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NATURAL LAW AND NATURAL RIGHTS

IN NINETEENTH CENTURY BRITAIN

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A thesis submitted in fulfillment of the requirements for the degree of Doctor of Philosophy

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2014
DECLARATION

I, Graham Costello, hereby declare that this thesis is my own original work, except as acknowledged in the text.

I hereby declare that the work contained within this thesis has not been submitted to any other university or institution as a part or whole requirement for any other degree.

Signed: __________________________

Date: 25-02-14
Natural Rights and Natural Law in Nineteenth Century Britain

Declaration i
Contents ii
Abstract iv
Acknowledgement v
Dedication vi
Introduction: Issues of Natural Law and Rights 1
Chapter One: The Nineteenth Century British Natural Law and Rights Ambiguity 11
  Definitional Issues of Natural Law and Rights 12
  Historian’s Perspective on Nineteenth Century Natural Law 17
  Conflicting formative influences on Nineteenth Century Natural Law 24
  Law of Nations – International Law 37
Section A: Jurisprudence and Natural Law
  Chapter Two: Charles James Foster 40
  Chapter Three: James Lorimer 66
  Chapter Four: Denis Caulfeild Heron 128
Section B: International Law and Natural Law
  Introduction 140
  Chapter Five: Robert Phillimore 145
  Chapter Six: Travers Twiss and George Bowyer 161
  Chapter Seven: James Lorimer and the Law of Nations 190
Section C: Natural Law and Spiritual Life

Chapter Eight: Henry Drummond 206

Chapter Nine: George Combe 262

Chapter Ten: John Seeley 309

Conclusion 327

Bibliography 328
This thesis challenges the view of many historians that the natural law and natural rights tradition, while flourishing in the Enlightenment period, disappeared in nineteenth-century Britain with the expansion of the role of positive law, only to reappear post-WWII in human rights discourse. The focus of historians of political thought on canonical figures, Jeremy Bentham, John Austin, and John Stuart Mill, all of whom were antagonistic to the natural law and rights tradition has led them to fail to appreciate not only the continued role of natural law and rights but its development of a post-Enlightenment accommodation with positive law, resulting in a more pragmatic understanding of natural law. The examination of non-canonical figures who were nevertheless important in their time reveals the continued role of natural law as positive law expanded.

The thesis is developed through the analysis of figures in areas where natural law was significant: Jurisprudence; the Law of Nations or International Law; and Spiritual Life. Jurisprudence was the area in which theorists of natural law mounted direct opposition to the theories of Jeremy Bentham, John Austin, and John Stuart Mill. The writers investigated include Charles Foster, an early nineteenth century proponent of natural law through his writings and lectures; the Scotsman, James Lorimer, writer and lecturer on jurisprudence and law of nations; and the Irish Catholic lawyer Denis Caufield Heron. In International Law the advocates of natural law theory were Robert Phillimore, judge of the High Court of Admiralty; Travers Twiss and George Bowyer as civil lawyers; and James Lorimer. Writers on Natural Law in Spiritual Life, included Henry Drummond, lecturer and ecclesiast; George Combe, phrenologist; and John Seeley, historian; who were in conflict with churchmen over the church’s exclusive right to interpret religious teaching and the appropriate relationship between natural law and religion.
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I dedicate this thesis to the memory of my father, John Joseph Costello, who saw much of its preparation but sadly passed away in 2012 before its completion.
SECTION A: ISSUES OF NATURAL LAW AND RIGHTS

INTRODUCTION

My thesis uncovers a vibrant natural law discourse in nineteenth-century Britain. It uncovers this nineteenth century natural law tradition through an examination of a spectrum of non-canonical jurists, philosophers, and religious thinkers. While now often ignored, these figures had an important role in Victorian society. In evaluating the intellectual tenor of the nineteenth century, historians have tended to focus on canonical figures such as Jeremy Bentham (1748–1832), John Austin (1790–1859), and John S. Mill (1806–73), writers who were hostile to the natural law tradition. In so doing they have obscured the presence of a more broadly based continued acceptance of the role of natural law and natural rights theories. My focus on non-canonical figures leads to a very different understanding of Victorian thought concerning natural law and natural rights.1 The figures I consider were by no means insignificant and have generally been examined for reasons of jurisprudence, international law or their social or religious influence. The study of British natural law is of particular interest because it addresses a considerable degree of controversy over the nature and development of the growth of British law in general, particularly in the nineteenth century.

Many historians have argued that, in the nineteenth century, the natural law theories which reached their peak in the Enlightenment weakened during a period of high nationalism and positivism, only for them to reappear after the reaction to the Second

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1 Duncan Bell also observes that many historians of political theory ‘have tended to focus on canonical figures’, see Duncan Bell, Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought, Ideas in Context; 86 (Cambridge; New York: Cambridge University Press, 2007). 3.
World War and the Holocaust in the form of the 1948 Declaration of Universal Human Rights. Where historians such as Anthony Pagden, Jeremy Waldron and Sankar Muthu subscribe to this claim, Mark Mazower and Samuel Moyn now question the argument that the human rights discourse post-World War Two was a reaction to the Holocaust, although they too subscribe to the view that natural law was buried by nineteenth-century nationalism and positivism,² I will challenge this narrative and argue that natural law and rights not only survived the nineteenth century in Britain but, that evidence reveals a new discourse based on a meld of high enlightenment ideals and a far more prudent and pragmatic understanding of natural law and natural rights, Britain is the most challenging context within which to test this hypothesis because it was in Britain that positivist philosophers such as Bentham and Austin and historicists such as Henry Sumner Maine and John Westlake made the most strident attacks on the natural law and rights tradition.

The perception that the idea of natural rights was all but extinguished from the early nineteenth century to World War Two leads us to a view of the 1948 Declaration of Human Rights as a sudden and transforming event, whereas it could be perceived to have been built on a long nineteenth-century tradition. Moreover, the complexity of that tradition may change our understanding of twentieth-century rights. A failure to take account of this nineteenth-century natural law tradition results in an incomplete understanding of the basis on which historical choices were made, and equally

importantly, were not made.\textsuperscript{3} The natural law tradition which I uncover in nineteenth-century Britain drew upon medieval, Enlightenment, and ‘modern’ theories of natural law but was, at the same time, a new formulation and melange of what natural law had been, incorporating nineteenth-century influences including positivism and the historical school.

The argument of my thesis draws on a variety of natural law theorists from three areas in which natural law played a significant role in nineteenth-century British thinking: ‘Jurisprudence’; ‘International Law’; and ‘Spiritual Life’. While each area provided controversies, those of Jurisprudence and International Law were primarily jural, while Spiritual Life was almost exclusively focussed on moral and ecclesiastical issues. Each area is rich in evidence of non-canonical figures who, throughout the century, believed in the relevance of natural law to their field of influence. I have made a selection from these areas of representative theorists who, while not regarded as canonical figures by contemporary historians, nevertheless had noteworthy influence in their time.

‘Jurisprudence’ was the area in which the presence or absence of natural law was controversial. Debate about the continued relevance of the natural law concept was the overarching concern in the context of an expanded reliance on positive law. If indeed the natural law concept was accepted then the relationship between natural law and positive law became the issue; the subservience of positive law to natural law, the role of the historical school, particularly represented by Henry Sumner Maine; the non-existence of

\textsuperscript{3} This understanding of the history of ideas was proposed by Quentin Skinner. For a discussion of Skinner’s views, see Richard Whatmore, “Intellectual History and the History of Political Thought” in Richard Whatmore and Brian Young, Palgrave Advances in Intellectual History, Palgrave Advances (Basingstoke [England] ; New York: Palgrave Macmillan, 2006). pp. 118-122.
natural law; the replacement of natural law by civic law and the declining role of civil lawyers led some contemporary historians to assert that natural law disappeared in nineteenth-century Britain.\(^4\) The theorists I have selected in examining ‘Jurisprudence and Natural Law’ are Charles Foster, James Lorimer, and Dennis Caufeild Heron.

Charles Foster (1818–96) was an eminent British jurist, Barrister at Law and Professor of Jurisprudence at University College London. He was a former student of John Austin. His lecturing, however, strongly opposed Austin’s positivist approach, instead supporting the role of natural law in British jurisprudence. James Lorimer (1818–90) was a Scottish jurist and university lecturer who keenly promoted the role of natural law in both Jurisprudence and the Law of Nations (International Law) writing on both. He was involved in the development of Scottish universities and was appointed to the revived Regius Chair of Public Law and the Law of Nations at the University of Edinburgh in 1862. Lorimer was a founding member of the Institut de Droit International (Institute of International Law) in Ghent, Belgium, in 1873 along with ten other distinguished international lawyers. One of these was Ernest Nys, a Belgian professor, who subsequently translated Lorimer’s work on natural law into French. The Institut was founded to bring together renowned international lawyers to study and develop international law. In 1904 the Institut was awarded the Nobel Prize for Peace. Dennis Caufeild Heron (1824–81) was an Irish barrister, QC, university Professor of Jurisprudence and Political Economy at Queen’s College Galway. From 1870–74 he was

\(^4\) Sir Henry Sumner Maine (1822–88), was an important English historian and jurist. His most significant work was his book *Ancient Law* where he argued that common law and contract theory developed throughout history from the growth of social groups, and that natural law was an imaginary hypothesis.
the Liberal parliamentary member for co. Tipperary in the House of Commons. He was a counsel for the crown in the trial of Charles Stewart Parnell (1846–91). Parnell was an Irish landholder, parliamentarian, political leader and agitator for Irish land reform who was tried and imprisoned under a Coercion Act.

An area of jurisprudence in which natural law and natural rights flourished was the law of nations or international law – the latter term ironically coined by Jeremy Bentham in 1789. Natural law provided a philosophical and legal solution to the problem of many political theorists for whom ‘international law’ was a contradiction in terms. Followers of the theory of John Austin would argue that laws could only be established within sovereign states, and there was no sovereign international body. Natural law, the basis of the law of nations, required no temporal sovereign, nor even a deity.5

‘International Law and Natural Law’ while also focusing on jurisprudence had the added difficulty of trying to interpret and fill a legal vacuum - the lack of an overarching authority, and the applicability of any one European nation’s interpretation of law to other nations. Law could only be implemented by consent, a consent coloured by each nation’s aspirations and self-interest. The situation was thus complicated through enforcement, by negotiation, not by an absolute authority. It is scarcely surprising Austin argued that international law could not exist without a ruling sovereign. While the initial imperative of international law was to protect European countries from each other, it progressively had to accommodate a variety of degrees of civilisation, to recognise

5 The theorists considered in this thesis were all theists and believed in God as creator. Nevertheless, accepting that humans had free will, they didn’t consider he maintained a ‘management’ role in daily life or in the functioning of natural law. Moreover, many maintained that natural law would operate even in the absence of that deity.
inequalities between nations, from advanced to ‘barbaric’ and their uneven capacity for reciprocity. For some theorists these circumstances made natural law appealing as a logical philosophical, legal and moral underpinning of international relations. I examine the roles of Robert Phillimore, James Lorimer, Travers Twiss and George Bowyer. Sir Robert Phillimore (1810–85) was a baronet, a most distinguished civic lawyer, advocate of the Church of England, Queen’s Counsel, and the last judge of the High Court of Admiralty. Phillimore was a contemporary and close friend of William Gladstone, and parliamentary member for Tavistock. His interest in natural law linked with his judicial role in the Admiralty and prize courts and his works on international law. James Lorimer’s involvement in international law and its links with natural law was at least as significant as his contribution to jurisprudence as referred to earlier. Sir Travers Twiss and George Bowyer, though supporting opposing views on the position of the Catholic Church and the Pope in English sovereign territory, had similar views on the importance of natural law. Twiss (1809–97) an eminent British jurist, university teacher, international authority on the Law of Nations and member of Doctors Commons, having ruined his career through a marital scandal became what could be termed an international jurist and consultant-at-large on international law. George Bowyer (1811–83) was also a member of Doctors Commons, a London society of lawyers who practised civil law. Bowyer, having converted to Catholicism became an advocate for papal authority over English bishops.

The spiritual life of the British people was an area in which the issue of natural law and rights flourished. Due to their primary focus on state law and jurisprudence, the critics of natural law, Bentham, Austin and Mill, expressed limited interest in its relationship to religion, morality and to the extent a sense of prohibition by unwritten
natural law directed human behaviour. At the same time as there was an obvious acceptance by the community of the role of the state in requiring obedience to positive laws, people believed that due to their essential humanity there were also unwritten laws which prescribed some behaviour and proscribed other.\(^6\) While the parameters of these moral laws and natural laws were blurred and the subject of widely varied interpretations, there was, nevertheless, a widely held conviction that laws of an extra-legal agency guided human behaviour. Where Aquinas was unchallenged in believing in the congruency of God’s and natural laws, the expansion of positive law in the nineteenth century by reducing reference to the Deity as a source of law, had a similar effect on natural law. The terms, God’s or natural law, were essentially used interchangeably, despite Austin’s denial of the existence of natural law. The essential component was a legal stricture in both. People did not believe they were merely following a moral whim or a sense of conscience; they believed they were obeying law.

‘Natural Law and Spiritual Life’ focuses on Henry Drummond (1851–97), George Combe (1788–1858) and John Seeley (1834–95). In the areas of jurisprudence the conflict was essentially between positivists, the historical school and natural law theorists; in spiritual life the legislative function was scarcely considered, the conflict was mainly between natural law theorists and ecclesiasts. The reaction of some churchmen, though by no means all, to the perceived minimised role that natural law understandings of spiritual life left for conventional religion and their own authority bordered on the hysterical. Henry Drummond (1851–97) was a Scottish scientist, evangelist, lecturer, and

\(^6\) While most saw rights as confined to human beings, Henry Drummond extended these to all objects, animate and inanimate, to the extent of their capacities. A tree, for example, had rights according to its nature. See chapter 7 on Henry Drummond for this discussion.
a theological writer. He preached for some time throughout Scotland in the company of Dwight L. Moody, an American evangelist. *Natural law in the Spiritual World* (1883) brought about Drummond’s contemporary recognition. In this work he proposed an almost linear progression from the lowest elements of nature through humans to the spiritual world. The text was a selection of speeches delivered to working men. In the same year Drummond made a scientific journey to Africa. He promoted the Boy’s Brigade during a tour of Australia and the New Hebrides. In 1893 he delivered the Lowell Lectures in Boston, Massachusetts which were published as *The Ascent of Man* (1894). While Drummond advanced his belief in natural law by attempting to link Christianity to evolution he was criticised by clerics for overlooking the fundamentals of Christian doctrine, and by scientists for extending science into the spiritual world. His work, the text of a speech *The greatest thing in the world* (1887) where he preached that the greatest thing was not faith but love continues to have influence today.

George Combe (1788–1858) is one of history’s unappreciated figures. He was trained and initially practised as a lawyer until his involvement in the practice and preaching of phrenology became all consuming. Although he was not the originator of phrenology he was its most passionate and widely successful British advocate. It was his writing of *The Constitution of Man* (1847) that confirmed his fame in both Britain and the United States. This text outlined his particular view of the role of natural law in the operation of the temporal world. Combe saw phrenology as a most useful vehicle for promoting his understanding of the universe, God’s creation of it, and the necessity for all

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‘punishment’ to be undergone in the physical world. Even more than Drummond he offended and alienated clergy; his demise came when the practice of phrenology deteriorated into fairground quackery performed by charlatans and Charles Darwin’s evolution supplanted his writings. Condemnation of phrenology as a pseudo-science largely banished Combe and his natural law writings from the pages of history. Combe’s contribution is now scarcely noticed. Yet at a time when the role of the brain in influencing human behaviour was largely unrecognised, Combe proffered a plausible explanation on the basis of available evidence. Phrenology, in its primitive fashion, was a valuable attempt to comprehend the issues which are now encompassed by modern neurology, psychiatry, and psychology. His Constitution of Man contributed to philosophical and metaphysical study of the universe and religion. The breadth of popular reading of his works, particularly amongst the common people encouraged the broad seeking of scientific and not just religious explanations of the nature of man and his world. The controversy generated by Combe far exceeded that of Darwin, possibly smoothing the latter’s path to acceptance.

John Seeley (1834–95) a classicist, university lecturer and historian was initially regarded by his fellow students as a scientific positivist while at University College London. They failed to recognise his humanist approach to science and the natural religious basis of his views on science, civic life, politics and even nationalism. Ecce Homo (1865) which he published anonymously raised the ire of churchmen because of his advocacy of a natural religion governed by nature’s laws. He brought to Cambridge as Regius Chair of Modern History a more contemporary and practical focus of study noting its capacity to inform the present and the future. Here too he challenged establishment
thinking. *The Expansion of England* (1883) brought together the elements of his beliefs: the practice of religion in a national setting where it underpinned the importance of statesmanship; and the linking of these with England’s expansion through its colonies in its position as a world power.

Thus the continued incorporation of the theory of natural law and rights into nineteenth century philosophical and jural thinking developed essentially in two directions. Where jurists who subscribed to natural law theory in jurisprudence and international law and the concept of natural rights faced positivists, contract theorists and the historical school, those who focussed on natural law’s connection to spiritual life confronted clerics who jealously and aggressively guarded their perceived exclusive divine commission to preach on faith and morals. Throughout the following chapters the evidence of the theorists demonstrates a vibrant and committed belief by these theorists in continued relevance of natural and rights to nineteenth century Britain.
CHAPTER ONE: THE NINETEENTH CENTURY BRITISH NATURAL LAW AND RIGHTS AMBIGUITY

In prefacing a public lecture Quentin Skinner posed the questions, ‘What would we be talking about if we were to talk coherently about the concept of freedom? What are we valuing when we talk about liberty?’ Acknowledging that it would be nice to give a definition of freedom, he considered it would make for a very short lecture. He summarised the problem stating: ‘I do not think that we can ever hope, with any concept that has a complex history, to offer a definition. In fact I would go further in the Nietzschean spirit and say that to the extent that concepts have histories they evade definition’.\(^1\) The long and complex history of natural law and natural rights has similarly prevented their ever having a single specific and unambiguous definition. Skinner’s dilemma concerning the definition of liberty or freedom precisely identifies the problems underlying any attempt to define the concepts of natural law and natural rights, which also have a ‘complex history’. Explanations, by users of the term, rather than definitions of the concepts are particularly diverse, varying throughout different historical periods and amongst both nineteenth and twentieth-century jurists, clerics, scientists and philosophers.

