

Perelman's Theory of Argumentation and Natural Law

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Chaïm Perelman resuscitated the rhetorical tradition by developing an elegant and detailed theory of argumentation. Rejecting the single-minded Cartesian focus on rational truth, Perelman recovered the ancient wisdom that we can argue reasonably about matters which admit only of probability. From this one would conclude that Perelman's argumentation theory is inalterably opposed to natural law, and therefore that I would have done better to edit the title of my article to read, "Perelman's Theory of Argumentation as a Rejection of Natural Law."

However, my title accurately captures my thesis that Perelman's theory of argumentation connects to the natural law tradition in interesting and productive ways. Perelman referred to natural law in a number of his essays as an example of the excessively rational focus that he sought to correct with his theory of argumentation, but he also noted the power of natural law claims in legal argumentation. To my knowledge, he never offered a detailed account of the connections between his theory of argumentation and natural law. However, Perelman's deep and abiding concern with justice suggests that he could not help but be interested in lines of argumentation that challenge positive laws from some other standpoint – that, in some manner, he must embrace some elements of the natural law tradition.

I wish to outline the ways that a natural law account can fit with Perelman's theory of argumentation in order to address an ontological crisis that grips contemporary legal theory. Steven Smith has persuasively described "law's quandary" now that legal practice purports to be divorced from the natural law contexts in which it developed.² I contend that

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² See Steven D. Smith, *Law's Quandary* (Cambridge, MA: Harvard Univ. Press, 2004). Smith contends that there is "at least a strong *prima facie* case that modern legal discourse is operating in a sort of 'ontological gap' that divides our explicit or owned ontological commitments (which preclude us from recognizing the reality of 'the law' [that

by working through a conception of natural law that fits with Perelman's philosophy of argumentation we can find a promising way to address law's ontological crisis. The philosophy of The New Rhetoric is a rich resource for describing the ontological space in which law operates, and also for providing normative guidance to those engage in legal practice.

The Natural Law Tradition

The term "natural law" generally calls to mind a philosophical account that bloomed in ancient Rome, was absorbed into the Christian tradition, reached full expression in Aquinas, and then was secularized and rationalized as a philosophy of natural rights. Cicero famously offered a succinct definition of pre-Christian natural law based on the Stoic tradition, arguing that natural law is universal, eternal, and unchanging, and that these characteristics of reality follow from the fact that natural law is authored and administered by a deity.³ Cicero's account was easily accommodated to Christian principles that were embraced and propagated by the Roman Empire. Centuries later, Aquinas famously differentiated eternal law, natural law and positive law, arguing that God's divine will is beyond our ken, but that we are capable of determining the conditions for human flourishing through use of our reason because, to borrow Paul's words, the natural law has been written in our hearts.⁴

stands distinct from empirical legal practices]) from the ontological assumptions not only implicit in but essential to our discourse and practice (which seem to presuppose the reality of 'the law')." For my review of Smith's book, see Francis J. Mootz III, "After Natural Law: A Hermeneutical Response to Law's Quandary," 9 *Rutgers Journal of Law and Religion* 1-12 (2008).

In a similar vein, Peter Goodrich describes the plight of contemporary legal theory with concise accuracy: We have abandoned natural law foundations originally constructed in ecclesiastical venues only to find that the project of developing a secular legal language capable of transforming the management of social conflict into questions of technical rationality is doomed to failure. See Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996): 160-61.

³ Cicero writes:

True law is right reason in agreement with Nature . . . it is of universal application, unchanging and everlasting . . . we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.

Cicero, *De Re Publica* (Clinton Walker Keyes trans.) (Cambridge, MA: Harvard Univ. Press, 1928): III, xxii.33.

⁴ Cf. Romans 2:14-16, *New American Standard Bible* (1995): "For when Gentiles who do not have the Law do instinctively the things of the Law, these, not having the Law, are a law to themselves, in that they show the work of the Law written in their hearts, their conscience bearing witness and their thoughts alternately accusing or else defending them, on the day when, according to my gospel, God will judge the secrets of men through Christ Jesus."

In the Enlightenment period the persistent demand for human rights became rooted in univocal reason rather than a religious cosmology, in response to the centuries of war and violence waged on behalf of religious belief. In this account, it is human nature that gives rise to certain moral precepts; more precisely, it is the integrity and intrinsic worth of human life that gives rise to a variety of moral dictates. This shift in emphasis is noted in the term “natural rights,” which a person bears, as opposed to “natural law,” to which a person is subject.

