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THE COURTS, NATURAL RIGHTS, AND
RELIGIOUS CLAIMS AS KNOWLEDGE

Francis J. Beckwith*

The American Founders understood that the government they put in place presupposed a cluster of rights that citizens have by nature and that the government is obligated to recognize. This is clearly spelled out in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."1 Or, in the words of Alexander Hamilton, "[t]he Sacred Rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the Hand of the Divinity itself, and can never be erased or obscured by mortal power."2

But these rights imply a deeper understanding about the nature of human beings and the goods that are required for their flourishing. For example, if a human being possesses by nature a right to life, this means that other members of the community are morally obligated to not violate that right to

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
life. But this seems to imply something about human beings and their nature that is moral in quality, a sacredness that requires that we treat each other with a certain dignity and respect that creatures of this sort ought to be treated. Thus, natural rights seem to imply a natural moral law.

There are, of course, many complicated and important issues concerning the relationship between natural rights and natural law, such as the differences between Hobbesian natural rights, Lockean natural rights, and Thomistic natural law, as well as the disputes between the new and traditional natural law theorists. In fact, some natural lawyers have suggested that we ought to chuck the idea of natural rights altogether because of their Enlightenment patrimony. Although these and other issues are certainly worthy of serious assessment, in this article I will set them aside and focus on the more modest question of whether it is reasonable to believe that the natural moral law requires the existence of God, as the American Founders believed.

What I mean by “reasonable” is not that reason requires that one must believe it. Rather, what I am suggesting is something less ambitious, namely, that a citizen who believes that natural rights and natural law require the existence of God embraces a philosophically defensible position that he or she may legitimately claim is an item of knowledge. Non-believing citizens who disagree, therefore, are not ipso facto irrational.

In order to make my case, this paper covers three overlapping topics. In Part I (“Faith, Reason, and the Courts”), I critically discuss how some federal court opinions imply or affirm that religious claims are by their nature irrational, and thus cannot ever in principle be the grounds of any public policy, which would apparently include natural rights and their theistic paternity that the Founders embraced and many citizens believe is the ground on which all policy must rest. As part of my discussion, I critically

5. See, e.g., ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (2nd ed. 1984) (“there are no such rights and belief in them is one with belief in witches and in unicorns”).
6. See infra Part I.
assess some comments by the well-known atheist and legal theorist, Stephen Gey, who has claimed that religious beliefs are by their nature irrational and thus cannot be items of knowledge.\textsuperscript{7} I then show how the courts seem to assume in their opinions that theological claims can never rise to the level of knowledge that may serve as defeaters to the deliverances of so-called “secular” reasons.\textsuperscript{8} I argue that this view is deeply flawed.\textsuperscript{9} My reason for doing this is to show that if theological claims, including the claim that natural rights and natural law have their grounding in God, can be items of knowledge, then there is no a priori reason to exclude theologically informed public policy proposals from the public square on the grounds that they can never be items of knowledge.

In Part II (“Natural Moral Law and Contemporary Atheism”), I show how some contemporary atheists, seem to presuppose a natural moral law and thus natural rights.\textsuperscript{10} I conclude in Part III (“Why the Natural Moral Law Suggests God”) by offering an argument as to why I believe that natural moral law seems to require the existence of God.\textsuperscript{11} Part of my case includes a critical assessment of a Darwinian account of the natural moral law offered by several contemporary legal and political theorists.\textsuperscript{12}

I. FAITH, REASON, AND THE COURTS

The sort of argument I am offering in this article has become more difficult to make because of a common, though mistaken, belief that religious claims are by their nature not rational. Unfortunately, this understanding has been embraced by legal scholars and courts for several decades. For instance, legal scholar Steven Gey asserts that belief in God and liberal democracy are incompatible, that the first is against reason while the latter demands it, Gey writes:

The establishment clause should be viewed as a reflection of the secular, relativist political values of the Enlightenment, which are incompatible with the

\textsuperscript{7} See infra Part I.
\textsuperscript{8} See infra Part I.
\textsuperscript{9} See infra Part I.
\textsuperscript{10} See infra Part II.
\textsuperscript{11} See infra Part III.B.
\textsuperscript{12} See infra Part III.A.
fundamental nature of religious faith. As an embodiment of these Enlightenment values, the establishment clause requires that the political influence of religion be substantially diminished . . . . Religious belief and practice should be protected under the first amendment, but only to the same extent and for the same reason that all other forms of expression and conscience are protected—because the first amendment prohibits government from enacting into law any religious, political, or aesthetic orthodoxy . . . . [R]eligious principles are not based on logic or reason, and, therefore, may not be proved or disproved, . . . . [R]eligion asserts that its principles are immutable and absolutely authoritative, democratic theory asserts just the opposite. The sine qua non of any democratic state is that everything political is open to question; not only specific policies and programs, but the very structure of the state itself must always be subject to challenge. Democracies are by nature inhospitable to political or intellectual stasis or certainty. Religion is fundamentally incompatible with this intellectual cornerstone of the modern democratic state.  

Although claiming to side with the friends of reason, Professor Gey’s argument seems to provide more comfort to its opponents. First, his embracing of relativist political values (whatever those are) is self-refuting.  

Relativism is the view that there are no universal and unchanging political values that apply to all persons in all times and all places. Yet Professor Gey states that a true proponent of liberal democracy ought to be a relativist, for he claims that liberal democracy and opposition to relativism are incompatible. But to claim that one ought to be a relativist is to make a non-relative normative claim about what it means for a member of the political community to be intellectually virtuous. Thus, Gey’s claim refutes itself. On the other hand,

15. See Beckwith & Koukl, supra note 14.
if he denies that each member of a liberal democratic political community ought to be a relativist on the matter of political values, then necessarily it is not the case that each member of a liberal democratic political community ought to be a relativist on the matter of political values. Consequently, whether he affirms or denies his claim, Gey's claim is refuted, and thus we can safely say it is something that no friend of reason ought to seriously entertain.

Second, although Gey associates his view with the Enlightenment, it is difficult to square it with the non-relativist moral and political philosophies of John Locke, Immanuel Kant, and John Stuart Mill, whose Enlightenment credentials no one doubts.