In this chapter I explore the issues that are involved where theorists and historians attempt to seek a definition of natural law and rights, but in fact confirm the relevance of Skinner’s observation on the unlikelihood of finding a single unambiguous definition. This leads to an exploration of attempts to define rights, both natural and positive. A

number of historians have either overlooked or directly rejected the idea that natural law and rights discourse had a place in nineteenth-century Britain. The claims of these historians necessitate a scrutiny of conflicting though formative influences on nineteenth-century thinking. Although it was largely marginalised by the nineteenth century, the ‘State of Nature’ concept requires mention due to its discussion by Henry Maine and James Lorimer. Conflicting views of Utilitarians and Positivists contrast with the common law theorists.

**DEFINITIONAL ISSUES OF NATURAL LAW AND RIGHTS**

Due to varied interpretations and usage it becomes impossible to give a single precise definition of either natural law or natural rights. Duncan Bell acknowledges it was difficult to separate political theory ‘from other domains of nineteenth-century thought – it was embedded in, and shaped by, political economy, theology, jurisprudence [and] the emerging social sciences’.\(^2\) This difficulty had particular bearing on the understandings and roles of natural law and rights due to their various interpretations.

The concepts of natural laws and rights examined here have some degree of comparability in their descriptions: ‘Rights are natural in the sense of being derivative of certain natural laws. Rights...are those moral qualities that form part of our rational and sociable nature, and that are prior to and independent of our belonging to any particular political community’.\(^3\) ‘Natural rights refer to certain moral relations that hold independently of the existence of any legal system, or perhaps any social or political

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\(^2\) Bell, *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought*. 3.

system at all’. These descriptions, while not providing a definition, suggests qualities which are broadly compatible with the thinking of the nineteenth-century theorists discussed here. These theorists tended to draw more on Enlightenment thinking, rather than Hobbesian modern natural law and rights theory. They believed in the principle of human sociability rather than ‘all against all’ individuality, or individual self-interest.

The term ‘natural law’ as used by both its nineteenth-century supporters and critics was a chameleon-like being. Even with a careful attempt in the twenty-first century to avoid anachronistic interpretation of its usages, the task is complicated by the variety of understandings of the term by both its users and opponents throughout the nineteenth century. Any common understanding, of supporters and critics, seemed to apply natural law to obligations and rights that related to the nature of people through their simply being human. Where rights involved freedoms, laws could determine restrictions and obligations. Nevertheless distinctions between them were often blurred to the extent that they were frequently used interchangeably. John W Salmond in the Law Quarterly Review in 1895 noted the difficulties caused by these terms in English nomenclature. He observed how the power of words could influence thought. ‘In most languages, ancient and modern, the same term is used to signify both law and right. Jus, Droit, Recht, Diritto, all have this double signification. To this rule modern English is a striking exception. We have no term that combines the ethical and juridical meanings;

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4 Ibid. 39.
right is purely ethical, law is purely juridical"). It was significant that as late in the century as 1895, Salmond should claim that ‘to express the ethical meaning we must use the terms natural right or natural justice; while the juridical meaning is expressed by the terms natural law or the law of nature’. More recently Mary Gregor pointed to Immanuel Kant who was an influence upon the imprecision in the concept of laws and rights. In her attempting to translate Recht, and Rechtslehre, which she felt had no English equivalence; she believed Kant’s understanding of positive laws was of those given by a legislator who determined their empirical content. Where they were based on *a priori principles* she stated that Kant called them ‘external natural laws’. His explanation became somewhat unclear in that ‘the system of such laws is natural Right (Naturrecht) or ‘the metaphysical first principles of the doctrine of Right’’. As Kant’s preoccupation was with the concept of Right it remained uncertain as to which concept, Law or Right, he attached pre-eminence.

Theories concerning natural law and rights are generally regarded as universalist; nevertheless Jeremy Waldron in *Nonsense upon Stilts* (1987) considers them as individualist: ‘by its very nature, a theory of rights is an individualistic theory. Rights purport to secure goods for individuals: that is an elementary consequence of their logical form. A right is always somebody’s right’. Despite the apparent lexical antithesis of universalism and individualism, Waldron’s individualist view is, in fact, perfectly consistent with a universalist one. Both agree that natural law and rights are *universal*

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7 Ibid. 122.
affirmations of the individual. Such an interpretation is consistent with the Thomist, Enlightenment, and Hobbesian concepts of natural law and rights.¹⁰ Raw individualism within this universal concept is consistent with Hobbesian modern natural law and rights theory predicated as it was on the basis of individual survival. Waldron acknowledges the connection between universalism and individualism when he states that such theories ‘proclaim the rights of all persons, so that everyone who makes a personal claim on his own behalf is immediately aware that exactly the same claim can be made on behalf of anyone who is like him in the relevant respect’.¹¹ Waldron’s argument fails to refute the view that natural laws are universalist.

Among twentieth-century historians, Leo Strauss in *Natural Right and History* (1953) makes a significant observation on the character of natural law and rights theories. ‘All natural right doctrines claim that the fundamentals of justice are, in principle, accessible to man as man. They presuppose, therefore, that a most important truth can, in principle, be accessible to *man as man.*’ [My emphasis]¹² There was an important assumption that had underpinned all natural law theories beginning with Aristotle. Although few were suggesting that there was no God, they developed theories that could operate independently of a Deity. They were not implying that God was an absentee landlord either; rather that He had created a fully self-functioning world which required no direct Divine intervention, a view that George Combe, nineteenth century phrenologist

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and writer advocating natural law, argued strongly. Hugo Grotius (1583–1645) had the
temerity to acknowledge this in his controversial statement:

What we have been saying would have a degree of validity even if we should concede [etiamsi daremus] that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.13

Unsurprisingly, George Bowyer, the Catholic common law lawyer, from his religious perspective, underlined the role of natural law in underpinning legislation. He explained ‘Municipal Law as a part of a great moral science’, and that the law of nature was the basis of every branch of law.14 Following Grotius he believed it:

to consist in certain principles of right reason, which enable us to know that a certain action is right or wrong, according to its congruity or incongruity with the reasonable and social nature of man, and, consequently, that God, who is the Author of nature, commands or forbids that action.15

The varied and conflicting explanations of rights, particularly natural rights is a further obstacle to understanding their nineteenth-century usage. There would be little disputing the observation that the understanding of natural law and natural rights underwent considerable change from that of the eighteenth century and indeed preceding centuries. Notably, with the growth of positive law, its profile became less obvious making it easier to formulate generalised assumptions about its demise. A close examination of the period reveals a continued and vibrant natural law and rights tradition.

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14 George Bowyer (1811–83) was a catholic common law lawyer with strong papal links. He will be discussed further in his relationship to Travers Twiss in chapter 6.
HISTORIANS’ PERSPECTIVE ON NINETEENTH-CENTURY NATURAL LAW

Many historians argue that natural law was not employed in the nineteenth century. These authors have failed to recognise the body of non-canonical texts which employ natural law theory to underpin their thinking about positive law in nineteenth-century Britain. The tradition was in fact employed by nineteenth century intellectuals to establish the rights and entitlements of Europeans. At the same time, often by redefining humans, it was being used to deny the rights of colonised peoples. There also remained a continued opposition to imperialism, which was not just religious or political, but depended on natural law theories concerning the fundamental rights of human beings.

Discussing post World War II human rights, while acknowledging their development from ‘the older notion of natural rights’, Anthony Pagden argues that the French Revolution had linked human rights to the idea of citizenship and ‘also implicitly to a particular kind of political system’. This is the beginning of his claim that natural law and rights were not current in the nineteenth century. He considers that all the criticisms of natural rights had in common that ‘rights’ are cultural artefacts.


17 Michael Lobban cites an extensive list of both nineteenth-century and more contemporary writers who noted a distinctly ‘English’ school of jurisprudence dominated by Jeremy Bentham and John Austin. These begin with Frederic Harrison in 1878, and include P.S. Atiyah, R.S.Summers, Stefan Collini, and Philip Schofield. The date, 1878, for the first reference is particularly interesting as Charles Foster’s refutation of Austin’s theories predated it by twenty five years. For details see Michael Lobban, “Was There a Nineteenth-Century ‘English School of Jurisprudence’,” The Journal of Legal History Vol. 16, no. 1 (1995). 54n.

masquerading as universal immutable values’. 19 Their construction was based clearly on Eurocentric Judeo-Christian values. Pagden’s definition of nineteenth-century rights as ‘cultural artefacts’ ignores the fact that many users of the concept did not identify them in this way. Many did believe they were universal, although understood more or less perfectly, relative to degrees of civilisation. Pagden declares emphatically that ‘With Kant, the natural law tradition, and with it the notion of a “natural” right, comes to an end’. With the rising tide of nationalism ‘the time seemed to have come to jettison the abstractions on which natural rights had been grounded’. 20 While arguing that those who regarded themselves as civilised, not be cruel or inhuman to uncivilised peoples, [a form of paternalistic philanthropy], Pagden concludes ‘But there was no law in nature, no body of rights, to which the barbarian could appeal against any would–be aggressor. Barbarians, as Mill said, “do not have rights as nations.” And only members of nations could have rights’. 21 Mill had expressed a firmer position when he stated that ‘Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end’. 22 Similarly Lobban has written of the ‘“vulgar Austinianism”’ which dominated the English mind of the late nineteenth century’. 23 Generally Lobban characterises the position as a school which ‘rejected the metaphysical approaches followed on the continent of Europe, ... in favour of a command-based positivism’. 24

19 Ibid. 172.
20 Ibid. 188.
21 Ibid. 191.
23 Lobban, "Was There a Nineteenth-Century 'English School of Jurisprudence'?" 34.
24 Ibid. 34.
Jeremy Waldron in *Nonsense Upon Stilts* provides a different explanation for the rejection of natural law and rights theory in nineteenth-century Britain. He argues for a direct connection between the eighteenth and early nineteenth-century, and the ‘modern’ twentieth-century period, omitting reference to the later nineteenth century, suggesting that in the contemporary context, ‘the idea of human rights is taken more seriously now than it has been for centuries’.

He qualifies his views later, arguing the absence of natural law and rights influence in the nineteenth century following the influence of Bentham, Burke and Marx. ‘In the years that followed...the theory of human rights suffered a decline, then a renewal’. The renewal to which he is referring was the post-World War II Declaration of Human Rights. Waldron credits the *decline* to the ‘rise of large-scale social theory’ particularly as articulated by Karl Marx, Emile Durkheim and Max Weber. His position is significant because it attributes the decline in natural rights to something other than positivism or utilitarianism. He determines that:

> In general, then, the utilitarian concern for the detailed calculation of social consequences and its repudiation of any absolute commitment of principle seemed to match the maturity and sophistication of contemporary social thought. By comparison the morality of rights seemed naive, simplistic and irrelevant to the complexity of the problems of nineteenth-century society. The Industrial Revolution was viewed largely in terms of a play of forces which were to be understood sociologically, not ethically.... Social determinism, the sociology of ideas, legal positivism and utilitarianism: in the midst of these theoretical currents, the rights of man seemed hopelessly out of their depth.

Waldron acknowledges that there was still some discussion about natural rights in the later nineteenth century, referring to J S Mill’s essay *On Liberty* (1859), which was

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25 Waldron, *'Nonsense Upon Stilts': Bentham, Burke, and Marx on the Rights of Man*. For his introductory discussion see pp. 1-5.


grounded in the theory of utility, and the continued influence of the American Constitution’s appended Bill of Rights of 1787. Nevertheless he believes:

But even there, the idea came to be seen by many as an outdated encumbrance on the natural growth of a form of politics that would be increasingly concerned with economic efficiency and social justice, rather than with the abstract rights of the individual.28

Waldron sums up his position with the statement, ‘It was not until the Second World War that human rights re-entered the mainstream of Western thought and politics’.29 He clearly subscribes to the view of the absence of natural law and rights from later nineteenth-century discourse.

Casper Sylvest by contrast identifies naturalism in law [natural law] in nineteenth-century Britain by stating that:

Naturalism in law can generally be defined as the idea of justifying, founding, or supporting law by reference to some extra-legal structure or agency, but in the Victorian era it was unclear to what extent the natural law under attack based itself on religion or hypothetical speculation in the contractual tradition (or both).30

Sylvest’s description and his comment point to the common ingredient of natural law theories, an ‘extra-legal structure or agency’, as well as to the major dilemma in identifying it. The theorised ‘sources’ of natural law and natural rights vary from a supernatural Deity to the temporal world itself. Essentially the views on the source of natural law remain as irreconcilable as its character. The so-called ‘ancient’ view evident in Thomist writing and the Salamanca school, and echoed by some Enlightenment writers assumed intrinsic human goodness and sociability; the so-called ‘modern’ theory,

28 Ibid. 153.
29 Ibid. 154.
30 Casper Sylvest, “The Foundations of Victorian International Law”. In Bell, Victorian Visions of Global Order : Empire and International Relations in Nineteenth-Century Political Thought. 50.
questionably attributed to Hugo Grotius, but clearly expounded by Thomas Hobbes (1588–1679), assumed only the ‘law’ of survival, meaning human self-interest or selfishness. 31 Sylvest ‘noted that the concept of natural law was a constant source of confusion during the nineteenth century, a point widely acknowledged among legal scholars by the end of the century’ 32. Although he expresses uncertainty about the role of natural law theory and does not identify the legal scholars to whom he refers he reaffirms its existence throughout the nineteenth century.

Stefan Collini presents a more ambivalent view on the presence of natural law in the nineteenth century. He considers the role of Victorian morality, as distinct from natural law in relation to cultural values. He suggests that where a general sense of values is central to any culture, ‘Victorian culture was marked by what I want to call the primacy of morality, or ... in their more extended reflections ... Victorian intellectuals gave evaluative priority to “morality” ’. 33 Collini’s position on morality, law and jurisprudence in Public Moralists (1991) is intriguing. He appears to agree with historians who reject a role for natural law theory in nineteenth-century Britain by ignoring it in a text where he discusses public morality, jurisprudence, religion and the making of Victorian character. He notes that ‘the historian of early modern political thought, after all, takes for granted that even in Britain natural jurisprudence formed the

32 Casper Sylvest, “The Foundations of Victorian International Law”. In Bell, Victorian Visions of Global Order : Empire and International Relations in Nineteenth-Century Political Thought. 50.
chief matrix of the subject up until at least the late eighteenth century’. Thus implicitly he accepts the absence of natural law in the nineteenth century. Collini presents the views of Albert Venn Dicey, a nineteenth-century British jurist and legal positivist, as being representative of the period claiming that ‘they have become so familiar as no longer to be regarded as the claims of any one author in particular’. Collini states, ‘Dicey proposed that the distinguishing characteristics of the English constitution were the sovereignty of Parliament, the rule of law, and the ultimate dependence of the conventions of the constitution upon the law of the constitution’. This identifies a general acceptance of a positivist rather than a universalist perspective of the law in the period.

Collini, however, refers also to the ‘casual universalism of much Victorian political language’. In dismissing the idea of an ‘illusion of universalism typical of bourgeois society’ he considers that ‘because fundamental human feelings were constructed as benign and harmonious: they thus operated as a covert universal’. Rather than being evidence of philanthropic humanitarianism, the feelings suggest human sociability, the basis of both ancient and Enlightenment natural law, as well as a universality which countered positivism. Collini does not link these claims with natural law or rights. Nevertheless whether he associates these feelings with morality, philanthropic humanism, or natural law, this ambiguity highlights the semantic uncertainties concerning the discrete boundaries of morality, divine law, and natural law and rights. This conflict and fragmentation supports my contention that, rather than

34 Ibid. 254.
35 Ibid. 291. Albert Venn Dicey (1835–1922) was a British jurist and noted constitutional theorist who wrote An Introduction to the Study of the Law of the Constitution (1885). He was a legal positivist.
36 Ibid. 85.
37 Ibid. 86.
disappearing, natural law mutated and developed into a new form during the nineteenth century in Britain.

There is little difficulty in locating those who reject the use of natural law theory in nineteenth-century Britain both amongst contemporaries and later historians. Sandra Den Otter in her book on British idealism refers to the ‘predominantly positivist landscape of British thought’ in the nineteenth century, particularly the latter part.38 Rejecting a presence of either natural law, or even more specifically, natural rights, she traces the philosophical contexts for the growth of idealism. Those elements while certainly facilitating Idealism’s development provided the appropriate context for the persistence of the more pragmatic natural law and rights theory that was evident in the thinking of, for example, Caufeild Heron, Irish Catholic lawyer, QC, university professor and politician. She refers to a less recognised Aristotelian influence – a strong link with the origins of natural law. Although idealist thinking was probably linked to Darwinism, attempts by idealists to ‘integrate knowledge of the natural sciences into a social theory’, were not a long way removed philosophically from Henry Drummond’s linking of the natural laws of the physical world with the spiritual world.39 Den Otter comments that ‘the national lines of philosophical development were so insistently pressed within Britain’.40 The British distrust of French and German philosophers could be argued as a support for both civic-based rights and universalism.41 French philosophy suffered by

39 Ibid. 8-9. Henry Drummond was an Irish Catholic lawyer, QC, university professor and politician.
40 Ibid. 12.
41 It is important to note that while there was a distrust by British philosophers of their French and German counterparts, there was a strong connection amongst the jurists.
being linked politically to republicanism and the French Revolution. A perception of German philosophy’s links with dangerous authoritarian doctrines was confirmed by the outbreak of war in 1914. The persistence of natural law and rights theory was accompanied by a growth of idealism and a corresponding lessening of the value of positivism. These maintained a universal element, despite the fact, that Van Otter argued that British Idealism adopted a civic rights framework. In Lorimer’s hands, natural law justified a hierarchy of nations. While it was universalistic, it also gave an explanation of universal differences.