Most recently, Germain Grisez, John Finnis and Robert P. George have argued for a “new natural law” that purports to rejuvenate Aquinas’s approach in terms that are suitable for our secular and rationalist age. In very general terms, they contend that a number of incommensurable human goods simply are given as elements of human flourishing, and that these human goods provide a stable basis for ethical decision-making through the exercise of a non-calculative and non-utilitarian practical reasoning.⁵ George emphasizes the chastened character of the “new natural law” by rejecting the idea that judges may directly access its principles in deciding cases; rather, positive law always imperfectly implements natural law, and the rule of law is a critical feature of modern constitutional democracies.⁶

This long-standing, but constantly evolving, tradition of natural law thinking does not easily connect with Perelman’s theory of argumentation for the simple reason that genuine argumentation plays no role in its existence or elaboration. By positing an abiding criterion that exists outside of time or place, there is no room for argumentation; instead, there is simply validity or non-validity. Even the “new natural law” also is at odds with Perelman’s philosophy because it presumes that there are correct answers to moral questions even people acting in good faith debate which answer is correct, and that reaching the correct answer is a matter of refining our abilities to reason practically.⁷

⁵ Theories of natural law are reflective critical accounts of the constitutive aspects of the well-being and fulfillment of human persons and the communities they form. The propositions that pick out fundamental aspects of human flourishing are directive (that is, prescriptive) in our thinking about what to do and refrain from doing (our practical reason) – that is, they are, or provide, more than merely instrumental reasons for action and self-restraint.

Robert P. George, “Natural Law,” 52 *American Journal of Jurisprudence* 55, 55 (2007). See generally, John Finnis, “Foundations of Practical Reason Revisited,” 50 *American Journal of Jurisprudence* 109 (2005).

⁶ George, “Natural Law,” at 71-75.

⁷ Anthony Lisska criticizes Finnis’s “new natural law” for promoting the exercise of theoretical reason in the guise of practical reason. Lisska’s reconstruction of Aquinas’s philosophy in terms of Aristotelian practical reasoning provides a plausible starting point for conceiving natural law in terms of Perelman’s theory of argumentation. See Anthony J. Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford: Oxford Univ. Press, 1996): 156.

Consequently, it should come as no surprise that Perelman roundly criticizes natural law. He rejects the secular, rationalist incarnation of the tradition because it presumes that reason can determine not only what is true in the world of empirical fact, but also what is just in the social world.⁸ As Perelman notes, this approach to natural law continually runs aground on the shoals of experience, as demonstrated by the fact that reason has been impotent to settle debates regarding justice that reach back at least as far as Sophocles.⁹ He concludes that justice is not univocal; instead, it requires continuous choices between justifiable tenets that are in conflict. Law must operate in the realm of the reasonable as well as the rational if it is to do justice.

At the same time, Perelman's philosophy is deeply indebted to Aristotle and so he recognizes that there may be room for different understandings of natural law.¹⁰ Aristotle was too wedded to the necessity of an equitable leavening of the law to endorse a thoroughly rationalized approach to legal practice. In response to a question at a seminar, Perelman criticized the alignment of natural law with the "rational" – regarded in terms of the mathematical model of moral reasoning – but he emphasized that there was a line of thinking from Aristotle to Aquinas that embraced a more flexible account. "I don't see either Aristotle or Thomas Aquinas saying as Grotius says, that there are eternal laws of justice, just

⁸ Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (William Kluback et. al., trans.) (Boston, MA: D. Reidel, 1980): 29-32, 42-44, 131. His friend and colleague, Mieczyslaw Maneli, argues that the New Rhetoric rejects any traditionalist reliance on a "natural" state of affairs. Mieczyslaw Maneli, "Perelman's Achievement Beyond Traditional Philosophy and Politics," *5 Law and Philosophy* 351 (1986): 361-62.

⁹ Perelman, *Justice, Law, and Argument*, at 165. Robert George concedes that the truths of natural law often are obscured by socially-constructed ideologies, as occurred in the ante-bellum American South when persons defended slavery. George, "Natural Law," at 62. Hence, his conclusion:

So, if there is a set of moral norms, including norms of justice and human rights, that can be known by rational inquiry, understanding, and judgment even apart from any special revelation, then these norms of natural law can provide the basis for an international regime of human rights. Of course, we should not expect consensus.