Third, Gey claims that "there can be no sacrosanct principles or unquestioned truths in a democracy" and that "no religion can exist without sacrosanct principles and unquestioned truths." But the latter claim is itself an unquestioned truth about which Gey seems certain. For he employs it as the ground by which the law may permanently sequester a large segment of his fellow citizens from the public square simply because they may choose to shape their communities with policies that are informed by their religious beliefs. Moreover, Gey's position assumes a first principle—democracy ought not to be based on unquestioned truths—that he stipulates and for which he does not offer support, and thus seems to function as an unquestioned truth. But if Gey were to offer support for that truth, those grounds too

17. Id. at 79.
18. According to Locke, God endows us with unchanging natural rights and that a just government has an obligation to ensure that these rights are not trampled upon by other citizens or the government itself. See John Locke, Second Treatise on Government (Barnes & Noble Press 2004) (1690). For Kant, the administration of justice cannot contravene the categorical imperative: "Act only according to that maxim by which you can at the same time will that it should become a universal law." Immanuel Kant, Foundations of the Metaphysics of Morals 39 (Lewis White Beck trans., 2d ed. 1989); see also Allen D. Rosen, Kant's Theory of Justice (1996). In the case of Mill, justice is measured by his version of the principle of utility: "The creed which accepts as the foundation of morals, Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness." John Stuart Mill, Utilitarianism 9–10 (13th ed. 1891). None of these thinkers—leading lights of the Enlightenment—affirmed or defended the relativism supported by Professor Gey.
19. Id. at 174.
would need support, and those grounds would then become
the new first principle. At some point, therefore, Gey must
rely on a first principle, a foundation, on which his claims
about liberal democracy and its support may rationally rest
and for which no other grounds are necessary. Thus, if, as
Gey argues, the political application of "unquestioned truths"
is a sufficient condition for political disenfranchisement of
fellow citizens, then his own position serves as the ground by
which the state may disenfranchise him, since his
philosophical arsenal has within it at least one unquestioned
truth, namely, that "democracy ought not to be based on
unquestioned truths." Consequently, Professor Gey's position
is by its own lights irrational, and thus we need not think of
it as an impediment to the political participation of citizens
who embrace what Professor Gey pejoratively labels as
"unquestioned truths."

I say "pejorative," since it seems to me that when Gey
writes of citizens who believe in these "unquestioned truths,"
he is claiming that they do so irrationally or without
adequate warrant. But this is surely not the case, for two
reasons: (1) There are numerous well-reasoned works critical
of the sort of crude relativism Gey offers, and none of these
works presents esoteric religious arguments whose premises
would seem irrational to many unbelievers; 20 and (2) Gey does
not interact with any of the relevant academic literature on
religious belief, morality, and rationality. 21 Thus, it is
difficult to know how he would reply to the sophisticated and
compelling arguments offered by members of the growing
intellectual movement of theistic philosophers in Anglo-
American philosophy published before 1990 (the year Gey’s
article appeared in print). 22

Unfortunately, the idea that religious belief or any of its

22. See, e.g., MORTIMER J. ADLER, HOW TO THINK ABOUT GOD: A GUIDE FOR
THE 20TH CENTURY PAGAN (1980); MORTIMER J. ADLER, TEN PHILOSOPHICAL
MISTAKES (1985); WILLIAM LANE CRAIG, THE KALAM COSMOLOGICAL
ARGUMENT (1979); FAITH AND RATIONALITY: REASON AND BELIEF IN GOD (Alvin
Plantinga & Nicholas Wolterstorff eds., 1983); JOHN FINNIS, NATURAL LAW AND
NATURAL RIGHTS (1980); JOHN FINNIS, FUNDAMENTALS OF ETHICS (1983); J. P.
MORELAND, SCALING THE SECULAR CITY: A DEFENSE OF CHRISTIANITY (1987);
ALVIN PLANTINGA, GOD AND OTHER MINDS: A STUDY OF THE RATIONAL
JUSTIFICATION OF BELIEF IN GOD (1967); RICHARD SWINBURNE, FAITH &
attendant ideas (such as morality) is irrational (at worst) or outside of the proper scope of reason's scrutiny (at best) is found in numerous court opinions. Historian James Hitchcock, after assessing many of these cases, concludes that "the incoherence of the modern jurisprudence of the Religion Clauses is the inescapable result of the Court's positing of religion as essentially irrational." The following are a few of the cases presented by Hitchcock (although numerous other cases could be cited or quoted, space constraints prevent me from doing so).

In *United States v. Ballard* (1944), Justice William O. Douglas writes:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensibile to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom.

In a 1976 case, Justice William Brennan suggested that "it is the essence of religious faith that ecclesiastical decisions are to be reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria." He then added that "constitutional concepts of due process, involving secular notions of 'fundamental fairness' . . . are therefore hardly relevant to such matters of ecclesiastical

24. 2 *JAMES HITCHCOCK, THE SUPREME COURT AND RELIGION IN AMERICAN LIFE: FROM "HIGHER LAW" TO "SECTARIAN SCRUPLES" 67-76, 120-32 (2004).*
25. *Id.* at 128.
27. *Id.* at 86-87.
cognizance," which would come as a surprise to Moses.30

According to Justice Tom C. Clark in School District of Abington Township, Pennsylvania v. Schempp (1963),31 "the place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind."32 Although Abington is a school prayer establishment clause case in which religious practice initiated by school officials rather than religious beliefs themselves are the object of scrutiny, the opinion's understanding of religious belief as personal and private seems to exclude it as a legitimate object of reason.

In his concurring opinion in the 1977 case Wolman v. Walter,33 Justice John Paul Stevens writes:

The distinction between the religious and the secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case: "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve."34

As a principle of religious free exercise, the above comments make sense, for the freedom of belief, as the Founders envisioned it, is an ultima facie right since it is a matter of conscience.35 But this is not where the real action is in contemporary constitutional jurisprudence. Rather, it is in

29. Id. at 715.
30. See Numbers 35: 29–30 (New Revised Standard Version) ("These things shall be a statute and ordinance for you throughout your generations wherever you live. If anyone kills another, the murderer shall be put to death on the evidence of witnesses; but no one shall be put to death on the testimony of a single witness. Moreover you shall accept no ransom for the life of a murderer who is subject to the death penalty; a murderer must be put to death.").
32. Id. at 226.
34. Id. at 265 (Stevens, J., concurring in part and dissenting in part) (citation omitted).
the assumption of religion's irrationality or incapacity to be rationally assessed in cases in which religious citizens try to shape policy that their critics claim violates the establishment clause. In other words, the above quotes and citations are at too high a level of abstraction to be of any practical help in establishment clause cases in which the idea of religion as irrational is bluntly and uncritically employed. I say this because religious claims, or those claims closely associated with them (e.g., moral claims), are wide-ranging in their content and thus in their status as possible knowledge. There is no "one size fits all" when it comes to religious claims, just as there is no "one size fits all" when it comes to claims in disciplines as different as chemistry, English literature, physics, stamp collecting, or the martial arts. For a court to claim otherwise is for it to denigrate, without the appropriate arguments or reasons, the epistemological status of all religious claims. That is a philosophical project for which the judiciary is not trained or is especially competent. And yet, that has not prevented them from doing so.