**CONFLICTING YET FORMATIVE INFLUENCES ON NINETEENTH CENTURY NATURAL LAW**

While nineteenth-century natural law theorists established a new understanding of natural law, they did so through adopting a number of earlier authorities on the subject. These influences contributed to the philosophical and juridical assumptions on which the concepts were supported or attacked. Natural law proponents in nineteenth-century Britain, while progressively moving towards a new melding of ancient and modern natural law, and an accommodation with positivism, incorporated or refuted a range of natural law and rights theories.

So-called ‘ancient’ natural law was based upon Thomas Aquinas’ (c1225–74) study of Aristotle. As Heinrich Rommen noted, St Thomas Aquinas began from a likeness of human nature to the divine nature. Man’s intellect and free will were a temporal image of God in the material universe.42 This had significant implications for his interpretation of natural law. The divine origin meant that man was subject to divine

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laws: those of the physical sciences; and those laws which applied to man through his
capacity to reason – laws which determined his moral and social behaviour. Natural laws
were imposed, and man’s reason was the means of determining and understanding them.
Ancient theories also assumed human sociability. Although these theories were capable
of functioning without a Deity, all of the theorists, including Hugo Grotius, assumed
God as the highest source of natural law. The role of human reason through the impetus
of Grotius and Kant was progressively treated as the determiner, not merely the
interpreter, of natural laws; an issue which brought into question the relationship between
human reason and the divine. Thomas Hobbes’ ‘modern natural law theory’, predicated
on human self-interest, reversed the moral assumptions of ancient theories and effectively
removed the divine moral elements from the operation of natural law.

Despite being marginalised by the nineteenth century, the concept of man in a
state of nature was widely discussed albeit in a negative way. Jean-Jacques Rousseau
(1712–78) had spoken in terms of ‘natural man’ in a ‘state of Nature’. Anthony Pagden
explains Rousseau’s understanding of natural man as ‘someone whose mind is unfettered
by the moral and intellectual constraints of civil society’, enlightened by the clarity of
natural thinking. It was the original ‘state of nature’ concept on which Henry Maine,
the historicist, based much of his criticism of natural law while proposing his historical
approach to the formation of British law, however, most contemporary natural law
theorists agreed with him on this point. James Lorimer, in propounding his natural law
theory, argued strongly against theories based on the original state of nature. He claimed

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43 The particular position of Grotius will be considered later.
44 Anthony Pagden, The Fall of Natural Man: The American Indian and the Origins of Comparative
the state of nature existed in any contemporary period. Henry Drummond, reversing the problem, claimed that it was a state yet to be attained as Man to achieve perfection; that is, perfection would be the state of nature. Although from a far less religious perspective, George Combe’s theory bore this similarity to Drummond’s. A belief in the concepts of ‘natural man’ and ‘status naturalis’ had been largely rejected and discredited before the nineteenth century. Immanuel Kant (1724–1804), while not rejecting the idea, was one earlier critic of the supposed innocence of ‘status naturalis’, arguing that it was a permanent state of either actual or potential conflict. Pagden points out that sixteenth and seventeenth century observers ‘lived in a society [believing] firmly in the universality of most social norms and in a high degree of cultural unity between the various races of man’. For them, Pagden argues, ‘otherness’ was unthinkable.

The virtual congruence of natural law and civic law that had existed from Aristotelian and Roman times was changed by the exponential growth of positive law and jurisprudence accompanying the industrial growth and national interests of the eighteenth and nineteenth centuries. It was little wonder that Jeremy Bentham should so emphatically condemn natural rights and law as nonsense, but while developing his utilitarian theories the question remained: although he denounced all forms of natural law and rights as offensive, which particular contemporary variant was he actually addressing?

In his text, Anarchical Fallacies published in 1816, Jeremy Bentham proclaimed

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46 Pagden, The Fall of Natural Man. 5.
the non-existence of natural rights, describing it as ‘nonsense on stilts’. Pocock
refers to the arrival during the eighteenth century of the ‘idiom of Burke and (far more
deliberately created) the idiom of Bentham, both of which...may be said to have arisen as
mutations within the changing patterns of political rhetoric or discourse [my
emphasis]’. Pocock’s observation in fact touches a concept at the heart of my thesis;
that while natural law and rights remained part of a vibrant nineteenth-century discourse
they also mutated into forms which, while related to both so-called ‘ancient’ and
‘modern’ natural law theories, took on a number of different characters, each able to
accommodate one another. As such, natural law and rights displayed a rather different
character from their enlightenment forms.

For Bentham and the devotees of Utilitarianism that followed, any belief in or
appeal to natural law was unsound. Bentham saw contemporary religion as similarly
irrelevant. He considered that most religion was not so much wrong as redundant. It was
perfectly obvious to Benthamites that the basis of morality was the injunction to cause
happiness; the remainder of religion was merely window dressing. Benthamite concern
was even greater: Bentham’s basic concept of creating happiness would not only make
religion redundant, but it would strip it of its primary claim: as being the sole vehicle for
obtaining ultimate human happiness.

Where Bentham’s attack on religion was extremely provocative, his dismissal of
natural law and rights was equally so. Natural rights were irrelevant also because they

48 J.G.A. Pocock, “The Concept of a Language and the metier d’historien : Some Considerations on
Practice” in The Languages of Political Theory in Early-Modern Europe edited by Anthony Pagden.
were not moral ends but simply one of the conceivable means towards the greatest happiness for the greatest number. It is difficult to avoid accusing Bentham of himself accepting a basic tenet of a natural law in so far as he believed that morality had universal existence. The moral impulse could, by and large, be taken as given. Again the issue became largely a semantic one: did the moral impulse actually constitute a law? Where did man’s knowledge of this universal stricture originate? If from God, then the same semantic issue faced by Austin, natural law as misnamed God’s law, was faced by Bentham even earlier.

Michael Lobban’s discussion of Austin’s role in nineteenth-century English jurisprudence parallels my contention that Austin’s interpretation of natural and God’s law was a semantic issue. He claims that:

Austin’s analytical jurisprudence did not foresee an activist role for a legislative sovereign; rather, like the German professors, he imagined jurists would tease concepts and principles out of the materials of legal practice. 49

He further observes that, unlike Bentham ‘Austin in effect used utility to get at the ‘natural’ law embedded in the community’. 50 Lobban’s comments suggest that Austin too was caught up in the difficulty of separating morality from God’s or natural law. They were laws where temporal sanctions were employed. Although Lobban’s views involve a significant reinterpretation of Austin’s position, they accommodate considerable ambiguity in Austin’s thinking. Thus where other theorists elided the distinction between God’s and nature’s laws, and Austin regarded natural law as God’s law misnamed, it is appropriate to consider the difference between Austin and other theorists as semantic. 51

49 Lobban, "Was There a Nineteenth-Century 'English School of Jurisprudence'" 36.
50 Ibid. 42.
51 See Chapter 2 for a discussion of Austin pp.63-65.
There were attempts during the nineteenth-century to codify laws and develop a science of jurisprudence. The writings of James Mackintosh, Charles Foster and James Lorimer, for example, provided evidence of this tendency. A problem requiring further analysis has been the justification for acceptance or rejection of the natural law concept. In some instances, Austin being a notable example, the rejection had been a semantic one, dismissing the terminology while acknowledging its substance. In *A Discourse on the Law of Nature and Nations* (1791) James Mackintosh (1765–1832) stated that ‘The science which teaches the rights and duties of men and of states, has, in modern times, been called ‘the law of nature and nations.’ The continued references to his discourse and its publication throughout the nineteenth century highlighted its significance for jurists and philosophers during the period. Implicit in his reference to a ‘science’ was his wish to codify its references, limiting them within the wider context of general assumptions of morality. Mackintosh noted that this definition:

> Included the rules of morality, as they prescribe the conduct of private men towards each other in all the various relations of human life; as they regulate both the obedience of citizens to the laws, and the authority administering government; and as they modify the intercourse of independent commonwealths in peace, and prescribe limits to their hostility in war.  

In establishing the continued influence of natural law theory Mackintosh’s definition was important. His reference to its application to ‘the conduct of private men towards each other’ and its application to ‘all the various relations of human life’ took

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52 For evidence of the practical measures taken after 1840 to improve the lack of systematized legal education, particularly after the 1846 House of Commons Select Committee on Legal Education, see Lobban, "Was There a Nineteenth-Century 'English School of Jurisprudence'?." 44, 68n.  
54 Ibid. 204.
their function beyond positive law into the spheres of both public and private action and beyond the boundaries of the state. This was consistent with Kant’s comparing the behaviour of individuals with that of states. Kant noted that states, ‘like individuals, if they live in a state of nature without laws, by their vicinity alone commit an act of lesion’. His solution was for a ‘federation of nations’ accountable under law, based on natural law. Bentham and Austin, by contrast, confined their discussion to the jural role of law in the public sphere, restricting the private to the province of morality. Karl Morrison observes that Bentham embraced empirical and critical thought ‘to dispel erroneous pretentions and superstitions that debased human life’. Natural law was one of those superstitions.

Mackintosh’s definition subsumed positive law within natural law. The appellation of ‘science’ was evidence of his determination to restrict and codify both the definition and application of the term natural law. He restricted its reference by stating, ‘This important science comprehends only that part of private ethics which is capable of being reduced to fixed and general rules.’ His definition which dealt with the application of natural law to the science of jurisprudence differed from that of theorists such as George Combe and Henry Drummond who were concerned with its regulation of spiritual life. Consistent with the principles of earlier natural law theorists, Mackintosh acknowledged the varying interpretations of natural law amongst civilised countries in the ‘general principles of jurisprudence and politics which the wisdom of the lawgiver

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55 Emmanuel Kant, *Perpetual Peace*. 18. Kant discussed the absence of ‘natural law’ in the original ‘state of nature’ and the use of natural law as a basis for international law through a federation of nations, and ultimately the source of perpetual peace, pp.18-21.

adapts to the peculiar situation of his own country, and which the skill of the statesman applies to the more fluctuating and infinitely varying circumstances which affect its immediate welfare and safety’.57 While frequently acknowledging his debt to Mackintosh, Charles Foster, eminent jurist and, ironically, former student of Austin stated a similar aim to establish a ‘Science of Law’ of which he believed ‘moral philosophy affords us some certain foundation’.58 By the time of his publishing *The Institutes of the Law of Nations*, in 1872, James Lorimer worked from the assumption that this ‘science’ had been established.

With an extended metaphor comparing natural laws to ‘certain fountains of justice whence all civil laws are derived’, Mackintosh confirmed his recognition of the dependence of positive law on natural law. These laws like the streams from the fountains ‘do take the tinctures and tastes from the soils through which they run’.59 In this structure Mackintosh determined two variations of natural law: ‘“the natural law of individuals”’ and the other ‘“the natural law of states”’.60 In a declaration which would later find no agreement from John Austin due to ‘the vagueness of the language’, but would from George Combe, Mackintosh determined that the law of nature was a law properly so called ‘inasmuch as it is a supreme, invariable and uncontrollable rule of conduct to all men, the violation of which is avenged by natural punishments, necessarily flowing from the constitution of things, and as fixed and inevitable as the order of

57 Mackintosh and Winch, *Vindiciae Gallicae and Other Writings on the French Revolution*. 204.
59 Mackintosh and Winch, *Vindiciae Gallicae and Other Writings on the French Revolution*. 204.
60 *Ibid*. 207.
Bentham’s rejection of natural law and rights as ‘nonsense on stilts’; Austin’s denial, not of the concept, but of its terminology, as misnamed ‘Divine Law’ contributed a further difficulty of interpretation, as natural rights doctrines variously claimed that these pre-existing rights emanated directly from God or from nature. Thus, to a natural law theorist, Austin failed to solve his problem by merely substituting one natural law and rights definition for another. The other ‘chicken and egg’ dilemma remained: did natural law precede natural rights or did the reverse apply. Medieval and early modern theists had no difficulty with this: God determined natural laws, and rights subsequently grew out the interpretation of these. It was rather the more modern focus on the material world, independent of reference to the Deity which caused the ambiguity. While laws could be seen as obligations, duties and limitations, and rights as freedoms, the distinctions between the two were blurred, and the terms were often used interchangeably.

Reflecting the growth of nationalistic identity Samuel Taylor Coleridge (1772–1834), philosopher, critic and renowned poet, was an example of those who rejected natural rights, seeing civic rights as the only appropriate justification for a person’s entitlement to privileges and consideration within contemporary society. As Pamela Edwards observed, Coleridge, writing in his mainly self-published journal, *The Friend* rejected the concept of rights which were implicit in a human being, where the rights of a Russian serf would be equal to those of an English lord despite their rank and the

\[\text{Ibid. 207. As will be discussed later George Combe, the phrenologist, argued a direct an inescapable connection between transgression of the laws of nature, both physical and moral, and ‘punishment’ in the temporal world.}\]
different laws and customs of the empires into which they had been born. Where Mackintosh, Lorimer, Foster, Caufeild Heron and other jurists agreed that perception and appreciation of natural law depended on growth of intelligence and understanding, they believed it would be variously interpreted by different cultures, Coleridge considered them more from a specifically civic perspective. He related rights as subject to those which were “granted” by being born into a specific national tradition of local freedoms or “earned” by virtue of civic participation or performance of duty. If one held a certain civil right, one held it by virtue of its existence in the laws and constitutions of a particular polity in a particular age. Coleridge’s position represented the typical and widely recognised view of natural law antagonists who were uneasy about a perceived confusion of law and morality.

The contrast in views was clear. Where Coleridge thought that “the Idea of justice could only take place within the traditions and struggles of laws and courts groping rung by rung toward the moral goal of universal justice,” natural law theorists saw a similar struggle, but one whose object was to develop and enact positive law as it reflected the principals of natural law and rights. The agreement on the idea of a “struggle, rung by rung” explained a further juridical theory conflict. Where Maine, for example, like Coleridge, derided the concept of natural law, based on his belief in the intrinsic

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64 Ibid. 103.
importance of the historical approach through the growth of common law, nineteenth-century natural law jurists had no problem with accommodating both. Not only were they able to conflate the Thomist, post-Enlightenment, and modern natural law traditions with positivism, but the developmental nature of, or ongoing ‘struggle’ for their recognition perfectly legitimised the common law, historical approach within their juridical framework.

In his introduction to *Ancient Law* in 1861, Henry Sumner Maine (1822–88) strongly condemned natural law theory, along with contract or social compact theory, both for his belief in their errors, and for the pervasive influence they had on later interpretations of jurisprudence:

Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.65

Maine’s position was unchanged by the tenth edition of his work in 1885. Although he was condemning natural law theory nevertheless he was acknowledging its continued ‘universal acceptance’ and influence in the ‘later stages of jurisprudence’. Thus as a vehement critic of natural law theory Maine was acknowledging its widespread influence in nineteenth-century Britain. While contract theory was identified particularly with Locke and Rousseau, it was natural law, identified with Aristotle and Aquinas, most prominent in the eighteenth century, which was the particular focus of his condemnation. While seeing no value in conjecturing about law on the basis of man in a state of nature

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in the spirit of Rousseau, Maine pursued the historical method of analysing law and jurisprudence.

Ironically, where Bentham and Austin as utilitarians rejected both natural law and Maine’s analysis of common law through an historical approach, Maine showed limited acceptance of their views. While considering Bentham’s *Fragment on Government* (1891) and Austin’s *Province of Jurisprudence Determined* (1832) he noted that they resolved ‘every law into a command of the lawgiver, an obligation imposed thereby on the citizen, and a sanction threatened in the event of disobedience; and it is further predicated of the command, which is the first element in a law’.66 This view could accommodate the practical elements of utilitarian thinking with Maine’s own historical theory. While he felt they overlooked the historical development of law and the growth of modern jurisprudence he believed ‘this separation of ingredients tally exactly with the facts of mature jurisprudence’. Moreover Maine showed a somewhat surprising acceptance of elements of utilitarian thinking by considering that ‘by a little straining of the language, they may be made to correspond in form with all law, of all kinds, and at all epochs’.67 In this regard he argued that the principles of utilitarianism applied in all periods of jurisprudence. Showing further consistency with the views of Coleridge that laws developed within specific societies, Maine determined that ‘The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher

power into the judge’s mind *at the moment of adjudication*’. 68[My emphasis] This deliberately divorced principles of morality, right and wrong, from the determination of positive law. In his view the structuring of a sentence was not based on the concept of an appeal to an immutable natural law but to historically developed law where morality had significance only at the point of sentence. This position countered the views of Locke, Kant, Foster, Lorimer, and other jurists who saw morality as an indisputable foundation of positive law, and common law.

Maine analysed ancient society where he argued that under patriarchal despotism man’s actions were controlled by a regime governed not by laws but by caprice. 69 Rather than devolving from a law of nature Maine believed that early true unwritten law was ‘known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe or a sacerdotal college’. 70 Thereafter as the Courts at Westminster Hall began to base their decisions on previous judgments or precedents they became case law. This, for Maine was the true development of contemporary jurisprudence: not an attempt to interpret some nebulous moral imperative with alleged universal obligations, but civic law as determined in Britain at ‘the Courts at Westminster Hall’ developed through history from limited unwritten law antecedent to positive case law. Morality became a factor only at the point of judicial sentencing. Within what he referred to as ‘progressive societies’ he saw an element of discrepancy between the natural stability of law and the progressive development of the society. Again with acknowledgment of the Benthamite position on the function of law he accepted that ‘the greater or lesser happiness of a

68 Ibid. 7.  
69 Ibid. 8.  
70 Ibid. 12.
people depends on the degree of promptitude with which the gulf is narrowed’.71

LAW OF NATIONS – INTERNATIONAL LAW

Initially the extension of natural law to the Law of Nations, subsequently termed International Law by Jeremy Bentham,72 was intended to guarantee the sovereignty of the European nations. While the political aspirations of the different nations varied, they operated from what was essentially a common philosophical base: from an understanding of natural law based on Eurocentric Christian norms. Expansion through exploration and imperialism altered the perceptions of nineteenth-century theorists whose understandings now had to accommodate peoples with widely varying degrees of civilisation. The exact influence of natural law and rights in the formulation of international law generates much disagreement and, I believe, misunderstanding amongst historians who underrate its influence. Essentially the disparity occurs over what Sankar Muthu terms the conventional distinctions: ‘universalism and relativism or essential and constructed identities’.73

The legitimacy of natural law’s presence in nineteenth-century Britain, and throughout Europe, was confirmed by its necessary role in the Law of Nations. The position of the Law of Nations, and its linking to natural law further complicated the debate, particularly where it caused some positivists, such as John Austin, great difficulty

71 Ibid. 23. Maine discussed in detail his view of the history of natural law theory, originating with the Ancient Greeks, being passed on to the Romans and through them, into early British law, most particularly into equity. For this discussion see Maine, Ancient Law. pp. 53-72.
in reconciling international law’s very existence, there being no legislating sovereign.