Ibid. at 64.

¹⁰ In a dictionary entry on the term, Perelman cautions that combining two polysemic words such as "nature" and "law" yields myriad definitions and so one must think contextually and historically rather than conceptually. Paul Foriers and Chaïm Perelman, "Natural Law and Natural Rights," in 3 *Dictionary of the History of Ideas* 13-27 (Philip P. Wiener ed.) (New York: Scribner and Sons, 1974): 13-14.

As will become clear, I use the term "natural law" generally to refer to the tradition of natural law thinking, but I also wish to propose a new understanding of the term in light. The term "natural law" combines two elements: nature and law. I will argue that the "nature" under consideration is human nature – more specifically, our nature as finite, hermeneutical and rhetoric beings. The "law" to which I refer is not given in the natural world nor promulgated by a deity; rather, it is the social activity of legal regulation. I conclude that "natural law" is best understood as a "naturalized rhetoric," by which I mean that the manner in which we engage in legal regulation is rooted in our interpretive and rhetorical nature. Defined in this manner, natural law fits with Perelman's theory of argumentation, although it is necessary to define these connections carefully in what follows.

as eternal as the laws of mathematics. It is impossible.”¹¹ This gesture by Perelman toward the classical understanding of natural law as a feature of the interplay between the hypothesized rational legal system and the reasonable resolution of specific cases provides the starting point for my inquiry.

Perelman’s Theory of Argumentation and Natural Law

There are at least three different ways to think about natural law in conjunction with Perelman’s theory of argumentation. First, we can regard natural law as a line of argument, a related family of commonplaces that we find impossible to ignore, despite our overt positivist commitments. Second, we might connect Perelman’s contested (and often misunderstood) idea of a “universal audience” to the natural law tradition. Finally, and most radically, we might think of natural law in more far-reaching theoretical terms by conceiving Perelman’s philosophy as propounding a “naturalized rhetoric.” By connecting with the natural law traditional in these multiple ways, Perelman’s theory of argumentation has robust affinities with natural law. In this short article I wish to adumbrate an overview of these three lines of inquiry.

1. Natural Law as a Commonplace. Perelman recognized that natural law plays an important role in legal argumentation, even if we reject the claim that there is an objective structure of justice that can be understood through the use of reason.

The idea of natural law is also misconceived when it is posed in ontological terms . . . Natural law is better considered as a body of general principles or loci, consisting of ideas such as “the nature of things,” “the rule of law,” and of rules such as “No one is expected to perform impossibilities,” “both sides should be heard” – all of which are capable of being applied in different ways. It is the task of the legislator or judge to decide which of the not unreasonable solutions should become a rule of positive law. Such a view, according to Michel Villey, corresponds to the idea of natural law found in Aristotle and St.

¹¹ Chaïm Perelman, “The Rational and the Reasonable,” in *Rationality To-day* 213-24 (Theodore F. Geraets ed.) (Ottawa: University of Ottawa Press, 1979): 221 (Proceedings of a conference convened in October, 1977). As Jan Broekman summarizes, “Natural law and positive law are both historical and subject to change. It is precisely this dimension that defines the inquiry of Perelman.” Jan M. Broekman, “Justice as Equilibrium,” *5 Law and Philosophy* 369 (1986): 383.

Thomas Aquinas – what he calls the classical natural law.¹²

Perelman’s analysis of the natural law tradition as a collection of commonplaces exemplifies how rhetorical exchanges working from commonplaces contain a critical bite. He cites the decision by the Allies to justify the Nuremberg trials with appeals to natural law as a concession to the fact that the demands of justice exceed the capacity of positive law.¹³ Even if the history of natural law thought is marked by authoritarian and ideological overtones, Perelman does not regard the tradition as a “mistake” that should – or can – be exorcized from our vocabulary. He effectively strips natural law precepts of their inauthentic claims to eternal and universal validity and urges legal theorists and practitioners to utilize the principles as vital (indeed, unavoidable) resources for innovation and the critique of existing legal relations.