For example, in the 2002 Ninth Circuit case concerning the constitutionality of the recitation of the Pledge of Allegiance in public schools, Newdow v. Elk Grove Unified School District, the court assumed that if the subject under scrutiny could be shown to be "religious," the policy in question violates the Establishment Clause. But it seemed to never occur to the court that if the so-called "religious" claim were rationally defensible as an item of knowledge, then the court would be in the odd position of forbidding the public schools to teach what seems reasonable to believe is an item of knowledge.

Judge Goodwin wrote in the court's opinion:

The text of the official Pledge, codified in federal law,

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36. Newdow v. Elk Grove Unified Sch. Dist., 292 F.3d 597 (9th Cir. 2002), rev'd, 542 U.S. 1 (2004). It should be noted that the student on whose behalf Mr. Newdow sued the school district, his daughter, could have opted out of the public recitation of the Pledge:

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge. Rather, he claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"

Id. at 601.
impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.\textsuperscript{37}

By saying that the "under God" portion of the Pledge is "purely religious," Judge Goodwin did not need to go any further in assessing whether it is rationally defensible for the government to suggest to its citizens that America is in fact "under God," in the same sense that the Declaration of Independence asserts that our rights are endowed to us by our Creator. After all, as we saw above, the Supreme Court has declared that religion is by its very nature "in the individual heart," "not rational," "what men cannot prove," and "where knowledge leaves off."\textsuperscript{38} This is why Judge Goodwin can reel off several religious figures in a row—Vishnu, Jesus, Zeus, and the elusive "no God"—and claim that if the government were to say it was "under" any of them it would violate religious "neutrality."\textsuperscript{39} This indeed would make sense if all religious claims are equally irrational, for in that case "God" may indeed be replaced with any other name associated with an irrational belief without violating any of the government's obligations to conduct its business within the confines of reason. This, however, is hardly a neutral position, for it assumes, without argument, that all religious claims are by nature irrational, and thus the role God plays in "under God" is interchangeable with any religious or anti-religious figure or claim. In other words, a court is not acting in a neutral fashion in regard to religion if it issues a judgment on the epistemological status of all religious claims and then uses that judgment as an immutable standard by which to exclude a priori all religious claims from serious consideration in policy disputes. Although one could argue that the Establishment Clause of the First Amendment was intended to "separate church and state" even if those precise

\textsuperscript{37} Id. at 607–08 (emphasis added).
\textsuperscript{38} See supra notes 25–34 and accompanying text.
\textsuperscript{39} Newdow, 292 F.3d at 607–08.
words do not appear in the Constitution, it hardly follows from this that it was intended as an epistemological guide by which a court may separate faith from knowledge.

This is clearly evident when the court points out that the plaintiff, Mr. Newdow, "claims that his daughter is injured when she is compelled to 'watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is "one nation under God.'" But she is only injured if "under God" is a claim that she need not know or seriously entertain as a short hand description of the relationship between our natural rights and their source. In other words, her education is not diminished if it does not include "under God" or the philosophical scaffolding of our rights that it implies.

In order to grasp this, imagine if the plaintiff were a religious citizen who objected to his child being compelled to watch and listen as her state-employed teacher in her state-run school instructs her classmates in a science class that the entire universe including human beings is fully accounted for by purely natural causes and does not require God to account for them. In the latter sort of case, courts have suggested that religiously motivated parents, school board members, and/or legislators are constitutionally forbidden from trying to remedy what these citizens perceive as an injustice in school curricula and/or practices if the policy they are proposing is an inherently religious concept. In one case, *Kitzmiller v. Dover* (2005), a school board merely required that teachers for a few minutes at the beginning of class on the first day of the semester instruct students that Darwinian evolution is a theory with gaps, that one ought to keep an open mind about such matters, and that there are resources in the library that offer a contrary account of nature and its apparent purposes. The federal district court struck down

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40. Of course, this was initially applied to only the federal government until the Supreme Court incorporated the First Amendment through the Fourteenth Amendment. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).
41. *Newdow*, 292 F.3d at 601.
the policy on the grounds that the contrary account, Intelligent Design (ID),\textsuperscript{44} violated the establishment clause because the court found that ID is "an inherently religious . . .

teachers to read in class a series of brief paragraphs:
The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution and eventually to take a standardized test of which evolution is a part.

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

\textit{Id.}

44. Here is a definition of ID that I published in 2007. I distinguish ID from "creationism" in the third paragraph:

Intelligent design is not one theory. It is a shorthand name for a cluster of arguments that offer a variety of cases that attempt to show, by reasoning unaccompanied by religious authority or sacred scripture, that intelligent agency rather than unguided matter better accounts for apparently natural phenomena and/or the universe as a whole. Some of these arguments challenge aspects of neo-Darwinism. Others make a case for a universe designed at its outset, and thus do not challenge any theory of biological evolution. Nevertheless, they all have in common the notion that the human intellect has the capacity to acquire knowledge of, or at least have rational warrant to believe in, an inference that mind, rather than nonmind, best accounts for some apparently natural phenomena or the universe as a whole.

But even ID advocates who criticize neo-Darwinism are technically not offering an alternative to evolution, if one means by evolution any account of biological change over time that claims that this change results from a species' power to accommodate itself to varying environments by adapting, surviving, and passing on these changes to its descendents. This is not inconsistent with a universe that has earmarks and evidence of intelligent design that rational minds may detect. . . .