Travers Twiss, the civil lawyer, would have none of this. He regretted that at a time when there was evidence establishing the ‘ascendancy of the Reason over the Will’ people who were judged to be eminent writers in the field of jurisprudence had:

> adopted the primeval Notion of Law according to which Law is exclusively to be regarded as a rule of conduct imposed by a Sovereign Power upon a Subject Community; in other words, as the Enactment of the Will of a Superior Power 74

Undoubtedly with John Austin’s views in mind, Twiss pointed out, according to that use of the word ‘law’, there could be no such thing as a Law of Nations, there being no acknowledged common superior. 75 He believed that a more reasonable interpretation of Law was evident in the practice of law prior to Grotius. Where the sanction of a rule of conduct was physical, the term Law was appropriate, where the sanctions were within the human conscience, morality applied. 76 Twiss’s conflict with his fellow Catholic civil lawyer, George Bowyer, was over the role of the pope in controlling bishops, and their church land in the sovereign territory of Great Britain. Twiss argued against the pope’s authority on the basis of international law. The more frequent use of international law, however, was to protect European nations from each other. This involved the protection of sovereign territory, peoples, and possessions whether within the territory or in transit on the high seas. For these purposes the general commonality of Judeo-Christian principles could permit reasonable agreement amongst nations on the nature of common

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international laws. The absence of an overall sovereign meant the establishment of precedents based on universalist principles. Robert Phillimore as judge of the Admiralty court made decisions on the basis of civil law not common or civic law. Civil law had its origins in natural law. The reliance on universal natural law principles became particularly important in international disputes over prizes, and in times of warfare, where the relationship between combatants and non-combatants needed determination. The ownership of cargo at sea was particularly controversial: its source; ultimate destination; and purpose, military or peaceful, required arbitration and clarification. Unlike positive law, but in common with natural law largely, international law depended for its enforcement on general acceptance and adherence to the principles espoused. Political and commercial pressure rather than legal punishment were necessary in a setting where acquiescence by a nation was strongly influenced by its own aspirations and agenda.

The jural and spiritual contexts of these conflicting views demonstrate the lack of agreement on the continued role of natural law and rights. Although civic or positive law continued to grow exponentially, there was sufficient evidence of the continued use of natural law and rights theory to refute the argument that it had disappeared during the nineteenth century in Britain. The following figures to be discussed are examples drawn from jurisprudence, international law, and spiritual life who demonstrate not only a ready acknowledgement of natural law and rights theory but a willingness to meld it with positive law, creating legal structures which had not previously existed.

77 The perception of Turkey as one of the European nations caused endless difficulty where a perceived absence of these values caused them to be regarded as ‘barbaric’ or to be grudgingly and suspiciously accepted within the European community.
SECTION A: JURISPRUDENCE AND NATURAL LAW

CHAPTER TWO: CHARLES JAMES FOSTER

On Tuesday November 5 1850, Charles James Foster, M.A., LL.D., Barrister at Law, and Professor of Jurisprudence in University College, London, delivered his introductory lecture to the course of Jurisprudence in University College. The title of his lecture was ‘Natural Law’. Foster, having completed the necessary legal studies at University College London (UCL), was admitted to Lincoln’s Inn in 1835 and called to the bar in November 1841. Due to hearing difficulties he was unsuccessful at the bar. He continued his legal career at UCL as a professor, lecturer, and member of the university senate prior to emigrating to New Zealand in 1864.¹ The historical placement of this lecture in relation to nineteenth century natural law and rights was significant for several reasons. Firstly it was delivered by an eminent jurist to a class of potential future law practitioners. Secondly it was delivered at a period when the works of positivists, particularly Jeremy Bentham and John Austin were widely understood and embraced. Thirdly, in a post Hobbesian era he was cognisant of the differing interpretations of natural law by Enlightenment, ancient and modern theorists. In 1853 he published his series of lectures as a text, Elements of Jurisprudence. Within these, Foster explicated his understanding of and belief in the principles of natural law. In this process he demonstrated substantial agreement with Francis Bacon, James Mackintosh and Hugo Grotius while fiercely opposing the views of Thomas Hobbes, the outspoken advocate of modern natural law theories, as well as the positivism of Jeremy Bentham and his own

former teacher, John Austin. Nathan Isaacs describes Foster as ‘a recalcitrant pupil’ [of Austin]. Michael Lobban notes that Foster stated ‘that he disagreed “toto caelo”’ with the founder of the English School of Jurisprudence – Austin’. Morrison notes that ‘like the empiricists, Hobbes rejected the belief that the human mind was informed by images of an eternal archetypal reason ... [rather that] life was “nasty, brutish, and short”’. The acceptance of this led to Hobbes’ rejection of moral absolutes and belief only in the rules imposed by the state and a sovereign ruler. There was little that could reconcile Hobbes’ views with those of Foster. Foster rejected the utilitarianism of Bentham and Austin; he objected to Austin’s positivistic approach to law, which limited law to civic law, determined under the authority of a sovereign. Austin’s belief was later to cause difficulties in determining the law of nations.

There is little difficulty in appreciating why the views of Charles Foster were diametrically opposed to those of Bentham and utilitarians generally. Bentham was singularly unambiguous in expressing his contempt for natural law and common law and his reasons therefore. In a clear rejection of contract theory and positivism as represented by Bentham and Austin, and consistent with Lorimer, Foster expressed his increasing difficulty in accepting ‘the currently-received basis [of the science of Law] either as right or possible ... The received formula, “Law is a species of Command”, reduces the bulk of the internal law of every community – its customs and popular morality – to the

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3 Lobban, "Was There a Nineteenth-Century 'English School of Jurisprudence'?," 5n.

4 Morrison, *The Mimetic Tradition of Reform in the West*. 244.
abnormalism of *ex post facto* legislation, and excludes international law altogether from the domain of Jurisprudence.'  

Foster’s position highlighted the principle underlying the objection of all natural law theorists, traditional and modern, to Benthamite, positivist, and contract law exponents. Where the latter held that no law pre-existed society, and that it came into being either to satisfy the greatest general need for happiness, or through an original contract, the proponents of natural law theory insisted on the existence of law, natural law, prior to the development of human society and sovereignty, prior even to human existence. To the extent that they analysed the relationship between natural law and jurisprudence they all believed that the latter grew from the former. Foster saw a logical absurdity in the conventional [positivist] view because judicial decisions were, by their nature, retrospective, after the fact, and also that this view could not accommodate the concept of international law, there being no ‘‘determinate common superior’’. 

In seeking a basis for jurisprudence, Foster adopted a position which, while traditional, was slightly at variance with some other contemporary traditional theorists. James Lorimer as a jurist, Henry Drummond as a cleric and scientist, and George Combe, the phrenologist saw the laws of nature as being determined by an essentially Christian Deity as part of, though prior to, a received Christian religion. Their beliefs nevertheless assumed the existence of those laws prior to human existence. In his deeply religious pamphlet, *On the Future Destinies of Celestial Bodies* (1855), Henry Drummond stressed throughout the role of God’s creation and his laws, physical and spiritual, in the

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5 Foster, *Elements of Jurisprudence*. iii. 
6 Ibid. iv.
development of mankind. They believed humans came, with advancing intellectual development, to an understanding and an appreciation of the laws. From these, there developed moral laws and natural human rights. There was an inherent assumption in this thinking, evident also in missionary work, that a Euro-Christian perspective of the world was the correct interpretation, that any other religious or moral beliefs were inferior, or just plain wrong; that a true understanding of Nature and its laws would only be possible with the spread of Christianity throughout the world. While the spreading of Christianity was not necessarily their focus, a Christian perspective was implicit in their interpretation of natural law. This thinking had also underpinned the understanding of Thomas Aquinas, the Salamanca School and many previous theorists. It justified their conviction that all other religious beliefs were, at best, inferior attempts to seek the true religion - Christianity, or at worst, dangerously wrong.

While Foster unreservedly subscribed to the same religious belief in Christianity, he remained cognizant of the relationship between different religions and the subsequently varied cultural and religious interpretations of natural law. He looked for a common factor which was consistent both with the concept of natural law and varied religious and cultural norms of behaviour in different communities. His solution was to interpret natural law in terms of ‘natural rightness’. What was morally ‘right’ behaviour was consistent with what could be claimed as ‘a right’ by human beings. All natural law

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7 Henry Drummond, *On the Future Destinies of the Celestial Bodies* (London: Thomas Bosworth, 1855). The pamphlet is throughout Drummond’s analysis of the biblical story of creation, from the universe to mankind. It analysed both man’s physical and spiritual natures and their indivisibility under God’s laws.

8 In 1853 Dr Foster chaired a parliamentary committee formed to watch all parliamentary topics which concerned Dissenters, to communicate with sympathetic MPs and to promote effective parliamentary government over what Voluntaries saw as its ‘unsatisfactory attitude to religious equality questions’ and in its subsequent downfall. See G. I. T. Machin, *Politics and the Churches in Great Britain, 1832–1868* (Oxford [Eng.]; New York: Clarendon Press, 1977). pp. 281-2.
could be encapsulated in a dictum which he described as ‘the universal exponent – the most sublime of all commandments, as indeed it includes them all, which for this life man can obey – the rule of Him who said, to each and all of us, “Love your brethren. Do as thou wouldst be done by” ’. ⁹

There was notable irony in the fact that John Stuart Mill (1806–73), arguably the ultimate Utilitarian apart from Bentham, maintaining a position diametrically opposed to Foster, claimed in his essay *Utilitarianism* that ‘the golden rule of Jesus of Nazareth’ embodied most powerfully ‘the complete spirit of the ethics of utility. To do as you would be done by, and to love your neighbour as oneself, constitute the ideal perfection of utilitarian morality’. ¹⁰ Both writers quoted scripture to their own purposes. Mill’s explanation of Utility identified its principles clearly:

> 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. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure… Pleasure, and freedom from pain, are the only things desirable as ends. ¹¹

Mill propounded two arguments to link utility with morality:

> Utility would enjoin, first, that laws and social arrangements should place the happiness… the interest, of every individual, as nearly as possible in harmony with the interest of the whole; and secondly, that education and opinion, which have so vast a power over human character, should so use that power as to establish in the mind of every individual an indissoluble association between his own happiness and the good of the whole…that a direct impulse to promote the general good may be in every individual one of the habitual motives of action. ¹²

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Despite the irony of both a natural law theorist and a positivist quoting the same moral principle to support diametrically opposed philosophies, it is evident that their fundamental assumptions were equally different. Mill’s utilitarianism argued that the principle was correct because it was in an individual’s best interests, to maximise individual happiness, to do so – a state of ‘unsociable sociability’. Foster, following Grotius, believed in human sociability and that humans operated from an innate position of fundamental goodness. It was scarcely surprising that Foster would disagree with Mill on two jurisprudential grounds: that the principles of utilitarian law were retrospective, not based on any immutable principles; and that consequently they relied on no historical precedents – they treated common law as irrelevant. In one respect, John Mill’s belief in utility was consistent with the natural law views of Charles Foster and James Lorimer. Each believed that the principles of law were consistent with, but not dependent on, the revealed will of God, as in the Bible. The principles of law nevertheless preceded the teachings of Christianity. Unlike Mill, Foster and Lorimer believed that the immutable natural laws preceded it also. Mill held that a resort to natural or religious teaching was irrelevant since any ‘ethical investigation is as open to the utilitarian moralist as to any other’. Mill defended utility from criticisms of godlessness claiming it as ‘more profoundly religious than any other’. Despite the fact that he criticised the unscientific approach of Grotius, Foster lamented what he saw as the abandonment of Grotius’s principles, namely the dismissal of natural rights values in favour of what he saw as the reactive principles of positive law, a process he wished to reverse. His approach again

13 Ibid. 20.
14 Ibid. 20.
directly inverted positivist and utilitarian thinking which placed little value on historical precedent. Implied in utilitarianism was an assumption that laws and legislation satisfied their role by looking at or ‘solving’ issues in terms of their contemporary usefulness. In this context, historical development had little if any relevance.

Foster was affirming his belief in both natural law and common law when he contemptuously observed, ‘It cannot be that the principles of morality are an unknown tongue to a race which has been held together, for upwards of six thousand years, by their practical assertion’. For him, contemporary thinking established a moral void which was not only wrong, but failed to acknowledge thousands of years of the implementation of moral principles in shaping contemporary jurisprudence. It was this thinking which could perfectly accommodate natural law theory with the development of common law and positive law. Simply, natural law provided the basis for both: positive law addressed its implementation, and common law charted the progressive historical development and refinement of positive law. Nineteenth-century jurists were far more able to accept the conflation of these elements than contemporary historians appear to have been.

Significant in the demonstration of natural law and rights theory in nineteenth century British philosophy was the reference by contemporary thinkers to the views of theorists of previous centuries to validate their arguments. In this regard Foster cited the work of Hugo Grotius, *De jure belli ac pacis libri tres* (1625), as translated by William Whewell:

Natural Law is the dictate of right reason, indicating, with respect to any action, from its consonance with, or opposition to, a rational and social nature itself, that there is in it that which is morally shocking or morally necessary; and,

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consequently, that it is forbidden or commanded by God, who is the author of Nature.\textsuperscript{16}

Grotius had prefixed this statement with the following:

The most acceptable division of Right in this general sense is that of Aristotle. On the one hand there is Natural Law, and, on the other, Voluntary Law, or, as he calls it, “Legal Law,” or “Positive Law”, the word “law” being taken in its stricter sense.\textsuperscript{17}

The quotation Foster took from Grotius was noteworthy, showing as it did, Foster’s confidence in the relevance of Grotius’s seventeenth century concept of natural law to nineteenth century British jurisprudence. As the ‘dictate of right reason’, it was consistent with Euro-Christian interpretations, stretching back to Aquinas, of the operational independence of natural law from the Deity. It was also consistent with Lorimer’s and Drummond’s belief that human beings came to an understanding with their increasing intelligence, not that they invented it when, contractually, they established community. Agreement with Grotius’s reference to humans’ ‘rational and social nature’ was further evidence of Foster’s position as an ‘ancient’ natural law theorist. Foster’s acceptance of a division of law into both the natural and positive was also Aristotelian. This distinguished him from the positivists – notably Bentham and Austin.

Indeed the contrast could not be clearer than when Foster echoed John Locke’s seventeenth-century belief that:

The obligations of the law of Nature cease not in society, but only in many cases are drawn closer, and have, by human laws, known penalties annexed to them to


enforce their observation. Thus the law of Nature stands as an eternal rule to all men’.  

In rejecting the necessity for the role of a sovereign in promulgating and enforcing all law, Foster dismissed one of the tenets of positivism. In establishing the role of Duty in laying a foundation for jurisprudence, Foster insisted ‘It is not everything morally right which is rightfully compellable’.  

He was arguing that there were duties, and therefore laws, that while they were morally compellable, were not necessarily enforceable by an authority – they were not the subject of positive laws. His criticism extended to William Blackstone’s statement of the Rights of Nature. Sir William Blackstone (1723–80), a judge and highly regarded legal writer, was himself a strong advocate of natural laws, particularly concerning God’s role in determining them. Blackstone’s most notable writing was his *Commentaries on the Laws of England* (1765–69), which was an intensive analysis of British common law. Foster felt Blackstone’s statement of the Rights of Nature was linked to conditions which were ‘destructive of their practical value, by leaving nothing of the God-given privilege beyond the civil permission’.  

Foster reinforced his claim that laws, duties and rights extended beyond a sovereign, and therefore beyond positivism.

For Foster, it was not that positivism *per se* was wrong, rather that its focus was limited and provided only a partial understanding of the nature of law and its relationship to the science of jurisprudence. It was unable to answer the normative questions concerning the nature of law. His belief was that natural law was ‘not that which may

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belong to any individual Legislative system, but something which must pervade all that are permanent’. In this regard, Foster’s position was profoundly anti-positivist. He acknowledged that both the origins and the ongoing developments of different legislative systems varied greatly. In some he recognised a ‘more or less rigorous Feudalism’; others favoured individuality and independence; and he identified a third character which traced from the Roman Code. For him, however, one fact was obvious among the diversities:

that the legislative systems in which they are found, less perfectly as to some, but all appreciably, answer the requirements of that human nature which is at all times and everywhere the same…they must therefore be founded on some principle common to human nature.

This belief was his natural law principle, consistent with Grotius, a recurring theme in his lectures and writings: ‘That to which the Moral Sense attributes Necessity is the doing RIGHT. Right is – doing as you would be done by’. He argued that so far as the systems carried out this principle, they could be regarded as practical developments of this science [of Jurisprudence]. Where they failed to carry it out, or to run counter to it, then, ‘Jurisprudence has nothing to do with them, except to mark the point of their divergence or opposition’.

