

## ESSAY ROUNDTABLE

# CREATURELY LAW

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Theological explorations of law have sometimes followed a “prophetic” model in which scripture or theological ethics serves as the primary norm for human law.<sup>1</sup> After all, if God has spoken his Law into the world, especially a world beset by sin and oppression, should not human law answer to that Law? Moreover, is not law more authoritative when it is “found” or “discovered” within the framework of divine revelation than when it is “made” autonomously by fallen human beings?

Despite the surface appeal of such an approach in an age marked by a crisis of authority, our unhappy experience with political theology has meant that prophetic legal theology is rightly greeted with suspicion. There is, however, an additional reason to question the enterprise of prophetic legal theology: human law appears to be resistant to theological colonization, that is, it has its own normativity.<sup>2</sup> Although any society’s civil laws reflect its culture, including its moral and theological beliefs, only the most basic laws (such as those prohibiting murder, theft, and the like) stand in a direct deductive relation to theological or moral propositions.

In what follows, I hope to show that theology might nevertheless have important insights to offer the world of law. In particular, I hope to show that systematic theology<sup>3</sup> might serve law by informing the background narratives upon which law implicitly depends. Law depends indirectly upon answers to such questions as “What is a human being?” “Who is God?” “Why does the world exist?” “What is the point, if any, of human life and of the world we inhabit?” Implicit answers to these questions already inform laws and legal cultures; explicit theological answers to such questions set implicit cultural narratives in relief and help us assess both the challenges and the aspirations of extant human law and legal institutions.

The doctrine of creation is an obvious starting point for a legal theology aiming to articulate a background narrative of reality that could be helpful to jurists.<sup>4</sup> As suggested above, an important

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1 Oliver O’Donovan, *The Ways of Judgment* (Grand Rapids: William B. Eerdmans, 2005), xv.

2 Consider, for example, the famous Body of Liberties adopted by Puritan settlers in Massachusetts in 1641. On one hand, as John Witte has demonstrated, the document is shot through with Puritan theological concepts rooted in the biblical narrative of covenant; on the other, it is at least as heavily influenced by the tradition of English liberty rooted in Magna Carta, the achievements of the common law, and the political concerns of the English Revolutionaries: see John Witte, Jr., *The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007), 277–88.

3 It is not my purpose in using the term *systematic theology* to take sides at this point in debates over theological method. I mean merely to identify a constellation of learning marked out by familiar biblical and credal themes such as creation, fall, the human person, covenant, eschatology, and the Trinity.

4 One might start elsewhere—with the doctrine of God or with anthropology, for example. Indeed, the doctrine of creation cannot be neatly sealed off from these other topics. For example, to say that a human being is a *creature* implicates all of the above.

test of such a theology will be whether it can account for law's own normativity—or, put another way, whether its account of law's place in God's world is recognizable to lawyers and others who come into regular contact with human laws and legal institutions.

In what follows, I offer a brief survey of a few of the conventional categories employed in classic Western systematic theologies of creation: (1) creation *ex nihilo*; (2) dominion; (3) the Creator-creature distinction; and (4) time. I then outline in a preliminary way some of the insights these themes might offer for human law, with the goal of illustrating the potential of explicitly theological approaches for improving law and legal theory.<sup>5</sup>

### CREATION *EX NIHIL*O: THE CREATED ORDER'S CONTINGENCY

According to Christian doctrine, the created world is contingent in two respects: (1) God need not have made the world in the way he did, and, indeed, (2) God need not have made any world. The creation is contingent in the former sense because it was made “out of nothing.” Thus, “God in creating the world relied on nothing outside himself, so that creation is an act of divine sovereignty and freedom.”<sup>6</sup> Had God made the created world out of something preexisting, his freedom would have been constrained by that “something.” As it is, God's design for the world was not constrained by anything external to himself.