Because ID arguments do not contain Genesis and its tenets as propositions, and because ID advocates build their cases from inferences that rely on empirical facts and conceptual notions, ID does not run afoul of the U.S. Constitution. Of course, the cases for ID may indeed fail as arguments, but that is not a violation of the establishment clause.

concept,"45 "not science," and as a theory is based on very weak arguments.46 Thus, in _Kitzmiller_, the alleged injury to the offended parents and students that the Dover policy was intended to remedy is no injury at all, for the "injury" is what a well-educated student ought to know and thus the Dover policy advances a diminished pedagogy. Contrast this with _Newdow_ in which the alleged injury to Mr. Newdow's daughter is, in the opinion of court, the result of her having to sit through the recitation of a Pledge whose theological content a well-educated student need not know in order to be intellectually well-formed.47

45. _Kitzmiller_, 400 F. Supp. 2d at 722. The court asserts:
Roberto Pennock, Plaintiffs' expert in the philosophy of science . . . concluded that because its basic proposition is that the features of the natural world are produced by a transcendent, immaterial, non-natural being, ID is a religious proposition regardless of whether that religious proposition is given a recognized religious label. It is notable that not one defense expert was able to explain how the supernatural action suggested by ID could be anything other than an inherently religious proposition. Accordingly, we find that ID's religious nature would be further evident to our objective observer because it directly involves a supernatural designer.

_id._ at 721 (citations omitted).

46. _Id._ at 735. The court asserts:
We find that ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science. They are: (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the 1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community. As we will discuss in more detail below, it is additionally important to note that ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research.


47. The Ninth Circuit in _Newdow_ holds that the "under God" portion of the Pledge has no primary secular purpose, and it does so by citing the 1954 Congressional record that includes the reasoning behind the 1954 insertion of "under God" in the Pledge. _Newdow_, 292 F.3d at 609–12. This is what the record states:
At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the
Nevertheless, someone could argue that if the Kitzmiller court had concluded that the arguments for ID are indeed strong, then its status as "science" or a "religious concept" would be irrelevant to whether it is a proper subject of academic inquiry with which public school science students may or should become acquainted. But it is unclear that such a scenario is conceptually possible in the minds of jurists who are so deeply committed to the notion that faith and reason are on opposite sides of an unbridgeable chasm that they lack the intellectual resourcefulness to imagine that a religious belief can ever be rational and/or an item of knowledge. For example, in Kitzmiller, Judge John E. Jones makes the odd claim that "[a]fter a searching review of the record and applicable case law, we find that while ID arguments may be true, a proposition on which the Court takes no position, ID is not science." This is odd for two reasons. First, arguments are not true or false. Rather, true and false are properties of the propositions—premises and conclusions—of which arguments consist. Arguments, depending on their nature (whether they are deductive or inductive), are valid, invalid, sound, unsound, strong or weak.

Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.


Given the obvious intellectual content intended by the Congress that inserted "under God" into the Pledge, it is seems clear to me that the implication of the Ninth Circuit's reasoning is that a well-educated student need not know the Pledge's "under God" phrase in order to be intellectually well-formed. That is, if the case for ID is extremely weak, then one has no warrant to invoke extra-natural agent causation to account for certain natural phenomena based on these flawed ID arguments. But what if one did have such warrant? In that case, one would have to follow the arguments where they lead and conclude either that the ground rules of science need not exclude non-natural agent causes or that science, if it must exclude non-natural agent causes in order to remain science, is not always the best way to arrive at knowledge, and perhaps public schools are civically obligated to inform their students of that fact.

48. Kitzmiller, 400 F. Supp. 2d at 735 (emphasis added).
or green. Judge Jones' claim commits a category mistake.

There is another reason why Judge Jones' claim is odd. In order to be charitable, let us assume what he means by "ID arguments may be true" is that "the conclusions of ID arguments may be true" or that "ID claims may be true." But in that case, he could consistently claim that ID conclusions or claims may be true even though they are not real items of knowledge and/or rationally defensible. After all, it has always been true that atoms exist, even before we knew they existed. So, perhaps all that he is saying is that ID claims may be true, but they are not known because they have not been adequately supported by good evidence and/or strong argument. But in that case the apparent inherent religiosity of ID is not relevant to Judge Jones' assessment of the policy, since, in principle, it is possible that ID could become well supported and a legitimate rival to materialist accounts of natural phenomena. If that were to occur, it would be strange for a court to say that ID still could not be taught in public schools on the grounds that what is inherently religious cannot cease to be inherently religious, even if it is eminently reasonable for a citizen to embrace ID as a rationally defensible account of the apparent design in the natural universe. Nevertheless, I suspect that Judge

50. That seems to me to be a fair interpretation, since Judge Jones spends many pages assessing the arguments for ID and pronouncing them inadequate based mostly on the plaintiff's expert testimony and the cross-examination of the defendant's expert witnesses. Id. at 735-46. In fact, following the claim that "ID arguments may be true" is the paragraph quoted supra note 45. Id.

51. Despite my interest in this subject and my sympathy for the ID movement's goal to dismantle materialism and its deleterious implications on our understanding of what is real and what counts as knowledge, I am not, and have never been, a proponent of ID. My reasons have to do with my philosophical opposition to the ID movement's acquiescence to the modern idea that an Enlightenment view of science is the paradigm of knowledge. By seeming to agree with their materialist foes that the mind or intellect cannot have direct knowledge of real immaterial universals, such as natures, essences, and moral properties, many in the ID movement seem to commit the same mistake as the one committed by the late medieval nominalists such as William of Ockham, who gave us what is often called "Ockham's razor," though Ockham himself did not offer this precise formulation: "Pluralitas non est ponenda sine necessitate" (translated: "entities should not be multiplied unnecessarily"). See Paul Vincent Spade, William of Ockham, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 4.1 (Edward N. Zalta ed., 2008), http://plato.stanford.edu/archives/fall2008/entries/ockham/. According to many scholars, the practical consequence of "Ockham's razor" is that claims about a thing's nature, purpose, or intrinsic dignity—universal properties it shares with
Jones would dismiss this scenario as a conceptual impossibility because he seems to have accepted an understanding of theology and science that entails that they are non-overlapping categories with the former never being able to carry the epistemological freight to ever defeat the deliverances of the latter. The contrast between Newdow and Kitzmiller is striking. In Kitzmiller, the court declared as unconstitutional an attempt on the part of the Dover school board to remedy an apparent religious offense that requires a brief moment each semester in which ID and intellectual modesty are suggested to the students on a matter on which religion and science intersect. The offended students and parents who were on other things of the same sort—are "unnecessary" for our scientific investigation of the world because they don't add anything of explanatory importance to our direct empirical observations. See, e.g., RICHARD M. WEAVER, IDEAS HAVE CONSEQUENCES 44 (1948). But if one thinks of science as the only or best way of knowing, then these claims are not "knowledge" and thus not real objects of academic inquiry. This is a death knell for dogmatic and moral theology as actual knowledge traditions. Although I continue to maintain that ID advocates raise important questions about the nature of science and whether science should presuppose naturalism (namely, the view that all that exists is the material universe and that there is no mind, such as God, behind it), I have doubts about ID's answers and whether these answers can offer an attractive alternative to the inadequacies of the Enlightenment for the rationality of religious belief.