As a jurist, this was of considerable significance. In an approach similar to James Lorimer, the Scottish jurist, and unlike the positivists and utilitarians, Foster was developing for his students the proposition that natural law provided the underpinning for all legitimate positive law. Unlike Lorimer who expressed an uncomfortable acknowledgment that bad positive law, which offended the principles of natural law,

21 Foster, Natural Law: A Lecture. 1.
22 Ibid. 4.
23 Foster, Elements of Jurisprudence. 132.
24 Foster, Natural Law: A Lecture. 4.
was nevertheless legitimate law, Foster asserted that, to the extent it diverted from these principles it had nothing to do with jurisprudence. 25 In identifying the great principle to which he was referring he declared, ‘the subject-matter of Jurisprudence, considered as an universal science is [my emphasis] Natural Law’. 26

Considering legislative enactments, or positive law, in various places he noted that while the distribution of sovereign power was somewhat less diversified, the nature of enactments regarding property, personal liabilities, disabilities, rights of action, as well as the adjudication and enforcement of these differed markedly. One aspect of a conventional perception of the role of positive law was the ‘necessity of preserving the status quo’. 27 This, Foster noted, was regarded in the field of jurisprudence as one of its functions. What Foster felt was important, and he saw as neglect in positivism, was a consideration of the moral nature of the status quo. Arguing that the status quo could not be regarded as an invariable quantity he determined that ‘its value in the equation may always be deduced from the principle that Law is bound to follow as closely as possible the constantly advancing standard of public morality’. 28 This explained and justified for him the differences between cultures in their derivation of positive law from natural law. Significant evidence of the differing interpretations of natural law in framing positive law was provided by Mahommedan polygamy. As Foster noted, it ran directly counter to European notions of moral law – not providing for women’s natural rights and giving males unwarranted ones. In this regard it could also be considered, by Europeans, as

25 See Chapter on Lorimer. 80.
26 Foster, Natural Law: A Lecture. 5.
27 Foster, Elements of Jurisprudence. viii.
28 Ibid. viii.
opposed to natural law. Nevertheless, he acknowledged that a Turkish woman would consider her modesty outraged if expected to embrace the freedoms of English girls. His point was that this was an example of a different interpretation of natural law, satisfying the requirement of ‘doing as you would be done by’. In its implementation as positive law, ‘the law there answers the test which we originally proposed as the basis of the law’s action. It preserves the status quo’. To an extent he showed evidence of some unconscious agreement with Lorimer that positive law which offended natural law principles was still law.

In considering the development of natural law through contemporary general jurisprudence, he deemed two developments to be particularly representative: Roman law and English law. While avoiding analysis of the peculiarities of Roman law he observed that it had grown for thirteen centuries and, with various modifications, at that time governed the Christian world. Of greater British significance was his assertion that English law was also developed from natural law. One of the arguments by British opponents of natural law theory, as Foster observed, was that English jurisprudence had its origins in Common Law and was not derived from any natural law principles. He noted, ‘it has been the fashion to speak of the English system as of purely indigenous growth’. He referred to a contemporary historian, whom he regarded as ‘learned’,

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29 Ibid. 114.
30 Note my earlier reference to Foster’s views. ‘Unlike Lorimer who expressed an uncomfortable acknowledgement that bad positive law, which offended the principles of natural law, was nevertheless legitimate law, Foster asserted that, to the extent it diverted from these principles it had nothing to do with jurisprudence.’ There appears to be some internal contradiction in Foster’s thinking here.
31 Foster, Natural Law: A Lecture. 5.
but who made this claim, which Foster rejected.\textsuperscript{32} It was a significant element in the contemporary argument that natural law had either never existed or disappeared in nineteenth-century Britain, with the growth of positivism and the expansion of legislative enactments. Like Lorimer he was arguing strongly that it had not. Its role underpinning all positive law remained as valid. He was unable to accept that contemporary positive law simply grew from a common law tradition. It was scarcely possible, he believed, to construe that ‘that race of jurists (which the Romans were, no less than conquerors)’ had governed Britain for four hundred years without leaving a trace of their legislative presence. Rather British forefathers had drawn on Roman law sources in framing legislation and ‘transmitted it to us, mellowed into a softer effulgence, through the medium of more fortunate institutions, humainer manners, and a pure religion’\textsuperscript{33} His acknowledgement of a Christian religious tradition, did not lead him, as did Henry Drummond, to explore an essential continuum from one to the other, nor to link to natural physical laws. Rather, in both the ancient Thomist and modern traditions he looked at natural law as capable of functioning independently of the Deity. Nor did he, in the manner of George Combe, pursue the idea that the Deity incorporated natural law and predetermined punishments into the operation of Nature. Like Lorimer, his argument was strictly juridical.

Foster gave a further, and he considered less obvious, justification for referring to the English legal system as the other great illustration of the principles of natural law. It

\textsuperscript{32} John Reeves, \textit{A History of English Law (five volumes, 1783 to 1829)}. Vol. ii, 88. Cited in Foster, \textit{Natural Law: A Lecture}. 5. John Reeve (1752–1829) was a British conservative; who campaigned against Jacobinism. He was a Fellow of The Queen’s College, Oxford; a barrister and held various public offices.

\textsuperscript{33} Foster, \textit{Natural Law: A Lecture}. 6.
was the fact that it extended ‘over “regions Caesar never knew” ’. Like Rome, the country had lost colonies, but while they may have revolted against its constitution they had retained its laws. He was indicating that there was an underlying principle which, although undergoing some political reinterpretation, deserved to remain unchanged.

In arguing the strength of the British legal system, Foster maintained it gained its strength from its foundations in natural law. While noting that it had survived externally throughout the separation of colonies from Britain, he indicated it had survived even more stresses within the country. The thrust of his argument was that, since the reign of George the Fourth, the law had undergone a multitude of almost imperceptible changes, all strengthening, or returning to, a reliance on natural law. He cited several of these as examples of his belief. The first was the overturning of the fundamental rules of succession to real property. ‘The half-blood is admitted; and succession from the son to the father – the “luctuosa hereditas” of Roman Law – is now possible’ Yet, he claimed, in the process the underlying ‘object of the system – the preservation of Estates in families, according to their nearness of blood, and the indestructible hopes of Nature [my emphasis] – is only the more strongly secured’. In a similar manner he believed the destruction of the machinery for dealing with Entails, which had existed from the time of Edward the Fourth, with the substitution of a Protectorate simplified and lessened the cost of settlements without the mode being altered. Further, alteration to the Law of Wills had clearly underscored its intent ‘to guard the last directions of the testator from undue influence, misapprehension, or fraud’. In the examples he quoted, and others, ‘the

34 Ibid. 6.
35 Ibid. 7.
36 Ibid. 7.
alterations effected have been returns to the leading principles of Natural Law, originally contemplated, but lost sight of in the flight of years’. He gained satisfaction from the determination with which the ‘“old and accustomed ways” were followed to the last turning’.37

Even with the importance of this evidence of revision of legislation to re-establish principles of natural law, to prove its underlying influence, Foster believed that even stronger evidence was its sudden application when conventional law was unable to accommodate community or social changes, and new legislation needed drafting. He claimed, ‘If it then proves equal to the emergency, we have the truth of its development of Natural Law tested beyond power of question’.38 He cited as an example, the rebuilding of old London Bridge, and the construction of railways. The legal powers required from parliament were similar for both. In the case of the former, the delegation of powers and interference with rights were few. By contrast he asserted even though the advantages of the system were acknowledged every aspect of their building was accompanied by fierce controversy. Foster presented a dramatic description of the highly charged emotions generated by proposed land acquisitions, costs, and feared loss of rights. ‘“The throne was not too high, nor the cottage too low.” …the maintenance of the lunatic, the widow’s jointure, and the infant’s portion, if they elude the grasp of the Chancery, must be surrendered at the award of juries, consisting in all likelihood of expectant participators in the spoil’.39 He asked that memories be revisited if anyone felt he was exaggerating. He was contrasting the anticipated fears when the law was moving

37 Ibid. 8.
38 Ibid. 9.
39 Ibid. 10.
into uncharted waters to what he saw as the result. Despite the fears, he argued that the judiciary kept the powers strictly within bounds. When a judge was required to make a judgment, ‘he found the way already clear before him, marked out by old maxims, and the opinion of a former judge’.

He felt that the old principles of law were confirmed by the process, adding ‘but the mind is oppressed with the sense of what might have happened, had the obligations of Natural Law been less perfectly understood, or even had there been less elasticity in our system for its administration’. Where contracts were adhered to, they were dependent on a basis in natural law. Foster argued a direct link therefore between the need for the legislative and judicial system to address new circumstances and the underpinning of the system by natural law. He credited it with enabling so much power to be entrusted, and that power to remain so largely unabused.

Foster alluded to the variety of writers who had extensively explored the science of jurisprudence since the compilation of Roman law, producing systems of the Law of Nature. Whilst there would be no denial of the extensive exploration of natural law both in ancient times and since Thomas Aquinas, it was his belief in the relevance of these studies to nineteenth century Britain that are important to this study. Significant, was his belief that the philosophy of Francis Bacon and the writings of James Mackintosh were still relevant to the nineteenth century. While considering that Bacon’s aphorisms in his Treatise on Universal Justice (1623) didn’t develop his beliefs very effectively, it was the principles expressed in his prefatory remarks that Foster considered pertinent:

To decerne what, human society is capable of, what make for the weal of the publique, what naturall equity is, what the law of nations, the custom of countries,
the divers and different forms of states and republiques, and therefore to decerne and judge of lawes, both of naturall equity and policy.42

Believing that Mackintosh’s *Discourse on the study of the Law of Nature and Nations* (1799) encompassed Bacon’s work and extended further; he extended praise to Mackintosh, the ‘great master’, as a ‘teacher who gives lustre to the science which he teaches’,43 while pejoratively referring to the ‘unscientific method of Grotius and the terrible prolixity of Puffendorf’.44 Although Foster was criticising technical elements and style of Grotius’ and Puffendorf’s writing he was not rejecting nor acknowledging their views; to do so would be dismissing modern natural law entirely. He was however expressing his strong support for the substance and style of Mackintosh’s post-Enlightenment understanding of natural law. Foster’s enthusiasm for Mackintosh’s essay was for its demonstration of principles of Jurisprudence rather than its ‘machinery or materiel’ – its sense of the ‘unwearied exertions of a succession of wise men through a long course of ages; withdrawing every case… from the dangerous power of discretion and subjecting it to inflexible rules…contracting… the domain of brutal force and arbitrary will’.45 This underlined Foster’s belief in the relevance of primary rules to inform the practice of jurisprudence – those of natural law.

It was his conviction regarding the importance of natural law that led to his criticism of his former teacher, and First Professor of Jurisprudence at University

College, John Austin, whom he described as ‘a master indeed in the school of
Bentham’.46 Like Lorimer, he criticised Bentham heavily for the latter’s belief that
natural law was ‘nonsense on stilts’.47 Of Austin’s attitude to the law he disparagingly
stated, ‘Mr Austin treats Law as if he were explaining to a spectator the parts and moving
powers of some great physical machine’.48 While he felt that Austin addressed at
considerable length ‘What Law is’, he failed entirely to address ‘What the Law ought to
be’.49 This was a further critical observation, where Foster was rejecting Austin’s
positivist interpretation of law in preference to the normative position of natural law
theorists. To Foster’s disappointment, Austin had savagely criticised Mackintosh for his
treatment of the latter. His praise for Austin’s minute analysis of positive law and
jurisprudence was countered by his criticisms of the limitations that Austin put on it.
‘Anything more unlike to the splendours of Mackintosh, it is impossible to conceive’,
was Foster’s observation on what he saw as the confines of Austin’s analysis. In a clear
rejection of the narrowness of positivism, Foster likened Austin’s style to that of
‘Bentham’s raised to the nth power’.50 Blackstone combined the history of common law
and positivism, but always maintained its subservience to natural law normativism.
Where Austin, finding fault with the Constitution, criticised Blackstone’s method in ‘his
far too celebrated Commentaries’, for flattering [the English people’s] ‘overweening
conceit of their national or peculiar institutions’, he expressed confidence that ‘now it is

46 Ibid. 17.
Executor. 501.
48 Foster, Natural Law: A Lecture. 17.
49 Ibid. 17.
50 Ibid. 18.
happily vanishing before the advancement of reason’. Foster referred, by contrast, to Mackintosh’s eulogising of Blackstone’s writings. While acknowledging that neither the Constitution, nor Blackstone’s analysis were without fault, Mackintosh observed ‘“that if an English lawyer were to delineate the model of perfection, he would find that with few exceptions he had transcribed the institutions of his own country”’. Common Law was strong throughout the period, but Foster was arguing its consistency with natural law. Again, in contrast to Austin, Foster observed that if asked to identify Blackstone’s great merits ‘I should point to the constant endeavour to establish a moral basis for every requirement of law, as in itself a virtue that puts his faults in the shade’. It supported Foster’s belief in the necessity for a moral underpinning of jurisprudence, notably in the form of a reliance on natural law.

For Foster thus, effective jurisprudence was a combination of the virtues of both Mackintosh and Austin, but beginning with Mackintosh:

Morality and Jurisprudence, therefore, both arise from the same foundation; and they differ, afterwards, it appears to me, only in the extent to which their common sanctions applies. The science of Morality “teaches men their duty and the reasons of it.” Jurisprudence accepts equally the duties and reasons, but acts within a narrower range. Morality concerns itself with all that ought to be done – Jurisprudence with that only which ought to be enforced.

This statement to his students summarised Foster’s belief in the indissoluble link between natural law and the science of jurisprudence and the dependence of the latter on the former. It justified his criticism of Austin, not for Austin’s positivist and Benthamite

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51 Ibid. 19.
52 Ibid. 20. The significance of this statement for Foster was that it was written forty years after Blackstone had delivered his Lectures, and demonstrated the relevance and resilience of Blackstone’s moral views in the face of an attack from positivists.
53 Ibid. 21.
54 Ibid. pp. 22-23.
forensic analysis of the law, which he acknowledged as excellent, but for his failure to link it to what Foster saw as its essential moral underpinning – natural law. He demonstrated his belief that natural law predated and transcended governments, the establishment of social order and contract theory – the justifications for Bentham’s and Austin’s utilitarian thinking, and the root of positivism. David Lieberman in ‘Economy and Polity in Bentham’s science of legislation’ illustrates Bentham’s utilitarian focus in his ‘Principles of the Civil Code’. ‘Here Bentham differentiated the fundamental object of the legal system – the promotion of happiness – into four subsidiary ends: subsistence, abundance, security and equality, and how they were to be respectively ordered and coordinated as legislative objectives’.\(^5\) As an analysis of the fundamental aspects of the legal system, Bentham was completely utilitarian in his approach, unlike those who criticised his lack of a moral underpinning for his analysis: Foster, Lorimer, and Seeley as examples.

Foster indicated his essentially traditionalist position on natural law by explaining ‘that it consists of that portion of moral obligation which is enforceable by public authority’ that it ‘should aim at developing, throughout the extent of Jurisprudence, the primary rule of morals, “Love your brethren”.’\(^6\) In the debate between traditional and modern natural law theories, Foster’s position was clearly a traditional one. Rejecting Hobbesian teaching that survival, human selfishness, was the only natural law, he embraced the concept of human sociability – that the law ‘as it naturally is’, its ‘moral


\(^6\) Foster, Natural Law: A Lecture. 23.
vision’, is guided ‘by the perfect law of love’. He summed this up both in the conclusion of his student lecture, and in his writing, by referring to ‘the rule of Him who said, to each and all of us, “Love your brethren. Do as thou wouldst be done by.” ’

Foster explained further his rejection of the logic of Puffendorf and Austin. Where he rejected Austin’s positivism because of what he saw as its inadequacy, he also rejected the explanation that he saw as justifying that inadequacy, in both Austin and his ideological source, Puffendorf. As noted earlier, Foster considered the inadequacy of positivism was its lack of a moral foundation. This criticism was particularly directed at Austin. In paraphrasing Puffendorf’s argument Foster took issue with several of Puffendorf’s views:

1. In themselves actions have no moral quality whatever.
2. If a superior being commands or forbids certain actions, they then become right or wrong by virtue of such command or prohibition.
3. The reasonable and social nature of which Grotius speaks has, undoubtedly, in point of fact, been imposed upon us by God.

Although Foster admitted this to be a part-summary of Puffendorf’s argument, (he claimed Puffendorf was too prolix to repeat) its importance lies in the fact that this constituted Foster’s nineteenth century understanding of the argument, reflecting the way it helped shape his thinking. Foster saw a number of difficulties. Most importantly was Puffendorf’s requirement that, for natural law to function virtuously, there be a superior, an authority figure to command or prohibit; the Grotian model, and other traditional

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57 Ibid. 23.
58 Ibid. 28.
59 Foster, Elements of Jurisprudence. 27. Foster selectively paraphrases Samuel Puffendorf, Of the law of nature and nations: eight books (1717).
models had no such requirement. For Puffendorf, the absence of such a superior meant there was no moral component to actions.

Similarly, the positivist Austin, basing authority in the sovereign while rejecting natural law entirely, rejected a moral component in action without a sovereign figure to legislate. Foster noted:

The result of the Grotian principle is precisely opposite. Morality and Law being independent of Command, the Customs and Moral Principles which *proprio vigore* have won the assent of separate Communities, and the great system of International Law which has bound these Communities together, are all Law, and would be Law, though no judge had ever recognised them, and no King ever decreed their observance.60

In linking elements of Puffendorf and Austin, Foster was rejecting their dismissal of natural law and their insistence that positive law could only function under the authority of a sovereign.

One of Foster’s stated aims was to establish a ‘Science of Law’ of which he believed ‘moral philosophy affords us some certain foundation’. He quoted Mackintosh who believed the enterprise ‘“might have been executed by the deep-searching genius of Hobbes, if he had not set out from evil principles; or by the judgment and learning of the incomparable Grotius, if his powers had not been scattered over many subjects, and his mind distracted by the cares of an agitated life”’. 61

Drawing on the analysis of Victor Cousin\textsuperscript{62}, regarding laws of the physical world, Foster, while rejecting axioms of modern natural law postulated four characteristics of laws which regulated the perpetual change of individual phenomena:

1. They do not participate in any way in the variableness of phenomena.
2. Their modes of existence are rigorously determined, inasmuch as we do not conceive of the possibility of their changing.
3. They embrace all that exists in time or space.
4. Not only do they exist: it is impossible that they should not exist.