Creation is contingent in the latter sense “[b]ecause . . . God is already, ‘in advance’ of creation, a communion of persons existing in loving relations.”<sup>7</sup> He therefore “does not need the world, and so is able to will the existence of something else simply for its own sake.”<sup>8</sup> Again, God is free to shape the created order according to his good pleasure; creation is not a necessary act on God's part. Further, unlike God, the world is limited, having “a beginning in time and [being] limited in space.”<sup>9</sup> Together, these themes imply that the world is not a necessary emanation from God. Though related to God, it is also separate from him—“a realm of being in its own right.”<sup>10</sup>

What does this have to do with law? The contingency of the created order calls attention to that order's particular characteristics. Because the world is contingent, its shape cannot be deduced in advance, whether on the basis of the nature of God's being, the nature of logical thought, the nature of eternal matter coexisting with God, or some other possible theoretical ground. Rather, the particular features of the world, including but not limited to human laws, must be examined in order to be known. We must learn about the shape of the particular world God has made, and the nature of the particular creatures he has made (especially human persons) if we are to understand human law.<sup>11</sup>

5 The discussion that follows is drawn in part from two previously published works: William S. Brewbaker III, “Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory,” *Journal of Law and Religion* 22, no. 1 (2006): 255–86; and William S. Brewbaker III, “Theory, Identity, Vocation: Three Models of Christian Legal Scholarship,” *Seton Hall Law Review* 39, no. 1 (2009): 17–61.

6 Colin E. Gunton, *The Triune Creator: A Historical and Systematic Study* (Edinburgh: Edinburgh University Press, 1998), 9.

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid., 10.

11 In a full treatment, an additional layer of complexity must be added. The “shape” of the created order must be understood through a biblical lens that resists “false abstractions.” For further discussion, see generally Michael Welker, *Creation and Reality*, trans. John F. Hoffmeyer (Minneapolis: Augsburg Fortress Publishers, 1999).

One of the achievements of perhaps the most influential extant Christian legal theology, Thomas Aquinas's *Treatise on Law*, is its articulation of a jurisprudential vision that attempts to give due credit to both the given moral order of the world as well as its contingency. For example, Aquinas identifies two ways in which natural law and human law are related. In a few cases, human law can be deduced from natural law "as a conclusion from premises."<sup>12</sup> In those cases, one starts with an important moral norm, such as "Thou shalt not steal" and can arrive at a positive prohibition with essentially the same content.

Significantly, however, most human law, though still derived from natural law, is arrived at in a different way. The bulk of human law serves the purpose of bringing the sort of specificity that a legal system needs in order to operate effectively. For example, a legal norm against theft is by itself insufficient. We must determine what sorts of offenses constitute "theft," what the penalties for violation will be, how the judicial procedures through which guilt will be established will operate, and so on. Aquinas likens the jurist's role in this process to that of an architect who has been retained to build a house.<sup>13</sup> The owner may specify that he wants a red brick house with three bedrooms, but there are many more decisions that must be made: How large will the bedrooms be? What light fixtures will they contain? How many windows? In which direction will the house be situated on the lot? How much insulation will it have?

Aquinas says that these latter judgments (*determinatio*) are related to the natural law only in the loose sense that they are the result of the decision maker's employment of reason oriented toward the common good. Aquinas says regrettably little about either the content of the *determinatio*, or the process through which they are arrived at,<sup>14</sup> even as he notes that the bulk of human law consists precisely of these sorts of decisions.

Aquinas's reticence may have something to do with the fact that the *Treatise* is part of a work of theology. His goal in the *Treatise* is not to tell lawyers how to practice law, judges how to decide cases, or legislators how to legislate (though he does some of each), but rather to situate law—in all its various cases—theologically. One suspects that, in response to a complaint about his lack of specificity with respect to the *determinatio*, Aquinas might reply that it is not the theologian's job to tell the jurist what constitutes good law, any more than it would be the theologian's job to advise the architect or the carpenter.

It is at this point that the connection between creation's contingency and jurisprudence becomes clear. In order to know what constitutes good human law, one needs to know something about morality and theology and politics, but one mainly needs to know something about law, and that knowledge is obtained—as one would expect in a *contingent* world—by learning and experience obtained within the world itself.<sup>15</sup> Indeed, in perhaps the most famous story of juridical

12 Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, 1947–48), 1–2.95.2.

13 See *ibid.*

14 One can, however, get some indications from Aquinas's discussion of justice and related virtues in the *Summa Theologica* 2–2.57–122. Other contributions to this roundtable likewise suggest some possible approaches to these questions, although at a more general level than Aquinas seems to have in mind. See Michael Welker, "What Could Christian Theology Offer to the Disciplines of the Law?," *Journal of Law and Religion* 32, no. 1 (2017) (this issue); Eric Enlow, "Mosaic Commands for Legal Theology," *Journal of Law and Religion* 32, no. 1 (2017) (this issue).