52. Judge Jones writes:
To conclude and reiterate, we express no opinion on the ultimate veracity of ID as a supernatural explanation. However, we commend to the attention of those who are inclined to superficially consider ID to be a true "scientific" alternative to evolution without a true understanding of the concept the foregoing detailed analysis. It is our view that a reasonable, objective observer would, after reviewing both the voluminous record in this case, and our narrative, reach the inescapable conclusion that ID is an interesting theological argument, but that it is not science.

Kitzmiller, 400 F. Supp. 2d at 745–46 (emphasis added). If one replaces in the above quote the term "theological" with "chemical" or "physical," then one can easily see that Judge Jones embraces an understanding of faith and reason that treats theology as if it can never in principle offer us knowledge that may count against the deliverances of other disciplines. No one doubts that an insight in chemistry may count against a theory in biology, or that the physicist may impart to the engineer a theory that may benefit the work of the latter. This is why it seems fair to say that when Judge Jones says that ID is theological and "not science" that he means that it is "not knowledge." See James R. Stoner, Jr., The "Naked" University: What if Theology is Knowledge, Not Belief?, 62 THEOLOGY TODAY 515 (2006).

the losing side of this case must put up with this arrangement, as they should, since the court found that ID is inherently religious and not rationally defensible. On the other hand, in Newdow, the offended parent is not required to put up with anything, for it is his offense that dictates the arrangement that the court's opinion calls for. But nowhere in the opinion does the Newdow court entertain the possibility that the idea that America is "under God" is a philosophically defensible position with which Mr. Newdow, like the parents in Dover, must put up. In both cases, the victor is the "enlightened" party whose views are hostile to the idea of theology as knowledge.

Thus, what accounts for the victories of the winning parties in these two opinions is a common assumption embraced by both courts. Each assumes that when it comes to policy proposals that are connected to theological claims, courts are required to employ an understanding of faith and reason—or religious epistemology—that treats the claims in question as if they could never in principle be rational. That is, just as the Supreme Court held in the cases we covered above, the Newdow and Kitzmiller courts assumed that theology by its nature is irrational and thus can never in principle be an item of knowledge. But, as we have seen in our assessment of both Gey's arguments as well as these court opinions, such an approach is riddled with many conceptual puzzles and errors. And, as I briefly mentioned in my critique of Gey, this posture toward theology is not even an accurate portrayal of the way sophisticated believers themselves think of and defend the relationship between faith and reason.

Consequently, because reason does not require that one accept the federal courts' opinions that imply or affirm that

55. See id.
56. See supra Part I.
theological claims are by their nature irrational, religious claims cannot be excluded from being the grounds of public policy because they can never be items of knowledge. For this reason, it seems that what many citizens and the America Founders have believed about their natural rights, that they have a theistic paternity, may in fact be rationally defensible. The purpose of the next two sections of this article is to make that case.

II. NATURAL MORAL LAW AND CONTEMPORARY ATHEISM

Almost all citizens—regardless of their political or religious commitments—assume in their political vocabulary a grammar of natural rights and natural moral law that the state is obligated to honor, even when these citizens explicitly deny a natural moral law or claim to embrace some sort of relativism. As we shall see, the critics of God assume a cluster of beliefs that inform and shape how one ought to conduct oneself in public life and in relation to others. These beliefs, it turns out, are moral in nature and required of all rational agents, and thus they also inform the state on how it ought to treat its citizens in relation to itself and how the citizens ought to treat each other under its sovereignty. So, for example, if slavery were to be reinstituted, our judgment of the law's wrongness would depend on a prior understanding of what it means to be a human being and why human beings are not by nature property. We would say that when someone is enslaved her rights are violated, even if the government under which this occurs does not recognize such rights.

This belief in a natural moral law is so widely held that it is rare to find anyone who does not employ it, even if they verbally claim not to believe it. For example, the atheist, Christopher Hitchens, in his book *God Is Not Great*, argues that "religion poisons everything," blaming religious believers and their beliefs for many of the atrocities of history. Setting aside the question of Hitchens' historical accuracy and philosophical acumen, his thesis asserts that human

58. CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).
59. A nice antidote to Hitchens' take on the influence of Christianity on history are the following works: ROBERT ROYAL, THE GOD THAT DID NOT FAIL (2006); RODNEY STARK, THE VICTORY OF REASON: HOW CHRISTIANITY LED TO FREEDOM, CAPITALISM, AND WESTERN SUCCESS (2005); RODNEY STARK, FOR
beings throughout history have had their rights violated by other human beings who committed their wicked deeds in the name of God and for bad reasons. Some of the cases Hitchens cites, e.g., the Spanish Inquisition, involve legitimate governments perpetuating and protecting acts that they had the legal power to perpetuate and protect. And yet this fact would not move Hitchens to say that the acts he thinks wrong are now right. Why? Because human beings have certain rights by nature that the government is morally obligated to recognize and protect. In fact, Hitchens writes that he and other atheists “believe with certainty that an ethical life can be lived without religion.” Thus implying that he and others have direct and incorrigible acquaintance with a natural moral law that informs their judgments about what counts as an ethical life. Consequently, the free-thinking posture that one finds on the prior page in Hitchens’ book—“[W]hat we respect is free inquiry, openmindedness . . .”—becomes a stingy dogma a page later when it comes to the “ethical life.” But this is good, since no one would want Hitchens or any other person to begin to question the rationality of his moral opposition to rape, murder, and theft.

Richard Dawkins, another prominent atheist, commits a similar faux pas in his book The God Delusion, when he laments the career path of Kurt Wise, who has, since 2006, held the positions of Professor of Science and Theology and Director of the Center for Theology and Science at the Southern Baptist Theological Seminary in Louisville, Kentucky. Prior to that, Wise had taught for many years at Bryan College, a small Protestant Evangelical college in Dayton, Tennessee.