Perelman’s approach recalls Aristotle’s advice about how to argue against application of a written law that is facially against one’s interest. In the *Rhetoric*, Aristotle suggests that one should argue that following the written law slavishly would do an injustice, quoting Antigone’s pleas as a basis for this line of argument.¹⁴ Tony Burns contends that Aristotle did not endorse this line of argument, but by including it in the *Rhetoric* he acknowledged that these types of argument – most vividly advanced by sophistic challenges to slavery as

¹² Chaïm Perelman, *The New Rhetoric and the Humanities: Essays on Rhetoric and Its Applications* (William Kluback, trans.) (Boston, MA: D. Reidel, 1979): 33-34. The dialectic of the rational and the reasonable in law shows the need for a more flexible understanding of natural law as something other than a rational construct that is timeless and universal. Ibid. at 120-22.

¹³ Ibid. at 104.

¹⁴ His suggested line of argumentation is:

4. for it is evident that if the written law is contrary to the facts, one must use common law and arguments based on fairness as being more just: 5. [say] that to use “best understanding” is not to follow the written law exclusively; 6. and that fairness always remains and never changes nor does the common law (for it is in accordance with nature) but written laws often change.

Aristotle, *On Rhetoric: A Theory of Civic Discourse* (George A. Kennedy trans. and ed.) (Oxford: Oxford Univ. Press, 1991): 1.15. He notes that the advocate should argue that not all written laws are just, and so the person seeking justice should conform to the unwritten law. Ibid. at sec. 7.

Tony Burns argues that Aristotle miscasts Sophocles as a defender of a universal and eternal natural law. Antigone is more likely appealing to religious custom that is tradition-bound and parochial rather than invoking abstract and eternal principles. Tony Burns, “Sophocles’ *Antigone* and the History of the Concept of Natural Law,” 50 *Political Studies* 545-57 (2002). This is just to say that Antigone invokes a pre-modern natural law argument that too often is accommodated to our rationalist readings of Aristotle, reinforcing the idea that the “natural law” is a confused concept that has been invoked as part arguments within differing contexts over the millennia.

an “unnatural” practice – had found currency among his contemporaries.¹⁵ More important, Burns contends that Aristotle eventually did endorse natural law arguments in order to *justify* the status quo against radical attacks.¹⁶

Natural law has a complex valence in Aristotle’s usage, but Perelman would certainly conclude that these different uses of natural law by Aristotle follow from the fact that it is an essentially contested concept that is closely connected to justice. If natural law is an ontological feature of the world, it must be the case that when both parties in a debate invoke natural law one of them must be wrong. However, when natural law is understood as a commonplace from which one may argue many points in different ways, one must regard it as a supple and polysemic concept that does not yield singular answers to social and legal disputes. Even the highly rationalistic notions of natural rights that arose in the Enlightenment period can be viewed as lines of critical argumentation against the status quo that proved to be incredibly productive rhetorical strategies even though they lacked certainty through ontological backing.¹⁷

¹⁵ Tony Burns, “The Tragedy of Slavery: Aristotle’s *Rhetoric* and the History of the Concept of Natural Law,” *25 History of Political Thought* 16-36 (2003), 28-35. Burns challenges the conventional attribution to the sophists of radically relativist beliefs, concluding that “at least some of the sophists were not relativists but objectivists so far as questions of ethics are concerned,” *ibid.* at 25, and “the critical attitude of this group of thinkers towards the institution of slavery indicates the presence in fifth-century Athens of a universalist, cosmopolitan, rationalist and humanitarian approach to questions of ethics and politics.” *Ibid.* at 26. The primary example is Alcidimas, who maintained that the institution of slavery contradicts rather than conforms to the principle of equity, which is the most fundamental principal of natural justice. This principle states that those who are equal ought to be treated equally in relevantly similar circumstances. The difference between Alcidimas and Aristotle is that Alcidimas took the view that all human beings *are* by nature equal, and therefore that slavery is ethically unjustifiable, whereas Aristotle did not. Burns, “Sophocles’ *Antigone*,” at 550.

¹⁶ Burns, “Tragedy of Slavery,” at 34-35. Burns explains: Aristotle’s treatment of the concept of natural justice or law . . . in the *Nicomachean Ethics*, in striking contrast to what he says about natural law arguments in the *Rhetoric*, might be seen as a classic illustration of such a rhetorical manoeuvre. The irony of Aristotle’s suggestion that it is his radical political opponents such as Alcidimas who employ the concept of natural law in a merely rhetorical manner whereas he himself employs the same concept in the pursuit of objective ethical truth is readily apparent—especially (but not only) to those of a Nietzschean or poststructuralist philosophical persuasion. *Ibid.* at 35.

