are not respected notwithstanding the language in the Constitution of the People's Republic of China. These have been detailed in small part in the basic text of this paper so there is no need to repeat them here.

If we are to respect human rights, even as set forth aspirationally in the Constitution of the People's Republic of China, we must see all people as people made in the image of God.<sup>4</sup> Moreover, our jobs, whether in government, the academy, or in the practice of law, serving God is not a job from which we can walk away from as we please. We are living in a broken world, and serving God is a calling, no matter the profession we may be in. The cross is the centerpiece of the Gospel, and there is no other worldview that has the cross in this position, because in the cross all of the absolutes converge that we look for, evil, justice, love, forgiveness. These are abstract ideas until we come to the cross and see how they come together in actuality and reality. Justice, love, and forgiveness are never cheap. This is why I am here today, and why I have come to China 22 times in the last 10 years, a month each time.

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<sup>1</sup> Daniel Wiley, "But if we Have Respect to the Word of God,": An Evaluation of Calvin's Perspective on the Believer's Responsibility to the Governing Authorities," *Puritan Reformed Journal*, Vol 11 (July 2019), 45, 50-51.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Interview of Ravi Zacharias in response to movie, *The Least of These*.