According to Dawkins, Wise was at one time a promising young scholar who had earned a degree in geology (from the

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60. For a view of the Inquisitions, including the Spanish Inquisition, contrary to the one offered by Hitchens, see STARK, supra note 59, at 201–90.
61. See, e.g., HITCHENS, supra note 58, at 37–62.
62. Id. at 6 (emphasis added).
63. Id. at 5.
64. RICHARD DAWKINS, THE GOD DELUSION (2007).
65. Id. at 284–86. Coincidentally, the school is named after William Jennings Bryan, three-time Democratic presidential candidate and prosecutor in the 1925 Scopes “Monkey Trial.” Id. at 284.
University of Chicago) and advanced degrees in geology and paleontology from Harvard University, where he studied under the highly acclaimed Stephen Jay Gould. Wise is also a young-earth creationist, which means that he accepts a literal interpretation of the first chapters of Genesis, and maintains that the Earth is less than 10,000 years old. It is not a position I hold, and for that reason I am sympathetic to Dawkins' bewilderment of why Wise has embraced what appears to many Christians as a false choice between one controversial interpretation of Scripture (young-earth creationism), and abandoning Christianity altogether. (But that is another topic for another article).

In any event, at one point in his career Wise began to understand that his reading of Scripture was inconsistent with the dominant scientific understanding of the age of the Earth and the cosmos. Instead of abandoning what many of us believe is a false choice, he continued to embrace it, but this lead to a crisis of faith. Wise writes: “Either the Scripture was true and evolution was wrong or evolution was true and I must toss out the Bible . . . . It was there that night that I accepted the Word of God and rejected all that would ever counter it, including evolution. With that, in great sorrow, I tossed into the fire all my dreams and hopes in science.” So, Wise abandoned the possibility of securing a professorship at a prestigious research university or institute.

Dawkins is disturbed by Wise’s theological judgment and its consequence on his obvious promise as a scholar, researcher, and teacher. Dawkins writes:

> I find that terribly sad; . . . the Kurt Wise story is just plain pathetic—pathetic and contemptible. The wound, to his career and his life's happiness, was self-inflicted, so unnecessary, so easy to escape . . . . I am hostile to religion because of what it did to Kurt Wise. And if it did that to a Harvard educated geologist, just think what it can do to others less gifted and less well armed.

Of course, some religious believers including Christians may be just as troubled as Dawkins. So, one need not be an

66. Id.
67. Id. at 285.
68. Id. (quoting Kurt P. Wise, 47, in IN SIX DAYS: WHY 50 SCIENTISTS CHOOSE TO BELIEVE IN CREATION 351, 354 (John Ashton ed., 1999)).
69. DAWKINS, supra note 64, at 285–86.
an atheist to raise legitimate questions about Professor Wise's intellectual and spiritual journey. But, given Dawkins' atheism, there is something odd about his lament, for it seems to require that Dawkins accept something about the nature of human beings and the natural moral law that his atheism seems to reject. Let me explain what I mean. Dawkins harshly criticizes Wise for embracing a religious belief that results in Wise not treating himself and his talents, intelligence and abilities in a way appropriate for their full flourishing. That is, given the opportunity to hone and nurture certain gifts—e.g., intellectual skill—no one, including Wise, should waste them as a result of accepting a false belief. The person who violates, or helps violate, this norm, according to Dawkins, should be condemned and we should all bemoan this tragic moral neglect on the part of our fellow(s). But the issuing of that judgment on Wise by Dawkins makes sense only in light of Wise's particular talents and the sort of being Wise is by nature, a being that Dawkins seems to believe possesses certain intrinsic capacities and purposes that if prematurely disrupted results in an injustice. So, the human being who wastes his talents is one who does not respect his natural gifts or the basic capacities whose maturation and proper employment make possible the flourishing of many goods. That is, the notion of "proper function," coupled with the observation that certain perfections grounded in basic capacities have been impermissibly obstructed from maturing, is assumed in the very judgment Dawkins makes about Wise and the way by which Wise should treat himself.

But Dawkins, in fact, does not actually believe that living beings, including human beings, have intrinsic purposes or are designed so that one may conclude that violating one's proper function amounts to a violation of one's moral duty to oneself. Dawkins has maintained for decades that the natural world only appears to be designed, which means that his lament for Wise is misguided. For Dawkins is

70. See PLANTINGA, supra note 57.
71. Dawkins writes: "Darwin and his successors have shown how living creatures, with their spectacular statistical improbability and appearance of design, have evolved by slow, gradual degrees from simple beginnings. We can now safely say that the illusion of design in living creatures is just that - an illusion." DAWKINS, supra note 64, at 158.
lamenting what *only appears* to be Wise's dereliction of his duty to nurture and employ his gifts in ways that result in his happiness and an acquisition of knowledge that contributes to the common good. But because there are no designed natures and no intrinsic purposes, and thus no natural duties that we are obligated to obey, the intuitions that inform Dawkins' judgment of Wise are as illusory as the design he explicitly rejects.\textsuperscript{72} But that is precisely one of the grounds by which Dawkins suggests that theists are irrational ought to abandon their belief in God.\textsuperscript{73} So, if the theist is irrational for believing in God based on what turns out to be pseudo-design, Dawkins is irrational in his judgment of Wise and other creationists who he targets for reprimand and correction. For Dawkins' judgment rests on a premise that he has uncompromisingly maintained throughout his career only *appears to be* true.

Thus, the religious believer agrees with Hitchens that human beings have rights by nature, and the religious believer also agrees with Dawkins' presupposition that human beings have an intrinsic purpose, or design,\textsuperscript{74} that places on each of us a moral obligation to nurture our natural gifts and abilities in a way that help them to come to fruition and achieve their natural end for the good of ourselves and our community. So, the religious believer and these atheists seem to agree on the existence of natural rights, a natural moral law, and natural moral obligations, and that human beings have an intrinsic end or purpose that they may negligently or purposely fail to accomplish and be rightly

\textsuperscript{72} One, of course, may reject Wise's creationism and Dawkins' atheism and embrace a point of view that offers a theistic-friendly account of design in the universe. The most dominant option is Intelligent Design (ID), which I briefly discussed supra Part II. For a clear and accessible presentation of the dominant ID arguments, see MICHAEL J. BEHE, WILLIAM A. DEMBSKI & STEPHEN C. MEYER, \textit{9 SCIENCE AND EVIDENCE FOR DESIGN IN THE UNIVERSE} (2000).

\textsuperscript{73} See DAWKINS, supra note 64, at 77–109.

judged immoral for such a failure.

III. WHY THE NATURAL MORAL LAW SUGGESTS GOD

Because liberal democracy assumes natural rights, and because natural rights require a natural moral law, therefore, liberal democracy assumes a natural moral law. This, as we have seen, was the view of the signers of the Declaration of Independence, even though they disagreed with each other on a variety of religious questions. Again, as we have seen, it seems that today both believers and non-believers have these same intuitions.