15 See, for example, Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 96:

What I have tried to do is to discern and articulate the natural laws of a particular kind of human undertaking, which I have described as "the enterprise of subjecting human conduct to the governance of rules." These

wisdom in the Bible, Solomon's accomplishment has less to do with his ability to translate general moral commands into a more refined legal rule than with his understanding of human nature, incentives, and the limitations of the judicial process.<sup>16</sup>

## DOMINION

Part of the particular, contingent world God has made is the special relationship human beings have to that world. The human-world relationship can be summarized in the biblical concept of dominion: human beings have been placed in a world that flourishes under and, indeed, only under, human rule.<sup>17</sup>

As a prelude to considering the importance of the doctrine of dominion for human law, consider the uneasy relationship in modern thought between human beings and their physical environment. At one extreme, the nonhuman natural world is seen merely as a canvas on which humans create their own reality. As a "canvas," the nonhuman world has little importance in its own right; it is rather something to be mastered, a field within which humans operate to achieve their objectives without regard for the field itself.<sup>18</sup> The human being is alien to the rest of the created order. Regrettably, the Christian idea of dominion is wrongly associated with such a view. At the opposite extreme is the drive to go as far as possible in eliminating the marks of human presence on the earth. The presence of human agency acting on "nature" is, on this view, inherently problematic because the ideal is a complete continuity between humanity and the rest of the natural order.

In contrast to either of these extremes, dominion presupposes human habitation of a particular, contingent God-made world that is intended to flourish in the context of human rule. Human rule, if faithfully executed, enables the world to be what it was created to be. Creation is intended to be the field of free human endeavor, but part of that endeavor includes respect for the creation's own integrity and recognition of divine ordering. As Oliver O'Donovan has written, human dominion is not "a crude struggle to stamp an inert and formless nature with the insignia of [human] will." It is rather "a worshipping and respectful sovereignty, a glad responsibility for the natural order which [the human being] both discern[s] and love[s]."<sup>19</sup>

To illustrate one possible implication of dominion in the context of a legal theology, consider the rule of law as a response to the problem of tyranny. The idea of a "government of laws and not men" is attractive in principle because it appears to reduce the ability of the powerful to exercise their authority unfaithfully. However, human (that is, personal) rule—whether over a garden or

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natural laws have nothing to do with any "brooding omnipresence in the skies." ... They remain entirely terrestrial in origin and application. They are not "higher" laws; if any metaphor of elevation is appropriate they should be called "lower" laws. They are like the natural laws of carpentry, or at least those respected by a carpenter who wants the house he builds to remain standing and serve the purpose of those who live in it.

See also Jeremy Waldron, "Torture, Suicide and Determinatio," *American Journal of Jurisprudence* 55, no. 1 (2010): 1–29 (suggesting possible further specification of Aquinas's methodology).

16 See 1 Kings 3:16–28. This point may be further illustrated by reference to the important role of custom in law, and its relation to the physical world in which law operates, see, for example, *Ghen v. Rich*, 8 F. 159 (D. Mass. 1881) (addressing legal relevance of customs for hunting finback whales), or with reference to the particular frame of inquiry that courts use in fashioning procedural rules, see, for example, *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (explaining why US courts do not render advisory opinions).

17 See, generally, Genesis 1:26–28.

18 Oliver O'Donovan, *Resurrection and Moral Order* (Leicester: InterVarsity Press, 1986), 52.

19 *Ibid.*

a government—is built into the nature of things as a matter of creation. This insight need not entail a wholesale rejection of liberal institutions designed to curb misuse of power, but it may serve a salutary purpose in challenging potentially idolatrous assumptions. As in the other areas of life in which the human person exercises dominion, there is always the possibility that the judge will do so faithfully and excellently, or unfaithfully and incompetently. Despite the best efforts of modern political philosophers to develop stable systems of political rule,<sup>20</sup> this vulnerability cannot be engineered out of the system. Human freedom is always “very good indeed”<sup>21</sup> in an unfallen world, but its perversion in the aftermath of the Fall is not susceptible to cure by legal technique.

### THE HUMAN CREATURE

Another important concept in the classical formulation of the doctrine of creation is the Creator/creature distinction. For present purposes, its two most important implications are (1) that to be human is to be limited and (2) that the created order has its own separate (though entirely contingent) integrity.