In fine, our reason conceives of these laws as \textit{immutable, absolute, universal} and \textit{necessary}.\textsuperscript{63}

This expression of a belief in immutable laws regulating behaviour of phenomena, both physically and psychologically was a rejection of the fundamental axioms of modern natural law theory espousing ordered coded forms of human behaviour rather than the motivations of individual self interest. Foster’s proposals provided a considerable insight into his understanding of law and its basis, and to the beliefs he promulgated to his students and fellow jurists. Most importantly he saw the law he referenced as immutable and overarching all others. This was an obvious rejection of utilitarian argument, contract theory, and positivism, as well as modern, Grotian, natural law. Contract theory and utilitarian lawmaking were not immutable in that they both were part of, and therefore participated in, the ‘variableness of the phenomena’, Bentham, Austin and Mill considering laws on the basis of their usefulness and their ability to promote the greatest happiness accepted the impermanence of positive law, while rejecting any other. Foster

\textsuperscript{62} Victor Cousin (1792–1867), was a French philosopher and educator, regarded as the founder of eclecticism. His significance for Foster here was primarily his attempt to classify and explain scientifically, within philosophy, the relationship between psychological elements of human consciousness and universal experiences and beliefs of humanity. Cousin simplified the relationships claiming there were only two primary laws of thought: that of causality and that of substance. From these primary laws all others followed. He wrote \textit{Cours d'histoire de la philosophie morale} (1840–41).

\textsuperscript{63} Foster, \textit{Elements of Jurisprudence}. 8.
also acknowledged the impermanence and flexibility of positive law but saw its subservience to and dependence on the immutability and universality of natural law. He believed fervently that ‘it is impossible that they should not exist’. This contrasted the ‘nonsense on stilts’ rejection of immutable natural law by Bentham, and its equally dogmatic rejection by Austin and Mill. Austin’s semantic rejection of the term natural law, if not its concept needs scrutiny. Nathan Isaacs observed, ‘Austin’s severest critics admit that his conception of law is unimpeachable so far as the English law of his time is concerned. Their attacks are based on the fact that it will not comfortably fit the law of all times and places’. Isaacs’ observations had limited validity. Certainly there was little objection to Austin’s analysis of positive law, but, for natural law theorists it denied the underlying principles of positive law that were maintained in natural law. Similarly, Roscoe Pound, as quoted by Isaacs, mistook public appearance for reality. Pound stated, ‘It is noteworthy that the breakdown of philosophical jurisprudence ... coincides with the rise of a body of enacted law in which many traditional rules and doctrines were rejected summarily or made over from end to end’. Pound was proposing the demise of natural law. While acknowledging the explosion of positive law with the necessity for specific legal enactments, he failed to recognise that natural law’s underlying role in formulating positive law remained.

In Austin’s Lectures on Jurisprudence where he described a law as ‘a rule laid down for the guidance of an intelligent being by an intelligent being having power over

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64 Ibid. 8.
him…’ The term law embraces the following objects: ‘Laws set by God to his human creatures, and laws set by men to men’. 67 These descriptions of natural law would have scarcely found much dispute with ancient natural law theorists: they acknowledged the existence of laws which were ordained by the Deity and predated human development. There was no reference to the method of transmission of the laws to mankind so this produced no divergence in thinking either. Austin was not specifically considering the function of natural physical laws, any more than James Lorimer, Thomas Aquinas or members of the Salamanca school did. There was no specific requirement for traditional theorists to examine their function, although Henry Drummond and George Combe incorporated them into their theories. A consistent approach to natural law by traditionalists was that it was possible though not essential, in fact most unlikely, for natural law to operate independently of the existence of a Deity. For Eurocentric Christians there was perfect congruence between God’s laws and natural law. This was as it also appeared to be with Austin. The point of divergence came over a semantic issue. Austin stated:

To the whole or a portion of these has been sometimes applied the phrase, Law of Nature, or Natural Law. The phrase is also frequently applied to other objects which ought to be broadly distinguished.68

The conclusion to be drawn from Austin’s statement was his acceptance of the principle or concept of natural law. His further interpretation of the term confirmed this conclusion:

Rejecting it accordingly as ambiguous and misleading, I designate these laws, considered collectively, by the term Law of God.69

68 Ibid. 5.
Thus it becomes evident that Austin had no difficulty with the concept of natural law, merely its definition. As a relabelling of a concept hardly alters the nature and substance of the concept itself, it is evident, despite his own likely objections, that John Austin accepted the concept of natural law despite his semantic difficulties. It helps also to account for Foster’s criticism that while Austin closely examined what law was, he failed to consider, what the law should be. Having regarded the moral underpinning of jurisprudence as ‘God’s law’ albeit, with a different name, and considered the only other form as man-made law, Austin was satisfied to assume the laws of God, and to focus strictly on the laws of man – the province of jurisprudence. Both Charles Foster and James Lorimer, by contrast, as well as Henry Drummond and George Combe saw an indissoluble connection between God’s laws, the law of nature, and the laws of man. Austin’s explanation, rather than representing a rejection of natural law became, in fact, one of the mutations that the concept underwent in nineteenth-century Britain.

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69 Ibid. 5.
70 See the earlier analysis of Foster’s position.
CHAPTER THREE: JAMES LORIMER

James Lorimer (1818–90) was a noted Scottish jurist who demonstrated belief in the ‘ancient’ perception of natural law to an extent scarcely exceeded since the Spanish Jesuit, Francisco Suárez, in the sixteenth century. Having studied in Berlin and Bonn he was appointed Regius Professor in the chair of Public Law and the Law of Nature and Nations at the University of Edinburgh in 1862. He was an expert on international law and was noted particularly for two publications; namely ‘The Institutes of Law: A treatise of the principles of jurisprudence, as determined by nature’ (1872) and ‘The Institutes of the Law of Nations: A treatise of the jural relations of separate political communities’ (1884).

Lorimer’s approach to law was grounded in his Scottish heritage. An understanding of the differences between Scottish and English law is needed to appreciate Lorimer’s unique contribution to natural law which Koskenniemi describes incorrectly as ‘idiosyncratic’1 Lord Thomas Mackay Cooper (1892–1955)2 1st Baron Cooper of Culross, a judge, Scottish historian and politician, pointed out that, unlike English law that was heavily dependent on its engagement with common law, Scottish legal history from the twelfth and thirteenth centuries was quite anti-English in its formulation. Even the influence of Cromwell’s English judges disappeared with them at the Restoration. Cooper indicated that it was the Scottish-French alliance and Continental influences which resulted in the gradual incorporation of ‘a great mass of Roman law as

taught by the French and Dutch civilians, which made an irresistible appeal to the Scottish mind.³ He considered that the formulation of Scottish Law, as presented by James Dalrymple,⁴ Viscount of Stair (1619–95) in *The Institutions of the Law of Scotland* in 1681, marked the creation of Scots Law as we have since known it – ‘an original amalgam of Roman Law, Feudal Law and native customary law, systematised by resort to the law of nature and the Bible, and illuminated by many flashes of ideal metaphysic’.⁵

Cooper also referred to these elements of the origin of Scots law as ‘common law’ acknowledging that ‘this technical term “common law” is beloved of British lawyers but is used by them in so many different senses as sorely to mystify the lawyers of the Continent’. He explained his definition ‘as meaning the whole of our legal rules and doctrines which are not derived from enactments of Parliament’.⁶ The official HMSO pamphlet *The Legal System of Scotland* (1975) describes Scottish common law as ‘first, judge-made law; second, certain legal treatises having “Institutional” authority and, third, legislation.’.⁷ This official reference parallels Cooper’s understanding. Even at the present time the Commission acknowledges that despite English influences, ‘nevertheless in Scotland, civil law rests more on generalised rights than in England’.⁸

Cooper was careful to point out that when its legal architects had completed their codification of ‘mature’ Scots law by the early nineteenth century, ‘they had furnished

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⁶ Ibid. 13.
⁸ Ibid. 7.
Scotland with what most comparative lawyers will agree was an admirably finished philosophical system, [my emphasis] well in advance of its times’.9 It was a system which he felt deduced consequences ‘from the smallest possible number of carefully chosen general principles’.10 While he could speak of the ‘philosophical’ underpinning of Scots law in laudatory terms, he was highlighting an element that was practically an anathema in the English common law tradition. While discussing family law and acknowledging the gradual encroachment of English law on Scot’s law since unification, he was still able to state that ‘the basis of Scots law is immemorial custom, considerably coloured by doctrines of canon law’.11

W L Windram and H L MacQueen in ‘The Sources and Literature of Scots Law’ (1984) confirm the influences on the formation of Scots Law by the non-native sources: Roman Law; Canon Law; and Anglo-Norman Feudal Law. They believe that it is widely accepted that Roman law was received largely, if not entirely through Canon Law.12 They argue that the ongoing influence of English Law on Scots law was more complex and continuous than Cooper made it appear. They suggested that schemes for uniting English and Scottish law began with James VI after his accession to the English throne in 1603.13 Similarly, Michael Meston in the reprinting of Cooper’s text diverged sharply from Cooper’s position arguing that Scots law occupied an ambivalent position between the ‘two great legal traditions which have shaped the Western legal inheritance: on the one

9 Cooper of Culross and Meston, The Scottish Legal Tradition. 11.
10 Ibid. 12.
11 Ibid. 18.
13 Ibid. 12, 67.
hand, the English (or Anglo-American) Common Law, and on the other the Civilian (or Romano-Germanic) legal tradition of the Continent’. Meston believes that Cooper failed to recognise the extent and continuity of the ongoing influence of English Common Law on Scots Law.\textsuperscript{14} Nevertheless, despite their slightly diverging views all of these authorities consistently identify the separate sources of Scots Law, its individuality, and major differences of approach from English Law which provided the basis of Lorimer’s philosophy of law.

Of significance in Lorimer’s heritage was the fact that Scottish law, unlike English, never acknowledged any distinction between law and equity.\textsuperscript{15} This unity provided, much more readily, the link between positive law and underlying principles, particularly those which related to moral and philosophical imperatives, natural law and natural rights and these would be Lorimer’s abiding concerns. There should be little surprise that Lorimer sought a philosophical basis for his approach to law and jurisprudence.

Lorimer was not the only nineteenth-century Scot to examine natural law. Decades earlier fellow Scots, father and son, James and John Reddie had done so and come up with completely divergent opinions. Interestingly it was the son, John, who wrote on the subject initially, vehemently opposing the concept of natural law. In \textit{A Letter to the Lord High Chancellor of Great Britain} in 1828, John petitioned the Lord Chancellor to recodify the laws of Great Britain as ‘men of talent have declared that the present system of Law is no longer to be tolerated’. He stated that:


\textsuperscript{15} Commission, "The Legal System of Scotland." 5.
They have proposed to establish an entirely new Civil Code, to serve as an universal rule for the future; and to abrogate all Laws, not comprised within that Code.\textsuperscript{16}

His approach to law was a strongly positivist one, wishing to undertake ‘a discriminating investigation of the true nature of law, Common and Statutory’. This would involve ‘dismissing the metaphysical doubts, and vague generalities, in which most writers on the nature of law have indulged’.\textsuperscript{17} John Reddie had seen the formation of law in positivist terms as being based entirely on custom and usage which was subsequently modified by expediency. He believed thus that law developed from ‘the genius – of the nation amongst whom it has arisen’.\textsuperscript{18} With his enthusiasm for positive law, developed from the precedent set by the growth of common law, he rejected a universalist natural law approach out of hand, describing it as ‘rather absurdly termed natural law’. He was most unambiguous in his rejection claiming it:

\begin{quote}
seems to have been founded on the very groundless, but delusive supposition, that there existed an immutable, perceptible, system of natural law, valid at all times, and in all places, and equally suitable for every nation, which only required to be discovered – like the philosopher’s stone – to render all systems of law completely perfect, - to transmute the baser metal into virgin gold.\textsuperscript{19}
\end{quote}

John Reddie saw natural law thus as merely ‘an abstract philosophy of right and wrong’.\textsuperscript{20}

He was, however, no more sympathetic to Bentham and utilitarianism, disturbed by what he saw as its similarities to natural law rather than its differences. For Reddie, Bentham ‘has too often lost sight of man as he is, to make laws for him, as fancy would

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\textsuperscript{16} John Reddie, \textit{A Letter to the Lord High Chancellor of Great Britain} (London: J and W. T. Clarke, 1928).
\textsuperscript{17} Ibid. 4.
\textsuperscript{18} Ibid. 5.
\textsuperscript{19} Ibid. 10.
\textsuperscript{20} Ibid. 11.
\end{flushright}
fondly picture him, capable of being; he has too often lost sight, of the \textit{data} which human nature affords’.\textsuperscript{21} He condemned Bentham’s utilitarianism doctrines as being ‘only susceptible of application among a ‘Nation of mechanical automatons’.\textsuperscript{22} Bentham could scarcely have been more affronted by John Reddie’s observation that ‘his [Bentham’s] principle of Utility is but another, and more delusive, appellation for Natural Law’.\textsuperscript{23}

The problem with both natural law and utilitarianism was their attempts at universality where laws had a tangible existence external to humans and specific societies, whereas Reddie saw the development of law as community-based with principles that were determined differently by one community or state from another. In rejection of the principle of ‘Man as he ought to be’ in his legal thinking, John Reddie also rejected the legal values of the universalist natural law jurists including Blackstone, Lorimer, Phillimore, and Twiss.

It was ironic that twelve years after John Reddie had published his letter to the Lord High Chancellor extolling the virtues of positivism, his father, James Reddie published his first book which included a defence of natural law in 1840, an exercise he developed further in a second expanded edition in 1847. It was evidence too of the waning of the fad of utilitarianism. With no enthusiasm for Bentham, James Reddie reproved Bentham when he observed cuttingly that:

\begin{quote}
Such [natural law] having been the views entertained by the most eminent jurists of the 16\textsuperscript{th}, 17\textsuperscript{th}, 18\textsuperscript{th}, and even 19\textsuperscript{th} centuries, it may be questioned, whether it was quite decorous in Mr Bentham, to treat, with so much contempt and ridicule, the opinions of his predecessors in the same walk of science, many of whom, perhaps, for the ages in which they lived, were at least equally distinguished by their
\end{quote}

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\textsuperscript{21} Ib\textit{id.} 45.\\
\textsuperscript{22} Ib\textit{id.} pp. 45-46.\\
\textsuperscript{23} Ib\textit{id.} 46.
\end{flushright}
original genius and scientific acquirements.\textsuperscript{24} James Reddie believed that confusion over natural laws occurred not because of their lack of existence ‘but from the erroneous and inaccurate mode, in which they [jurists] investigated these laws’.\textsuperscript{25} Principally he criticises Montesquieu (1689–1755)\textsuperscript{26} as an example of the theorists who looked erroneously to a state of nature to find the origins of natural law. Rather he considered that living in society was man’s natural state.\textsuperscript{27} Reddie was primarily criticising theorists who derived their principles from either a ‘state of nature’ or from contract theory which he described as an ‘absurdity’.\textsuperscript{28} Reddie, like the other theorists being considered, was unquestionably a theist. He did not suffer Austin’s difficulty in seeing natural law as misnamed God’s law but, like Lorimer, Combe and Drummond, saw it as the same law stating:

All the laws by which either the material or mental worlds are regulated, may be held ultimately to have their origin and foundation in the all-perfect Creator. Of all the laws, whether of the material or mental worlds, which form the object of the physical sciences, the Deity is obviously the author.\textsuperscript{29}

James Reddie thought that modern jurists mistakenly referred to a ‘state of nature’ and ‘contract theory’. He complained that they ‘have in their investigations of the law of nature, confounded the principles of ethics and coercive law; have carried their generalizations to ultimate principles, chiefly applicable to morality solely, or so general

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\textsuperscript{25} Ibid. 33.
\textsuperscript{26} Charles-Louis de Secondat, Baron de La Brède et de Montesquieu was a French enlightenment philosopher and political theorist.
\textsuperscript{27} James Reddie, \textit{Inquiries Elementary and Historical in the Science of Law}. 43.
\textsuperscript{28} Ibid. 45.
\end{flushright}
as to be of little or no practical use in law’.\textsuperscript{30} He regarded the rejection of the concept of natural law ‘for a being of such very limited knowledge, as man, … [as] rather presumptuous, and at any rate unphilosophical ’.\textsuperscript{31} His solution to their discovery was a more individual one. Unlike Lorimer, Phillimore and Drummond who believed natural law was discovered intuitively, with man’s developing intellect and advancing civilisation, Reddie felt a more scientific basis of discovery was appropriate:

\begin{quote}
And the more scientific mode of proceeding seems to be, to ascertain, whether the laws of nature, in the limited sense of the jurists, although not intuitively perceived, may not be discovered by the same process of observation, experience, and induction, by which the laws of the material world, mineral, vegetable, and animal, have been discovered and classified.\textsuperscript{32}
\end{quote}

Koskenniemi noted a similar emphasis in James Reddie’s writing in 1842 where he indicated it was time ‘to give up the idea of transferring the rules applicable to men viewed abstractly…to nations or communities, …and to investigate the principles of the human constitution, as ascertained by observation, experience, and the records of history’.\textsuperscript{33}

James Reddie’s thinking bore some similarities to both Drummond and Combe: to Drummond, where Reddie saw the linking between the natural laws of the physical and spiritual worlds; to Combe who saw a direct connection between both physical and spiritual actions and consequences in the temporal world. Having discussed the fact that moral and religious sanctions, though important, were not entirely effective he displayed a stronger similarity to Combe when he determined that while the Creator allowed the

\begin{footnotes}
\footnote{\textit{Ibid.} 45.}
\footnote{\textit{Ibid.} 76.}
\footnote{\textit{Ibid.} pp. 76-77.}
\footnote{Koskenniemi, \textit{The Gentle Civilizer of Nations : The Rise and Fall of International Law, 1870–1960}. 23.}
\end{footnotes}
exercise of voluntary action nevertheless ‘certain actions, or courses of action, or the omission of such actions, are uniformly attended with certain consequences...their power and range of voluntary action is subject to certain laws, which they cannot infringe, or disobey with impunity’. ‘He concluded ‘Certain consequences invariably and inevitably follow certain actions’.

Reddie’s similarity to Combe was in his acceptance the Deity’s provision of temporal consequences for actions; where Combe saw these consequences as replacing eternal judgments, Reddie saw them as merely earthly consequences which helped to guide spiritual behaviour, but like other theists, subscribed to the Christian belief in Divine justice.