Given this natural moral law, I want to now argue that the existence of God best accounts for these correct intuitions. The case I make is not a knock down drag-out proof for God's existence from the existence of a natural moral law. But rather, the case I make is much like a legal argument for a defendant's guilt in a criminal trial. It is, in a sense, arguing that given the "fingerprints" that one finds on natural rights when one reflects on their nature, it seems that they are best explained as the result of the hand and mind of the God of theism. Although one may reject this conclusion, it is difficult to conceive of a better alternative. In the words of philosopher Paul Copan, "objective moral values [the basis of natural rights] are quite at home in a theistic universe. Given God's existence, moral realism is natural. But given an atheistic universe . . . , objective morality—along with its assumptions of human dignity, rights, and moral responsibility—is unnatural and surprising and 'queer.' Thus, given the natural moral law, there are really only two options concerning its origin: it exists, but it is an accident, a product of chance; or it is the result of intelligence.

75. Most of this section is adapted from portions of two of my works: Francis J. Beckwith, Why I Am Not a Moral Relativist, in WHY I AM A CHRISTIAN: LEADING THINKERS EXPLAIN WHY THEY BELIEVE 17 (Norman L. Geisler & Paul K. Hoffman eds., 2d ed. 2006); Francis J. Beckwith, Natural Law Without a Lawgiver?, 68 REV. POLITICS 680 (2006) (reviewing LARRY ARNHART, DARWINIAN CONSERVATISM (2005)). The argument I am presenting in this section has similarities to the one developed by Gregory P. Koukl in BECKWITH & KOUKL, supra note 14, at 156–70. This argument also has affinities with that developed by C.S. Lewis in C.S. LEWIS, Right and Wrong as a Clue to the Meaning of the Universe, in MERE CHRISTIANITY 3 (3d ed. 1952).


A. The Natural Law Does Not Depend on God.

If the natural moral law is a product of chance, then it is a collection of brute facts that are the result of unguided, naturalistic, evolution. But this does not seem adequate, for if moral norms have no mind behind them, then there is no justification to obey them. Consider this illustration: if while playing Scrabble the letters randomly spell “Go to Baltimore,” should I obey the command, buy a plane ticket, make hotel reservations and/or take up temporary residence in Baltimore? Of course not, for “the command” is a chance-created phrase and is thus really no command at all. As Gregory P. Koukl points out, “Commands are communications between two minds. Chance might conceivably create the appearance of a moral rule, but there can be no command if no one is speaking.” A command created by accident “can be safely ignored.”

Suppose, however, that the evolutionary naturalist (EN) replies that morality exists because it is necessary for survival. According to this view, moral rules against adultery, murder, stealing, etc., are the result of the forces of natural selection “choosing” those genes that perpetuated traits that are more conducive to the preservation of the human species. In the words of Robert Wright: “If within a species there is variation among individuals in their hereditary traits, and some traits are more conducive to survival and reproduction than others, then those traits will (obviously) become more widespread within the population. The result (obviously) is that the species’ aggregate pool of hereditary traits changes.” Behavioral patterns that help sustain these species-preserving traits are part of what we call “morality.”

78. I say unguided and naturalistic evolution to distinguish it from theistic evolution, which affirms an evolutionary account of living organisms that is ultimately guided by God. A theistic evolutionist may, of course, consistently maintain that the moral law comes from God, which is why this critique only applies to atheistic, or naturalistic, evolutionists. See, for example, the work of Francis S. Collins, Director of the National Human Genome Institute Research Institute (as of summer 2008) in FRANCIS S. COLLINS, THE LANGUAGE OF GOD: A SCIENTIST PRESENTS EVIDENCE FOR BELIEF (2006).

79. BECKWITH & KOUKL, supra note 14, at 167.

80. Id.

So, according to the EN understanding, Mind is not a necessary condition to account for the diversity of natures of the living beings that arise out of the vast eons during which natural selection cooperates with random genetic mutations and perhaps other evolutionary forces. Consequently, living beings do not possess the stable realist natures that Thomas Aquinas and Aristotle believed exist. Rather, for the EN, the natures we ascribe to living beings are merely names (or "nominal essences") that are shorthand ways to label beings that have roughly similar characteristics. So, we may say that resulting from human nature are those practices, habits, and institutions the tool-using, language-employing, upright bipeds that have DNA similar to our own. But this human nature tells us nothing normative. It merely describes what is statistically ordinary and generally species-preserving. The EN thinks that is all that we need to ground natural law.

According to Larry Arnhart, who calls himself a "Darwinian conservative," scholarship in political theory has incorporated this evolutionary understanding in order to account for the human sentiments that are the foundation of family life. Citing the work of renowned political scientist James Q. Wilson, Arnhart writes:

> Wilson . . . argues that natural selection may have promoted a generalized psychological propensity to "attachment" or "affiliation." What he calls "affiliation" corresponds to what Aristotle calls "friendship" (philia): a natural drive to social bonding diversely expressed as sexual, familial, companionate, political, or philanthropic attachments . . . . Wilson believes the human sentiments of sympathy and benevolence, which throughout most of human evolutionary history would have enhanced reproductive fitness by inclining human parents to care for their young, can now be extended to people who are not offspring or even to nonhuman animals.

There are, however, several problems with the evolutionary naturalist account. First, because helping the weak, the genetically marred, and the social parasite are not

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83. See LARRY ARNHART, DARWINIAN CONSERVATISM (2005).
evolutionarily helpful, why do we have a sense of duty and incumbency to help those less fortunate than ourselves? Suppose the EN answers that we would not have this sense of duty and incumbency unless it was evolutionarily helpful. There are at least two problems with this answer. First, it begs the question, for it assumes that whatever moral senses we have they must be the result of evolution. But because the question is whether naturalistic evolution can explain all our moral senses, it is circular reasoning to assume that whatever moral senses we have they must be the result of naturalistic evolution. Second, because it is clear that not every human being has a moral sense that he or she has a duty and incumbency to help those less fortunate themselves, on what grounds could the EN say that these human beings are mistaken in their moral viewpoint? After all, people who lack this moral sense have existed all over the globe for generations, and if they too are the products of evolution, perhaps having such people in our population is necessary for the preservation of the species. If that is the case, then "moral sense" is person-relative and is not universally binding. But that undermines the notion of a natural moral law that atheists, such as Hitchens and Dawkins, must sustain in order to be able to issue their strong universal moral judgments against atrocities and wrongdoings committed throughout human history and across cultures in the name of religion. On the other hand, if the EN bites the bullet and maintains that those who lack the moral sense to see that they have an obligation to those weaker than themselves are morally wrong regardless of what moral sense they may feel, then there is a morality above naturalistic evolution by which we can make moral judgments about the moral senses of different segments of our population that resulted from unguided evolution. Thus, naturalistic evolution lacks explanatory power in accounting for the natural moral law.