¹⁷ Foucault argued that critique might be seen as “the art of not being governed quite so much” and highlighted the historical emergence of natural law arguments in favor of human rights as one of three historical points in the emergence of critique as an element of the Enlightenment. Michel Foucault, “What is Critique” (Lysa Hochroth trans.) in *The Politics of Truth* (Sylvère Lotringer ed.; Lysa Hochroth and Catherine Porter trans.) (Los Angeles, CA: Semiotext(e), 2007) (originally delivered as a lecture to the French Society of Philosophy on May 27, 1978).

Natural law can be seen as an ideological commitment to the status quo or liberating critique, which is precisely its importance as a line of argumentation.

2. Natural Law as the Construction of a Universal Legal Audience. Perelman's development of the ancient attention to audience is one of his signature contributions to rhetorical theory. Noting that the audience envisioned by the speaker "is always a more or less systematized construction," Perelman places emphasis on the speaker's goal of creating her audience in the course of addressing it.¹⁸ In some circumstances, a speaker will aspire to more than persuading the audience to which her speech is immediately directed, and will claim to offer reasons that would be convincing to all reasonable persons. "This refers of course, in this case, not to an experimentally proven fact, but to a universality and unanimity imagined by the speaker, to the agreement of an audience which should be universal, since, for legitimate reasons, we need not take into consideration those [who] are not part of it."¹⁹ The speaker constructs a universal audience to shape her discourse, but also to entreat the concrete audience before her – which "can never amount to more than floating incarnations of this universal audience"²⁰ – to imagine themselves as part of such an audience. As Perelman emphasizes, the actual audience helps to validate the speaker's construction of the universal audience, even as the universal audience serves as a check on the parochial concerns of the actual audience.²¹

All lines of argumentation are shaped to the audience to which they are addressed, and natural law arguments are no different. I believe that it makes good sense to regard natural law arguments as addressing a particular audience in their capacity as a contingent example of a hypothesized universal audience. When some sophists argued that slavery was an affront to the natural dignity and equality of all men they appealed to a specific Greek audience rooted in customary practices of slavery, but they sought to provoke this audience to recognize its membership in a broader universal audience. Arguing that slavery is a violation of universal norms that are part of the structure of reality does not call for an investigation of the natural world; rather, it calls for a reconfiguration of the self-understanding of the audience.

As a lawyer and law professor, I have no doubt that natural law arguments (even if not expressly characterized as such) are ubiquitous and perhaps unavoidable in legal practice. If we agree with Perelman that there is no abiding structure of reality that grounds these arguments ontologically, we must seek to understand these arguments by exploring the

¹⁸ Chaïm Perelman and L. Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (John Wilkinson and Purcell Weaver, trans.) (Notre Dame, IN: Univ. of Notre Dame Press, 1969): 19.

¹⁹ *Ibid.* at 31.

²⁰ *Ibid.*

²¹ *Ibid.* at 35.

character of the audience that the legal orator seeks to construct, and the manner by which the orator seeks to motivate an actual audience to act in response to these arguments. I regard this task as impossible without employing a conception of the universal audience, and therefore it is critical to Perelman's philosophical clarification of legal argumentation, a practice that he in turn regarded as exemplary for moral argumentation.²² This leads me to conclude that regarding natural law claims as commonplaces that seek resonance with an audience inspired to reconstitute itself as the universal audience resides at the center of Perelman's theory of argumentation and is not just an obscure detail in Perelman scholarship.