Due recognition of human finitude is important because of the idolatrous pretensions to transcendence that accompany human rule after the Fall. Perhaps especially but certainly not only in the modern world, human beings need to be reminded of their limitations. Human beings are neither omniscient nor infinitely wise; human beings are not free in the way that God is free. Human habitation of a created world suggests that human beings were made to live in a world of space and time, and that to be human is inescapably to be embodied, to be geographically and temporally situated and to participate in particular (and therefore limited) cultural life.<sup>22</sup> If human beings are limited in these ways, our civil laws need not be, indeed cannot be, universal and eternal. This insight creates space for distinctively human law—law made by human beings, appropriate to its contingent, limited place and time, and serving human needs. Neither particularity nor mutability renders human laws bad or deficient;<sup>23</sup> God has declared the particular, limited created order “very good indeed.”<sup>24</sup> Although judicial decision making should both reflect and contribute to human flourishing, our judges need not be oracles of deeper realities inaccessible to the rest of us.<sup>25</sup>

The idea of human construction of mutable, limited, but nevertheless good laws may be analogized to other forms of human making. In this respect, human freedom in the judicial task is not only inevitable but, within limits, something to be celebrated. God seems to have made a world in which, by his grace, human beings learn to administer justice and govern themselves in ways

20 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 140–44.

21 Genesis 1:31.

22 Cf. Richard B. Hays, “Whose World, Which Law?” *Journal of Law and Religion* 32, no. 1 (2017) (this issue) (“[T]here is no such thing as a law that has normative force and validity outside of . . . a particular story.”).

23 Of course, such laws may be particular and mutable and may also be unjust or unwise.

24 Genesis 1:31.

25 But cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992), where the Court notes,

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court’s concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

similar to the discoveries we make in other crafts—technology, farming, and cultural matters, to name a few.<sup>26</sup>

## TIME

A final element of the Christian theology of creation holds that the world is not just made by a god, but by God the Father, Son, and Holy Spirit. Focusing on the Trinity reminds us, among other things,<sup>27</sup> of the story that constitutes the world. Creation has a purpose—the showing forth of the Triune God’s glory—that is not fully accessible from within, and it thus cannot be fully comprehended from our limited vantage point.

The world’s main story cannot but put the story of the present (especially the political and legal present) in perspective. In the age between Christ’s advent and his promised future earthly rule, politics is destined to be temporary and provisional, as both history and scripture attest. Although legal and political ordering cannot be entirely unimportant to anyone who is concerned with the welfare of fellow human beings, political institutions are transitory and destined for replacement. We can hope for rulers and laws that are chastened in light of their provisional status. At their best, they can only anticipate dimly the shalom of God’s final rule, which cannot be established mechanically through institutions but requires the spiritual defeat of “principalities and powers.”<sup>28</sup> On the other hand, there are better things to come: God “puts hope in our reach through his promise. . . . In that knowledge [of the future coming of the Son of Man], our purposes may be formed this side of the veil, as we seize an occasion to do something, however modest.”<sup>29</sup>

## TOWARD A THEOLOGY OF HUMAN LAW

My aim in the brief discussion above is to point in the direction of a legal theology organized around systematic theology. I have used the doctrine of creation as a test case. While creation may be an area of plentiful low-hanging fruit, the possibilities of dialogue between law and theology it illustrates suggest that other topics within systematic theology may likewise help us toward better descriptive and theoretical accounts of human law.

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26 See, for example, Exodus 31:3–4. I am not suggesting that law can be reduced to technological considerations.

27 See, for example, Colin Gunton, *The One, the Three, and the Many* (Cambridge: Cambridge University Press, 1993).

28 See David VanDrunen, “The Two Kingdoms: A Reassessment of the Transformationist Calvin,” *Calvin Theological Journal* 40, no. 1 (2005): 165–76; Marva J. Dawn, *Powers, Weakness and the Tabernacling of God* (Grand Rapids: William B. Eerdmans, 2001), 1–34; William Stringfellow, *An Ethic for Christians and Other Aliens in a Strange Land* (Waco: Word Books Publisher, 1973), 77–94.

29 Oliver O’Donovan, *Finding and Seeking* (Grand Rapids: William B. Eerdmans, 2014), 151–52.