Second, naturalistic evolution is concerned only with the sorts of behavior that are conducive to the preservation of the species. But morality is more than just behavior, for it includes, among other things, motive and intent. In fact, a moral judgment is incomplete without taking these into consideration. For one can be immoral without any behavior, simply on the basis of motive and intent. For example, I can
intend to carry out a murder and never do it. One can be immoral simply on the basis of motive and intent even if the behavior has “good” results. For example, if I intend to trip someone in order to cause harm, but it results in the person not being hit by a car and thus saving his or her life, the results are good even though what I did was immoral. On the other hand, “bad” results may be part of a morally good act simply on the basis of motive and intent. For example, if a surgeon operates on a terminal patient with the intent to remove a cancer, but during the operation the patient dies of cardiac arrest, the surgeon has not acted immorally. Since naturalistic evolution, at best, can only describe what behaviors are conducive to the preservation of the species and does not address the role of motive and intent in evaluating those behaviors, naturalistic evolution is an inadequate explanation for the existence of moral norms.

Third, the naturalistic evolutionary explanation of morality is merely descriptive. That is to say, it merely tells us what behaviors in the past may have been conducive to the survival of the species and why I may have on occasion moral feelings to act consistently with those behaviors. But naturalistic evolution cannot tell me whether I ought to act on those feelings in the present and in the future. Granted, I am grateful that people in the past behaved in ways that made my existence possible. But why should I emulate only those behaviors that many people today say are “good?” After all, some people in the past raped, stole, and murdered. And I know of many people today who have feelings to rape, steal, and murder. Perhaps these behaviors are just as important for my existence and the preservation of the species as the “good” behaviors. Unless there is a morality above the morality of naturalistic evolution, it is difficult see how one can distinguish between morally good and bad actions if both types may have been conducive to the preservation of the species.

Consequently, evolutionary naturalism may very well explain why each of us may have certain moral feelings on occasion. But it cannot say why citizen X ought to perform (or not perform) act Y in circumstance Z. To cite another example: Arnhart argues that the traditional family best protects and preserves the human species if it is widely
practiced. But what do we say to the eighty-something Hugh Hefner, who would rather shack up with five twenty-something buxom blondes with which he engages in carnal delights with the assistance of state-of-the-art pharmaceuticals? Mr. Hefner is no doubt grateful that his ancestors engaged in practices (e.g., the traditional family) that made his existence and lifestyle possible. But why should he emulate only those practices that many people today (e.g., Arnhart and I) say are “good”? After all, some of our ancestors were Hefnerian in their sensibilities, taking on a concubine or two and running off with one of them every once in a while. Perhaps this practice was just as necessary for Mr. Hefner’s existence and the preservation of the species as were the “good” behaviors practiced by history’s squares. Because we have always had in our population Hugh Hefners of one sort or another, it is not clear to me how Arnhart can distinguish between good and bad practices if both sorts may have played a part in the survival of the human race, unless there is a morality by which we assess the morality of evolution. But this would seem to lead us back to the old natural law, the one that has its source in Mind and that is not subject to the unstable flux of naturalistic evolution.

Fourth, although evolutionary naturalists such as Arnhart and Wilson seem to be correct that certain sentiments (e.g., love of family, children) are consistent with a natural law understanding of community and advancing the common good, these sentiments themselves seem inadequate to ground moral action or to account for certain wrongs. For example, Tony Soprano’s love of kin nurtures sentiments that lead to clear injustices, e.g., “rubbing out” enemies, about which Tony and family do not seem particularly troubled. In that case, the wrongness of the act is located not in the sentiments of its perpetrators (or even its victims, if the victims, for some reason, were convinced that they deserved to be rubbed out) but in a judgment informed by moral norms that stand above, and are employed by free agents, to assess acts and actors apart from their sentiments. Again, we are

85. ARNHART, supra note 83, at 46–58.

86. “Tony Soprano” is a fictional character in the HBO series, “The Sopranos.” In the show, Mr. Soprano (played by actor James Gandolfini) was the head of an organized mob family with its headquarters in New Jersey. The Sopranos (HBO 1999–2007).
back to the old natural law that has its source outside of naturalism's unguided torrent.

B. The Natural Law Does Depend on God.

Because the natural moral law does not seem to be the product of chance, only one option remains: it has its source in an intelligence. What sort of intelligence could this being be? It must be the sort of being who could be the ground of a natural moral law. So, it could not be a contingent intelligence, one whose existence and moral authority is dependent upon something else outside itself. For in order to be the ground of morality, a being must not receive its existence and moral authority from another, for that other being, if it is not contingent, would then be the ground of the natural moral law. Therefore, the source of the moral law must be a self-existent, perfectly good being who has the juridical authority that requires that we owe him our duty to obey. It seems only fitting to call such a being "God." As Richard Taylor puts it, "A duty is something that is owed . . . but something can be owed only to some person or persons. There can be no such thing as a duty in isolation. . . . The concept of a moral obligation [is] unintelligible apart from the idea of God. The words remain, but the meaning is gone."87

Of course, one could challenge this conclusion and the premises that support it, and many reasonable people will find such a challenge to be an adequate reason to reject the belief that the existence of God best accounts for the natural moral law. But from that it does not follow that one is unreasonable if one in fact believes, based on an argument such as the one I have offered here, that the existence of God best accounts for the natural moral law, and by implication natural rights. After all, none of the premises I have offered in my case are obviously unreasonable, that one must reject them because they are contrary to reason. In fact, it seems that the premises are widely held by reasonable people, who have diligently and carefully studied the issues and have come to the conclusion that in fact the existence of God best accounts for the natural moral law. Consequently, it seems reasonable to believe, as the American Founders believed,

that if there exists a natural moral law, the foundation of natural rights, it is best accounted for by the existence of God. And if it is reasonable to hold this belief, then it should be uncontroversial if a community passes legislation that requires that its public school students understand that it is reasonable to believe that America is "one nation, under God."