By considering natural law arguments we can avoid some of the misunderstandings arising from Perelman's use of the term "universal audience" to refer to a hypothesized audience of all reasonable persons to whom a philosophical claim to truth is addressed. A natural law argument is directed to a universal audience for whom the actual audience – whether a jury, judge or appellate panel – serves as a stand-in. But this is not to say that the audience is hypothesized to be generically "rational" or "philosophical." Claims in this setting are peculiarly legal in nature, and are best paraphrased as: "no reasonable person seeking to implement the values of our legal system could conclude that slavery is legitimate, notwithstanding our custom and written laws to the contrary." Arguments traditionally couched in natural law terms are not arguments to a timeless and decontextualized rational being; instead they are arguments designed to provoke the actual audience to rise above their parochial interests and to conceive of themselves as empowered to articulate truth, justice and other confused notions in a manner that all persons should find persuasive.²³

3. *Naturalizing Rhetoric.* There is a final, and more radical, sense in which we can connect natural law with Perelman's theory of argumentation, which I call "naturalizing rhetoric." This is a potentially misleading term, and so I want to unpack my meaning carefully. As used in contemporary philosophical discourse, "naturalism" refers generally to the position that philosophy clarifies the empirical dimensions of reality rather than engaging in speculative metaphysics. The assumption is that nature is just empirical reality, subject to scientific investigation as supplemented by philosophical reflection. I use the term "naturalized rhetoric" as a provocation to unseat this assumption. We "naturalize" rhetoric when we regard human "nature" as rhetorical. Simply put, it is our fixed human condition to be recreating ourselves and our society through continuous rhetorical exchanges with others. A naturalized rhetoric embraces the paradox that non-essentialism is essential to our

²² Perelman, *Justice, Law and Argument*, at 114-19, 146, 174.

²³ Restated in the terms of rhetorical criticism, we can say that natural law arguments address a particular audience of intended readers with the goal of invoking an audience. See generally, Jack Selzer, "More Meanings of Audience," in *A Rhetoric of Doing: Essays on Written Discourse in Honor of James L. Kinneavy* (Stephen Witte, Neil Nakadate, Roger Cherry eds.) (Carbondale: SIU Press, 1992): 161-77.

being, that we can find a foundation for reflection in anti-foundationalism.²⁴

A naturalized rhetoric has both explanatory and normative force. On one hand, a naturalized rhetoric underwrites Perelman's theory of argumentation by emphasizing that it is an affirmative account of our nature as reasoning beings rather than a reluctant concession to limitations of our rational capacity. Perelman is less vigorous in his critique of Cartesian rationalism than Vico, who argued against the incipient rationalism of the Western tradition by defending the priority of rhetoric and its connections to our imaginative capacities and the metaphoric structure of human understanding.²⁵ By naturalizing rhetoric in the humanist tradition exemplified by Vico we can elaborate the ontological claims that subtend Perelman's theory of argumentation.

Important normative implications follow from a naturalized rhetoric. If it is our nature to be rhetorical, an ethical system oriented toward promoting human flourishing would require that we ensure the social and legal context for the development of this capacity. This recognition would not lead to specific policy prescriptions or answer specific legal dilemmas, but it would provide a general orientation toward maximizing human communication and exchange. Moreover, a naturalized rhetoric suggests a basis from which we might approach one of the central questions in rhetorical theory – whether there is a basis for distinguishing

²⁴ Naturalizing rhetoric does not rest on theological beliefs, but it is not necessarily at odds with religious belief. John Macquarrie contends that a viable account of natural law can serve as a bridge between faith and morality if it “takes account of the change and development which . . . are characteristic not only of man's images of himself but of his very nature and of the world around him.” John Macquarrie, “Rethinking Natural Law,” in *Natural Law and Theology* 221-46 (Charles E. Curran and Richard A. McCormick, S.J., eds.) (New York: Paulist Press, 1991): 232. Macquarrie explains:

But if we acknowledge . . . that man's nature is open, and that he is always going beyond or transcending any given state of himself; and if we acknowledge further that this open nature of man is set in the midst of a cosmos which is likewise on the move and is characterized by an evolving rather than a static order; then we must say that the natural law itself, not just its formulations, is on the move and cannot have the immutability once ascribed to it. But what has perhaps more than anything else discredited the natural law concept is the tacit assumption that there was a kind of original human nature to which everything subsequent is an accretion. . . . Man's very nature is to exist, that is to say, to go out of himself, and in the course of this he learns to take over from crude nature and to do in a human (and humane) way what was once accomplished by blind natural forces (both in man and outside of him) working in a rough and ready manner.

Ibid. at 241. My notion of a naturalized rhetoric would be one manner of dealing with the dynamic reality of man's nature, and could be accommodated to religious belief as Macquarrie suggests without being dependent on any such belief.