While James Reddie and his son John presented diametrically opposed beliefs and interpretations of natural law they demonstrated the complexity of natural law theories in a Scottish environment, which produced diversity of thinking similar to the English context. This was the environment in which James Lorimer shaped his natural law theory.

Jennifer Pitts in her article ‘The Boundaries of Victorian international law’ suggests that ‘Lorimer undoubtedly had idiosyncratic preoccupations and unusually overt prejudices compared with his more conventionally positivist colleagues’. She agreed with Koskenniemi’s observation that Lorimer was ‘eccentric’. An examination of the nature of Scottish law and its differing characteristics from British law indicates that rather than being ‘idiosyncratic’ or ‘eccentric’, Lorimer’s approach to natural law and

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34 Reddie, Inquiries Elementary and Historical. 79.
jurisprudence was perfectly consistent with that of normal Scottish law principles and practices.

Lorimer had a particularly strong belief in natural law, developing an elaborate jurally based argument in its justification, and its applicability also to international law. Lorimer’s international reputation was apparent in his membership of The Institute of International Law and The Academy of Jurisprudence of Madrid. The high regard of eminent international jurists of his time was evident in the translation into French of his writings on international law by Ernest Nys, himself a Professor of International Law in the University of Brussels, fellow member of the Academy, jurist, and writer on the science of international law.

Unlike writers who acknowledged their belief in the principles of natural law as the self-evident basis for debating other issues, notably George Combe and Henry Drummond, Lorimer, making full use of his jural skills, was at pains to argue the legal and philosophical justification for its existence, and its role as the foundation of positive law and international law. A fierce and sometimes acerbic critic of Jeremy Bentham, John Austin, John Mill and Utilitarianism generally, Lorimer argued that Utilitarian beliefs were lacking any foundation. Mill, following Bentham, argued that ‘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’. 37 For Lorimer, this thinking promoted expediency, with no moral or philosophical basis for law or action.

Lorimer gave to what he termed ‘the rule of life’ the title of ‘Natural Law’. He stated unequivocally that ‘Conformity or non conformity with Natural Law, in this sense, is, to my mind, the only conceivable measure of the value of social activity that is either permanent or universal’. While of demonstrable religious conviction, Lorimer clearly focused the basis of law in the material world. Lorimer acknowledged a superior Creator, as will be evident, but followed the tradition begun by Thomas Aquinas of examining the nature and role of law somewhat independently of the role of a natural law giver. While accepting that the world is governed by God and that His power and might are supreme, Lorimer explained his understanding of the division of power by stating that, ‘though God has retained the ultimate government of the world to Himself, He has committed the proximate government of it to man; and unless man brings the proximate into conformity with the ultimate by the exercise of reason, God will do it for him at his cost’.40

Lorimer’s position was consistent with Kant’s concept of ‘common sense moral knowledge’ where a perfectly rational agent who had never been affected by principles contrary to the principle of reason expressed in the moral law would, of necessity, obey the principle. However ‘for a rational agent whose volition is affected by such impulses...he must be constrained to act in accordance with the moral law. For him the law is an imperative’.41 The appreciation of natural law through developing rationality was a recurring theme of Lorimer. It is significant that in prefacing the second edition of

39 It is ironic that as a Dominican, and subsequently a canonized Christian saint, Thomas Aquinas should be the person to look beyond Church tradition to Aristotle, and to begin a detached study of human law while, of course, still acknowledging God as Creator and the origin of all law.
41 Kant, The Metaphysics of Morals. 2.
The Institutes of the Law of Nations, Lorimer concluded that he was even more convinced of his position on Natural law than he was at the book’s original publication in 1872. He based this conviction on the sharpening of his views by discussion with his colleagues of the Institute of International Law and with his students.\[42\]

In explaining his interpretation of natural law, Lorimer carefully positioned himself not only in relation to his opponents, but also as to where his thinking agreed with, or differed from, the understandings of other natural law supporters. This was one example of the variety of interpretations by both supporters and opponents alike. Consequently, he was able to dismiss some of the criticisms of natural law, which simply did not form part of his understanding. The validity of natural law, for Lorimer, was importantly not to be considered as ‘limited to humanity, or to humanity under the conditions of time and space… [but]…as the law which determines the conditions of perfect human co-existence’.\[43\] In this he was not in complete disagreement with Bentham’s concept of law, which was also not entirely removed from the Aristotelian ideal of happiness. He did however condemn Bentham’s rejection of natural law in stating that in natural law could be seen the ‘permanent element of positive law’.\[44\] Lorimer’s position, unlike Bentham’s, made positive law clearly subservient to and dependent for its existence on natural law.

Along with its interpretations, the determination of the parameters of natural law did not have universal agreement either, finding inconsistencies amongst its supporters while provoking opposition amongst its opponents. Because natural laws could be

\[42\] Lorimer, The Institutes of Law. x.
\[43\] Ibid. 2.
\[44\] Ibid. 2.
interpreted as encompassing everything found in created existence, from the physical laws such as gravity to the determination of appropriate moral conduct in humans, varying theories had developed. Where some supporters, such as Henry Drummond, who saw a congruence between physical and spiritual laws, and George Combe, who happily blended what he saw as essentially two different elements of ‘law’, Lorimer did not. His definition, in some respects, narrowed his exposure to the criticisms of natural law opponents, as he interpreted and defended it in jural terms. In this sense he stated that ‘the law of nature…is not the whole scheme of the universe, but the branch of that scheme which has reference to human relations’. This distinction, something of a departure from the Aristotelian tradition, eliminated ‘laws of generation, of growth and decay…just as much as the laws of space and number, or the laws of thought’. Lorimer emphasised the critical issue underlying his interpretation, when he explained that the latter were ‘laws which wholly shut out the element of human volition’. The natural laws of the nature of ethics and jurisprudence ‘are, in a limited sense, laws of freedom. Unlike the ‘scientific’ laws of nature, they are capable of violation. He further described them as ‘self-avenging’ and as ‘ought-laws, not must-laws’. In this respect his argument bore some similarity to that of George Combe, discussed later, regarding these laws as ‘self-avenging’. Unlike Combe, however, he did not limit this consequence to the material world. His description placed his concept of natural law more in the character of moral imperatives than of legislative directives – an innate understanding of laws of human

45 Ibid. 3.  
46 Ibid. 4.  
47 Ibid. 4.  
48 Ibid. 4.  
49 Ibid. 4.
conduct and the rights attached to them. This was consistent with the general interpretation of natural law; Lorimer’s particular contribution was to justify and interpret it in jural terms, though his understanding provided a basis for much opposition from critics who believed in greater specificity in all forms of law.

As a critic of Utilitarianism, notably of Bentham and Mill, he took great care to explain his understanding and to indicate his debt to St Thomas Aquinas and Richard Hooker (1554–1600)\(^\text{50}\). Hooker’s philosophical base was also Aristotelian, with a strong emphasis on natural law eternally planted by God in creation. In this respect Lorimer placed himself squarely in the ancient Aristotelian natural law tradition. Clearly critical of Bentham, and also of contract theorists Lorimer distinguished natural law from ‘mere human enactments’,\(^\text{51}\) a description he reserved for positive law. Throughout, he carefully considered the jural concept of natural law, as distinct from theology and physiology. Like Aquinas, while he differentiated Eternal Law from natural law, he acknowledged that Eternal Law was ‘incarnated in the law of nature’\(^\text{52}\). By contrast Austin had described natural law as misnamed divine law.

Rejection of belief that natural law governed the life of man frequently focused on the claim that it must have existed in a primitive state of nature preceding human society. Critics denounced this claim as an impossibility. It was further argued that such natural law could not exist in a vacuum prior to human association. This absence of law required the development of positive laws to regulate human interaction. The denial of natural

\(^{50}\) Richard Hooker was an English cleric, rector of the Temple Church in London and an ecclesiast. His major work was *Of the Lawes of Ecclesiasticall Politie* (1593) in 8 volumes.

\(^{51}\) Lorimer, *The Institutes of Law*. 5.

\(^{52}\) Ibid. 5.
law’s origins was thus used to deny its existence. Lorimer acknowledged the unreality of the concept of the ‘imagined state of nature’ but instead carefully argued the existence of natural law prior to human association. He argued that to deny its prior existence would be as absurd as to deny the law of attraction before its discovery by Newton, or to claim that houses built before its discovery would tumble down.\(^53\)

A further objection to belief in natural law centred on the question of its existence or validity prior to divine revelation. Lorimer also dismissed this issue stating that ‘it existed equally before it was divinely revealed’.\(^54\) A feature of nineteenth century British natural law theorists generally was their rejection of the concept of natural man in a primitive state as suggested by people such as Rousseau, Montesquieu and Defoe. Foster, Drummond, Combe, and Caufeild Heron had no difficulty with the concept of natural law’s existence prior to civilization, but rather as a concept which was progressively understood with man’s developing intelligence and civilisation. Primitive man consequently had a limited understanding of natural law.

In his process of defining and characterising natural and positive law, Lorimer stressed the subservience of positive or enacted law\(^55\) to natural law in several ways. He described positive law as ‘natural law realised in time and place’.\(^56\) Positive law was ‘law as it is…natural law is…law as it ought to be’\(^57\). He argued, therefore, that while law enacted by a recognised authority, such as a monarch or parliament, should conform to natural law, it remained valid, though erroneous positive law, even if it stood in

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\(^53\) Ibid. 7.

\(^54\) Ibid. 8.

\(^55\) Although Lorimer indicated that he found the term ‘enacted law’ more precise than the term ‘positive law’, he tended to use the terms interchangeably.

\(^56\) Lorimer, *The Institutes of Law*. 8n.

\(^57\) Ibid. 8n.
defiance of natural law. R. S. White points out that ‘in classical Natural Law theory a law cannot be unless it is what it ought to be. Lex iniusta non est lex – an unjust law is not a law’. Lorimer’s position varied from this denying that failure to adhere to the precepts of natural law did not lessen a positive law’s legal standing. Here he noted the difference he saw between validity of law and of justice.

In analysing the nature of positive law as a development from natural law, Lorimer again applied strict jural principles by determining it as both a science and an art. The ‘science’ aimed at discovering the law of nature in special circumstances and special relations; the ‘art’ had recognition by special enactments as its goal.

Lorimer’s explanation of the dependent relationship between natural and positive law ironically accounted for some belief that the former had disappeared in nineteenth century, while at the same time arguing the opposing belief of its continued existence. He stated, ‘Apart from their realization in positive laws, the rules of natural law are merely hypothetical and contingent, depending for their concrete forms on the answers which may be given by observation and experience to questions of fact which they do not profess to solve’. His summative statement effectively confirmed the relationship. ‘Natural law…draws the issue to which positive law returns the verdict’.

A variety of historical developments, particularly the growth in nationalism, can account for the nineteenth century emphasis on positive law with the continued presence of natural law, even though the latter could be described anachronistically as ‘dropping

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60 Ibid. 9.
61 Ibid. 9.
below the radar’. The shift to consolidation of empire rather than exploration reduced somewhat the need to draw on natural law to justify or challenge the conquest and abrogation of native lands. Natural law’s overt use tended to be found particularly in the growth and refinement of the Law of Nations, in international law. At the same time Britain was undergoing transformation industrially, socially, politically, educationally and economically.62 Such a developmental process was unlike any that had gone before, creating issues of social interaction previously unknown and now requiring an intensity of legislative process and detailed administrative management. It was in this context that Lorimer was writing: the context of the enormous growth in positive or enacted law. It is no surprise that the practical issues of enacted legislation became the major preoccupation of legislators, jurists and the community at large. Lorimer was well aware of and understood this situation. It was no accident that his text was a treatment of the principles of jurisprudence. The obvious inference is that he was addressing the issues underlying, informing, and integrating with a considerably greater body of action and detailed jurisprudence. The further conclusion is, that while the community’s daily focus may have been on the minutiae of legislative detail, the underlying principles remained as relevant and influential as ever. In this too, Lorimer was countering the arguments of the critics who claimed the origins of positive law were only to be found in the historical extension of British common law. He was arguing that not only did natural law precede the beginnings of human socialization and consequently common law, but also that it continually informed the principles underlying all areas of jurisprudence, including

62 For a detailed study of the social changes in nineteenth century, see F. M. L. Thompson, The Rise of Respectable Society : A Social History of Victorian Britain, 1830–1900 (Cambridge, Mass.: Harvard University Press, 1988). A detailed examination of these changes is beyond the scope of this enquiry.
common law. Because the issue of natural law dealt with principles, it is not surprising that the discussion of natural law, by many jurists, both supporters and opponents, introduced their writings on jurisprudence. Such discussion provided a philosophical, ethical or moral basis underpinning their analysis of issues of positive law.

Lorimer developed further his belief in the dependence of positive enacted law on natural law by considering the requirements for sound legislative enactment. In arguing that every sound legislative enactment had involved a prior decision about an issue of natural law, he determined that there were ‘three moments of jurisprudence…natural law, human enactment, and (in case of controversy) judicial decision’. 63

By rejecting a number of the earlier assumptions about natural law, especially several that had drawn objections; Lorimer avoided some of its criticisms and, in part ironically, agreed with critics. Lorimer also carefully defined natural law negatively, in an attempt to distinguish it from matters with which, in his view, it had been inappropriately linked. Having stated what the law of nature was, he then considered what it was not. He distinguished it ‘from a primitive code, or body, of consuetudinary law, which is supposed to have prevailed in an imaginary “state of nature” ’. 64 He argued that, even if such an unlikely state had ever existed, such law would have had to be positive law, and very poor law at that. It was on the basis of ‘the state of nature’ that Henry Maine had rejected the law of nature; when examining human anthropology he concluded that an original state of nature was imaginary. As a result, Lorimer circumvented Maine’s principle criticism.

63 Lorimer, The Institutes of Law. 10.
64 Ibid. 11.
Lorimer was able to evade the rejection of the law of nature by the contract theorists such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau. He distinguished it from ‘a primitive contract by which men are supposed to have agreed to observe the principles of justice’. Such a contract, Lorimer argued, had to be preceded by the identification of such principles, thus requiring and substantiating the existence of natural law. In this, Lorimer was not denying the coming together of people in society by some form of agreement. Rather he saw this agreement as a development of positive law which was predicated on the principles of natural law. By similar means Lorimer further distinguished the law of nature from three other facets of law, with which it had often been associated: Roman *jus naturale*, *jus gentium*, and from English equity and common law. This approach ran counter to that of historians, philosophers and jurists who have seen a direct link from natural law through Thomas Aquinas to Roman law. Although Lorimer was squarely placed in the Thomist-Aristotelian tradition he rejected the link to Roman law. He felt the link with *jus naturale* was inappropriate because it was incompatible with his definition, which he restricted to human relations only and not to scientific ‘laws, which wholly shut out the element of human volition’. By contrast, Henry Drummond and George Combe saw a direct link between scientific and social natural laws. The Roman *jus gentium* was not appropriate either, because its intention to regulate relations between Roman citizens and others, gave it the character of positive law. Although the third rejection had less relevance to continental European thought, there was a strong belief among nineteenth century British jurists that positive law in

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65 Ibid. pp. 11-12.
66 Ibid. 4.
67 Ibid. 12.
equity was simply derived from, and an extension of, the British common law tradition. Again the law of nature was seen as either irrelevant or nonexistent. Lorimer felt this argument begged the question of a source of common law and countered that in any situation that arose, in the absence of positive law, the decision was discovered ‘in accordance with natural law’.  

His overview statement on natural law was concluded by Lorimer’s presenting a clear structure demarcating his Modern Divisions of the forms of law. The overarching form was ‘Natural Law, or Permanent and Universal Laws of the human relations’. Growing from this was ‘Positive Law, or Variable and Particular Laws of the human relations’. Positive law was then subdivided into ‘Municipal Law: the *jus civile*, or *jus gentis*, public and private; and International Law: the *jus inter gentes*, public and private’.  

In accounting for the sources of natural law through which, he claimed, were derived positive laws, Lorimer divided them into primary and secondary. The first, consistent with his religious convictions was ‘God, the Creator, the One first Cause of all things’. God, he argued, was the one Primary source of all natural law. He acknowledged that he was beginning with a postulate that he didn’t seek to explain – this was a field more appropriate to the theologians and metaphysicians and to be accepted by the jurists. By determining that the original source of law had to be a being, a Creator, an omnipotent entity that transcended humanity, Lorimer was rejecting the views of Bentham, Austin, and the Utilitarians, who excluded the Deity from the juridical process.

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as well as any beliefs that based their ultimate source of law in human terms. For Lorimer, God’s potency assured his place as the primal lawgiver, His omnipotence precluded any alternative, superior lawgiver, and His perfection warranted the perfection of His laws.\textsuperscript{71} In an acerbic reaction to Mill, Lorimer remarked that by taking away goodness and absolute perfection God may well become a devil, which would put an end to ethical dreams and ‘This appears to have been the sad outcome of Mr. Mill’s philosophy’.\textsuperscript{72} The necessity for an omnipotent source, Lorimer argued, also prohibited the possibility of a science of natural law being derived from any non-monotheistic religion: atheism; polytheism; dualism, radical or mitigated; pessimism; or nihilism.\textsuperscript{73} The necessity for a Creator, also, in his view, rendered pantheism inappropriate as the basis for ‘a science of jurisprudence’.\textsuperscript{74} It was necessary for the jurist to be able to believe in the ‘absolute supremacy and goodness of \textit{one personal}, that is to say, conscious, God’.\textsuperscript{75} In this respect Lorimer’s position on the role of God in the functioning of natural law went beyond even that of the Thomists. As noted, Thomas Aquinas, a fervent Dominican, analysed natural law in a manner that \textit{could} be independent of direct involvement by a supernatural being. Clearly he didn’t believe it was. By contrast, Lorimer saw the functioning of natural law as totally dependent on a monotheistic, Christian, divinity. Demonstrating a specifically Eurocentric Judeo-Christian outlook, it

\begin{flushleft}
\textsuperscript{71} \textit{Ibid.} 24.
\textsuperscript{72} \textit{Ibid.} 25.
\textsuperscript{73} \textit{Ibid.} 25.
\textsuperscript{74} \textit{Ibid.} 30.
\textsuperscript{75} \textit{Ibid.} 31. Although at this point Lorimer did not specifically identify a Christian God, his argument had focused on his belief in the superiority of Christianity. His discussion of the application of natural law seemed to be always within a Christian context, although he made the point that it transcended all human activity, including religious beliefs. He acknowledged the validity of revelation through other religions as well.
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is unlikely that Lorimer could have conceived of any other alternative. Many nineteenth-century and twentieth-century theorists while not denying a Deity virtually overlooked any role, basing their discussion on the nature of mankind.