²⁵ I have elaborated my reading of Vico in this context. See Francis J. Mootz III, “Vico's ‘Ingenious Method’ and Legal Education,” 83 *Chicago-Kent L. Rev.* 1261 (2008) and Francis J. Mootz III, “Vico and Imagination: An Ingenious Approach to Educating Lawyers with Semiotic Sensibility,” ___ *INT'L. J. OF SEMIOTICS AND LAW* ___ (forthcoming 2009).

“good” rhetoric from “bad” rhetoric – in a more productive manner.²⁶ It is crucial to keep in mind when exploring these themes that we must avoid the temptation to essentialize our rhetorical nature by supposing that it includes more substantive agreement on shared norms than can be secured in dialogue and argumentation. In other words, it is always illegitimate to recognize our rhetorical nature but then to prescribe certain “natural law” claims that *must* be accepted by all rational persons, and therefore which can be *coercively imposed*.

Perelman’s cautions about the dangers of invoking the universal audience speak to these potential abuses of natural law claims. Perelman warns of the danger of elitism that results in characterizing dissenters as heretics or irrational, or which leads the speaker to constrict the actual audience to a small vanguard that already agrees with the claims put forward.²⁷ These ideological tendencies are closely associated with natural law argumentation through the ages, but it is precisely by naturalizing rhetoric that we have the best chance to avoid this misuse of natural law commonplaces. By recognizing that it is our nature to be rhetorical, and that the variety of legal systems rest on this naturalized rhetoric rather than on an objective state of affairs that can be discerned by reason alone, we can understand how natural law argumentation works to construct a universal audience through rhetorical means.

I am not writing on a completely blank slate in legal theory to suggest this reading of the natural law tradition. Even the resolute analytical legal positivist, H.L.A. Hart, famously conceded that it made sense to acknowledge that there is a minimal natural law requirement that shapes a legal system in light of our nature and the bare need for survival.²⁸ There are

²⁶ Jeffrey Maciejewski makes just this claim by connecting the basic good of social life to the natural fact that rhetoric is necessary to fashion a community. Jeffrey J. Maciejewski, “Reason as a Nexus of Natural Law and Rhetoric,” 59 *Journal of Business Ethics* 247-57 (2005); Jeffrey J. Maciejewski, “Natural Law, Natural Rhetoric, and Rhetorical Perversions,” 79 *Proc. of the American Catholic Phil. Assoc.* 173-87 (2006). Although overly wedded to non-rhetorical features of Aquinas’s natural law philosophy, Maciejewski aligns himself with the notion of an evolving human nature that is rhetorically secured in social intercourse. He properly concludes that there is a natural rhetoric essential to the development of the person.

When examined more acutely using a moral theory attuned to human behavior such as natural law, it seems that declaring persuasion immoral as a violation of autonomy belies the human penchant for employing rhetoric as part of living in society. As rhetoric services reason, which in turn services the dispositions, it can be seen as a natural, morally praiseworthy concomitant of the exercising of reason which helps to reveal the potentiality of reason itself. Moreover, I believe it possible to refer to such rhetoric as “natural.”

Maciejewski, “Reason as a Nexus,” at 256.

²⁷ Perelman and Olbrechts-Tyteca, *The New Rhetoric*, at 33-34.

²⁸ H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994 2d ed.): 193-200. Hart argues that the nature of human existence – our vulnerability to each other, approximate equality in endowments, and not being either wholly altruistic or evil – all provide the context in which certain socio-legal conditions must be present to permit

several productive points of reference in recent legal theory that develop alternative accounts of natural law in a manner congenial to my thesis. In contrast to Hart's minimal concession, Lon Fuller argued that moral commitments generated in communicative exchange extend beyond, and sometimes override, the biologically-driven struggle to survive.²⁹ Fuller's dramatic final plea calls for a naturalized rhetoric: "If I were asked, then, to discern one central indisputable principle of what may be called substantive natural law – Natural Law with capital letters – I would find it in the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire."³⁰ More recently, Lloyd Weinreb has moved beyond Fuller's tentative suggestion and argued in favor of natural law, understood as the effort to work out the normative *kosmos* in which we find ourselves as creative participants.³¹ Fuller and Weinreb provide starting points in legal theory for understanding a naturalized rhetoric as a development of the natural law tradition.

Conclusion

If we reconsider the natural law tradition by connecting it to Perelman's theory of argumentation in the three ways I have described, I believe that we can make significant headway in providing a practical and theoretical response to the ontological quandary facing contemporary legal theory. Steven Smith's incisive description of this quandary paralyzes

survival. Hart suggests that this recognition shows a way to do justice to both the natural law and positive law traditions.

We shall no longer have to choose between two unsuitable alternatives which are often taken as exhaustive: on the one hand, that of saying that this is required by 'the' meaning of the words 'law' or 'legal system,' and on the other, that of saying that it is 'just a fact' that most legal systems do provide for sanctions.

Ibid. at 199. Rather than debating whether sanctions are an essential feature of the concept of legality, Hart suggests that we are better served by regarding them as a "natural necessity" in light of the human condition.

Richard Epstein has argued that we ought to inflate Hart's "natural necessity" to a more robust, yet libertarian, notion of human welfare. Richard Epstein, "The Not So Minimum Content of Natural Law," 25 *Oxford J. of L. Studies* 219-55 (2005). But see James Allan, "Is You Is Or Is You Ain't Hart's Baby? Epstein's Minimum Content of Natural Law," 20 *Ratio Juris* 213-29 (2007) (arguing against Epstein's inflation of Hart's minimalist approach).

²⁹ Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale Univ. Press, 1969 rev. ed.): 184-86. This point was made in Fuller's final reply to the criticisms of the proceduralist natural law. Some argue that Fuller was not a natural law theorist, but this is incorrect. I have argued previously that Fuller is best understood as a proponent of the style of natural law that I believe resonates with Perelman's rhetorical philosophy of argumentation. See Francis J. Mootz III, "Law in Flux: Philosophical Hermeneutics, Legal Argumentation, and the Natural Law Tradition," 11 *Yale J. of Law & the Humanities* 311 (1999): 338-45.

³⁰ Ibid. at 186.

³¹ See Lloyd L. Weinreb, *Natural Law and Natural Justice* (Cambridge, MA: Harvard Univ. Press, 1987) and Lloyd L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (Cambridge, MA: Harvard Univ. Press, 1994).

the reader by offering an either-or proposition: either “The Law” refers to something outside legal practice that can direct it, or it is just a nonsensical reference that exposes an ontological gap in which our discourse operates. These unsatisfactory alternatives obscure the fact that the rhetorical appeal to “The Law” is not an appeal to something that exists outside the practice of law. By attending more carefully to legal practice we can explain and justify our references to “The Law” as a part of legal practice. Legal practice has historical and normative depth that always vastly exceeds any particular legal argument.³²

In Perelman’s account, “The Law” is best conceptualized as a set of commonplaces from which one can draw in making an argument in a particular case and by which one invokes a universal audience that is competent to do justice.³³ The *topoi* that form “The Law” are real and provide guidance, even if they cannot resolve specific legal disputes definitively. Referring to “The Law” is just to make a general reference to the *topoi* from which one can argue for a specific result; consequently, “The Law” is neither empty nor a means of answering legal questions from the “outside.” Finally, the activity of appealing to “The Law” is a feature of our nature as hermeneutical and rhetorical beings, a nature that we can explore by pursuing a naturalized rhetoric. We find a natural law solution to law’s quandary in the account offered by contemporary rhetorical philosophy, even if it is very different from the traditional natural law accounts that shape Smith’s anticipation of a suitable resolution of the quandary. Perelman’s theory of argumentation provides a way to resuscitate natural law theorizing while at the same time moves firmly beyond the false certainties that Perelman knew only impede our quest for justice.

³² Consider the situation facing lawyers who are litigating a case of first impression regarding enterprise liability for drug manufacturers when the maker of the drug ingested by the plaintiff cannot be determined. Lawyers from both sides will argue strenuously that the law requires a verdict in favor of their client, which means that there is an appeal to something beyond the equities attendant to the particular case before them. The beyond, however, just is the historical trajectory of the ongoing practice brought to bear on the case before the parties. Lawyers cannot generate a uniquely correct result for the case at hand by means of dialectical reasoning (despite their rhetorical conventions that purport to do so), but in their appeals to the legal tradition they can generate plausible arguments for a rhetorical elaboration of what “The Law” requires in the case at hand.

³³ Perelman, *Justice, Law, and Argument*.