Sources of Revelation of Natural Law that Lorimer identified fell into two categories: Direct revelation to and through Man; and Indirect Revelation. The latter form, that of Indirect Revelation, was the more significant in the context of his support for natural law. Lorimer identified two forms of indirect revelation, Subjective and Objective. Subjective revelation was ‘the teaching of consciousness, or the revelation from the study of the Ego’. Objective revelation was ‘the teaching of external observation, or the revelation derived from the study of the Non-Ego, whether material or immaterial’.

These categories are particularly interesting as elements of natural law, because both, despite Lorimer’s titles, indicated a personal, subjective component in the acquisition of the principles of natural law. The study of the Ego suggested an introspective approach, an appeal to intuitive conscience. Despite Lorimer’s use of the word ‘objective’ with reference to external observation, it is difficult to exclude a subjective component here either, as varied interpretations of ‘external observation’ are probable.

In developing his concept of the character of natural law, Lorimer addressed the question of the ‘source’ or ‘channels’ of revelation of the absolute law of nature, identifying four schools of jurisprudence, each of which in his view laid claim incorrectly to exclusivity in possessing the key of knowledge: the Theological; Inductive or

76 Ibid. 37.
Observational; Subjective or Philosophical; and the Objective or Sensational school.

Lorimer’s belief was that, rather than any one school being able to lay claim legitimately to sole authority, there could be found a ‘co-efficient character which, in reality, belongs to them all’. The Theological school’s claim was based not on studying nature itself but on what the school claimed God revealed about Nature, through direct revelation. While he had no intention to contradict his previous statement that the existence of natural law preceded revelation, he acknowledged divine revelation as a source of explanation on the basis that moral law was laid down in the scriptures, but further argued that it was an inadequate explanation if limited to Judeo-Christian scripture, because ‘Mahometans and most Heathens’ professed to believe in direct revelation through their prophets. This somewhat modifies, though doesn’t eliminate the basis on which Pitts determines that Lorimer criticises Turkey when she claims that Lorimer believed Turkey was ‘bankrupt… of every quality of a nation’ on the basis of religious and racial grounds and for these reasons dismissed any reciprocal relations between European and Muslim states as impossible. Having determined that ‘what is revealed… “is the ways of God to man,” not of man to man’, he restated his earlier observation that ‘previous acquaintance of mankind with the law of nature is, manifestly, assumed’. Earlier sources of knowledge therefore had to be recognised. Lorimer further pointed out jural errors that he felt had been derived from the Theological School. A notable example from the school of jurisprudence involved differing interpretation of the rights of individuals. One

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77 Ibid. 38.
78 Pitts, "Victorian Visions of Global Order." 73.
79 The 119th Psalm is a long prayer for the indirect revelation of natural law. Cited in Lorimer, The Institutes of Law. 41.
interpretation vindicating rights ‘falls into the error of teaching us to prefer ourselves to
our neighbours’, justifying selfishness; the alternative, our neighbours to ourselves, ‘and
often falls into asceticism and fanaticism’. Lorimer’s argument was instead for an exact
reciprocity of rights and duties, as ‘the Bible enjoins us to love our neighbours as
ourselves’. 80 He took issue with Englishmen in general, and Herbert Spencer 81(1820–
1903) in particular, for falling into the error ‘of representing Christianity as exclusively
“altruistic”, and heathenism, as exhibited in the Greek and Roman writers, as exclusively
“egoistic”. 82 Lorimer claimed that the ‘“golden rule”’ was to be found everywhere, not
merely with Greeks and Romans but also notably in the oriental teachings of Confucius.
The claim about the ‘golden rule’s’ universality is important because it partly addresses
one of the criticisms of Lorimer, his European racist beliefs

The broad principles underlying his Inductive or Observational school were that
outside of direct revelation everything known about the law of nature had to be learned
through conscious observation and reasoning. While Lorimer was comfortable with this,
he objected to those proclaiming separately, doctrines of rights and of duties. He stated
emphatically, ‘the supreme rule of life which we seek is neither a doctrine of rights nor a
document of duties, but a doctrine of the relation between rights and duties’. 83 While
describing a Subjective (philosophical) School which used the study of humans’
subjective nature (Ego) for enlightenment on ultimate law, he considered that it had
largely fallen out of use at that time.

80 Ibid. 43.
81 Herbert Spencer (1820–1903) was an English philosopher, biologist, sociologist and political theorist.
82 Lorimer, The Institutes of Law. 44.
83 Ibid. 46.
More significant, however, was his criticism of what he termed the Objective or Sensational School. As this ‘school’ was the basis of Utilitarianism, a profoundly influential force in nineteenth century British intellectualism, fiercely opposed by Lorimer, it is scarcely surprising that he gave the creeds of Bentham, Mill, and Austin close attention. A close analysis of his viewpoint not only illuminates Lorimer’s objections to Utilitarian thinking but also demonstrates much of the range of arguments used by natural law supporters to denounce Utilitarianism.

His major criticism of utilitarianism was that its doctrine continually shifted between two positions in relation to the science of jurisprudence, one legitimate, the other not. The first position, which he described as most ambitious, assumed ‘the doctrine of utility claims to furnish us with a test of the quality of our actions, to constitute in itself a rule of life and thus to supply the place of the law of nature, the reality of which it denies’. To this explanation he exploded with the question, ‘“Useful, for what?”’ [Lorimer’s italics]. He believed this question immediately revealed their confusion of thought, as actions were means not ends, and could only be tested with reference to a final object ‘Thus a rule to ‘“follow virtue”’, or ‘“follow pleasure”’ provided, when defined, an object of the rule. ‘But “follow utility” is a rule which has no object – a fingerpost that points nowhere!’ Rather than providing the simplest of all tests of conduct, Lorimer protested that the utilitarian system provided no test at all. Seeing it as a means to an end, not the end itself, it could only be tested against a system that it repudiated – natural law. Lieberman notes that although Bentham avoided the use of the

84 Ibid. 48.
85 Ibid. 49
term ‘self-interest’, ‘the claim that the sovereign mastery of pleasure and pain [to achieve happiness] rendered all human conduct intrinsically self-interested’. Lorimer challenged Bentham’s, and his followers, assumptions concerning ‘happiness’:

In Mr Bentham’s hands, and those of the majority of his conscious followers, its object has been “happiness,” so defined as to rise little above animal enjoyment, and utilitarianism has thus been the equivalent, not to eudaemonism in the Aristotelian sense, but to hedonism in the sense of the later Epicureans. Stung by the reproaches to which so ignoble an object and so degrading a system exposed their adherents, Mr Mill, in his later writings, has sublimated utilitarianism into something that might be called transcendental-eudaemonism.

In his footnote to the same argument Lorimer further challenged the logic of Mill’s reference to the, ‘highest realizable ideal of human life’ as being the ‘true object of human endeavour’, when expressed by one in whose eyes ‘the pretended perfection of the order of nature and of the universe’ was regarded as a “superstition”’. Lorimer’s earlier observation that Utilitarianism was without foundation was illustrated in his argument that, even with Mill’s contribution, utilitarianism still did not qualify as a self-determining system, as anything more than ‘a method of inquiry into objects of life and the means of attaining them’. For Lorimer, the ‘objects of life’ into which utilitarianism was inquiring was indeed the exact concept of natural law. Utilitarianism’s failing for Lorimer was that he believed it was a process masquerading as a philosophical system. It had a particular problem with representation when attempting to determine the ‘utility’ of the attainment of any given end, because the ultimate consequences of recent events would be still in the future, and would be seen through the distortion of feelings and self

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87 Lorimer, The Institutes of Law. 49.
88 Ibid. 49n.
89 Ibid. 50.
interest. He was, perhaps unintentionally, focusing on general problems of historical
enquiry when he argued that, for events long past, utilitarian processes suffered from
information that was usually incomplete; was interpreted as the narrator saw it, and how
he intended it should be seen by others; and seen through contemporary passions
prejudices and ignorance.90

From a juridical perspective, a most significant problem for Lorimer was that, as
an external form of observation, utilitarianism had no ‘starting point’. Facts were means
not ends, and were useless without a standard against which they could be judged.91
These arguments demonstrated the nature of Lorimer’s opposition to utilitarianism, his
argument that because it was a process, it lacked the foundation of a philosophical
docctrine. He had remarked wryly in the introduction to *The Institutes of Law* that he was
pleased that Bentham’s doctrines had not successfully crossed the border [into Scotland],
and that any ‘Benthamites’, around his time of lecturing and writing, were well into
middle age.92

Having argued his belief in the existence and legitimacy of natural law, Lorimer
determined to explore and establish the relationship between man and natural law by
exploring the autonomy of human nature. Precisely, he developed his argument around
three enquiries: whether man is a ‘law unto himself’; if so, how law is revealed to him
and what is the law which man’s nature imposes on him? 93 Rather than pursuing the
matter by traditional philosophical or historical methods of enquiry, Lorimer determined

to consider ‘what our nature tells us directly’.\(^ {94}\) Initially, because he claimed our nature exerts its existence then the first step in the science of jurisprudence was to accept ‘the knowledge of life is a fact’ that ‘neither its reality nor veracity can be denied or even doubted.’\(^ {95}\) Once this was accepted, he continued, then ‘our nature guarantees the veracity of its testimony with reference to its qualities’.\(^ {96}\) He cited the example that if a person’s consciousness claimed that one’s love was fallacious, then the challenging of that love by the consciousness could be equally fallacious. Thus ‘the truth of the denial can never rest on higher testimony than the truth of the assertion’.\(^ {97}\)

Lorimer stated in his third ‘enquiry’ that ‘our nature asserts that it is the result of a cause external to itself, and independent of its volition’.\(^ {98}\) He based this on an assumption that the concept of unconditional dependence, as an essential element of religion, could equally be applied to jurisprudence. In agreeing with Aristotle that ‘actuality must precede potentiality’\(^ {99}\) he put the causative act of existence beyond that of human consciousness. Any other argument, he concluded, would involve the necessity of conceiving human activity prior to human existence, which would be absurd.\(^ {100}\)

An issue that generated much disagreement over time has been the relationship of natural law, rights, duties, and obligations, and their respective origins. As suggested earlier, this has been largely linked to differing conceptions of the legal structuring of society. A strict Aristotelian –Thomist belief in natural law being passed down from a

\(^ {94}\) Ibid. 54.
\(^ {95}\) Ibid. 55.
\(^ {96}\) Ibid. 56.
\(^ {97}\) Ibid. 56.
\(^ {98}\) Ibid. 57.
\(^ {99}\) Ibid. 57n.
\(^ {100}\) Ibid. 57.
Creator had natural law as the antecedent of any rights or obligations. Post-Enlightenment thinking would tend to reverse this seeing human rights growing out of humanity’s intrinsic nature, independent from the consideration of the role of a Creator. In this context natural laws would be regarded as the means of ‘enforcing’ or certainly legitimizing these rights. The relationship has been further confused by use of the terms ‘natural laws and rights’ interchangeably.

Consistent with his view that there could be no volition prior to consciousness, Lorimer noted that, regardless of any rights that may have resulted from our human nature, it would not be possible for any rights to have preceded it. His discussion linked his Thomist thinking to the association of human rights with property rights. This developed as a significant element of his theory. Claiming that he was taking a strictly jural direction, he argued that ‘nature reveals to us not a right, but a possession, the result of no antecedent right, and the necessary source of all subsequent rights’.101

Lorimer continued to develop what he saw as the extension of natural law into rights and thus into duties since he saw the issue as a frequent cause of confusion in the study of jurisprudence. Believing that rights preceded obligations he determined that ‘a proclamation of the nature of man must consequently take precedence of a proclamation of the rights or duties of man’.102 His linking of human rights with property rights was continued where he considered the primary human possession to be that of existence, a possession that was not only necessary but was not capable of being refused. He argued therefore that, ‘In accepting itself as necessary, our nature accepts itself as right’ and that

101 Ibid. 58.
102 Ibid. 59.
our normal qualities and propensities become the criteria of right and wrong, there being no higher standard of measurement. At this point Lorimer seemed particularly vulnerable to the supporters of revealed truth, but he pronounced, ‘The universal validity of natural law, if not unquestionable is undeniable’.  

In blending of theocratic and jural arguments, Lorimer attempted to explain the relationship between a divine Creator, human nature and subsequent duties. He began with a theological hypothesis assuming that the perfect character of the Creator was revealed not through our nature, but to it, and thus a science of jurisprudence could be deduced without a belief in the rectitude of human nature. Our understanding of the duties that arose in terms of our relationship either with God or others could only be derived through what he termed ‘the reality of the dictum of consciousness’. Anticipating any conclusion that might construe the link as one of fatalism, Lorimer distinguished between it and obedience, arguing that his linking involved ‘self-accepted though not self-imposed law’.

The linking in this relationship was significant, in that it put the argument about natural law beyond that of the Utilitarians, whose thinking was inextricably linked to human judgment. In explaining this ‘dictum of consciousness’ Lorimer’s argument, becoming as much philosophical and theocratic as juridical, was perhaps at its most vulnerable when he conceded ‘the ultimate test of the reality…is, of course, a subjective one’. He held that intrinsically we believe our fundamental nature, excluding ‘special and

103 Ibid. 59.
104 Ibid. 60.
105 Ibid. 61.
106 Ibid. 61.
exceptional impulses’ to be self-approving, and ‘the acts of which we instinctively
disapprove are acts by which that nature is violated’. We are forced to admit our being,
but not our qualities. He further deduced that we could not deny belief in the ‘Kosmos’ or
in the power of man to discover it.\textsuperscript{107} It was a point for further rejecting utilitarian
thinking which he associated with scepticism, and the questioning of man’s power of
discovery of eternal truth. He acidly observed, ‘Mr. Mill has shown that, in the form of
skepticism at all events, it is an abyss from which even gifted men are not safe’. In
referring to Mill’s beliefs as a ‘dreary creed’ he considered it would lead to a denial of
the possibility of natural jurisprudence altogether.\textsuperscript{108}

The assumption of the essential ability of mankind to ascertain the elements of
natural law provided the link, for Lorimer, between the Deity’s determining of natural
laws and humans’ identifying them. This was his justification for rejecting the theological
school’s claim to exclusivity in dispensing received truth. They were, he argued, merely
one of a number of means by which mankind discovered natural law.

Lorimer’s juridical exploration of his understanding of natural law was developed
through an investigation of the elements of laws of evidence that he believed had been
violated most frequently in an historical study of anthropology. In a most controversial
aspect of his study, Lorimer established the basis for his views concerning differences
between races of people that accounted for his later justification of their varied rights
under both natural and international law. By this he further distanced himself from those
who used as their premise an imagined ‘state of nature’, existing prior to human

\textsuperscript{107} Ibid. 62.
\textsuperscript{108} Ibid. 62.
association and the development of any positive law, in which natural law was the only law applying. They then used this premise either to support or discount the existence of natural law. Lorimer, as noted, had argued that natural law predated even such a state, and its use, either to support or refute, was irrelevant. Simply, for Lorimer, by studying savages, they were all looking in the wrong place.

Lorimer explained his own ‘anthropological’ laws of evidence as he applied them to the discovery of natural law and natural rights. In seeking evidence, ‘Preference must be given to the best witnesses’. This meant for Lorimer, that investigations had to be confined, ‘without hesitation’ and ‘almost exclusively’,

(a) To the higher races of mankind.
(b) To the more vigorous periods of their moral, intellectual, and political life; and –
(c) To the more highly developed portion of each community, as represented by its more prominent individual members.109

With this view, Lorimer was rejecting the approach of a number of theorists and adopting the direction to be later taken by Combe and Drummond, that of looking for the evidence of natural law in mankind’s potential for development, or the ultimate state to which human society could aspire. He believed that by ignoring what he considered this basic rule of evidence, there had been much fruitless and wasted effort employed to determine the primitive beliefs of mankind and also the opinions of races lacking any evidence of history. He believed that investigators had in fact mistaken the problem by confusing ‘the law of nature in the scientific sense and the laws of the so-called “state of nature”’.110 He commented dismissively that even if beliefs deriving from the earliest

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109 Ibid. 67.
110 Ibid. 67.
stages of social life were discoverable; they would probably be ‘abnormal, exceptional, and evanescent’.\textsuperscript{111}

Lorimer postulated a connection, or at least possible means of human progression between savage society and civilized man, while discounting several other theories. He disagreed with that of Friedrich Schelling (1775–1854), a German philosopher, whom he saw as appearing to be the advocate of a type of prior golden age on the basis that Schelling considered it implausible that man in a modern setting could have been able to raise himself ‘from instinct to consciousness, from animality to rationality’. By inference, civilized man must have always possessed these qualities. Similarly he discounted the opinions of Sir Alexander Grant (1826–84),\textsuperscript{112} from the University of Edinburgh, whom he saw as criticizing the Darwinian hypothesis by claiming that higher races, in additional to the human faculties of savages, must have possessed, ‘an inward impulse which led to the evolution of civilization.’ This was not a feature of savages. Lorimer noted that Grant simply was unable to conceive that Aryans and Semites, what he identified as the world’s first civilization, could ever ‘have taken its start from such a society, in primeval ages’\textsuperscript{113}.

By first dismissing the arguments that supported the clear separation of barbarians and civilized peoples, Lorimer argued significantly that, even putting aside differences between races there was no difficulty in conjecturing that barbarism may have resulted from the same causes that had produced regression in other periods throughout history. He believed that at that time the concept of a linear progression of society was so

\textsuperscript{111} \textit{Ibid.} 68.
\textsuperscript{112} Sir Alexander Grant, American born, but educated in England became Principal of Edinburgh University in 1868. He argued a distinction between the development of savages and civilised races.
\textsuperscript{113} Lorimer, \textit{The Institutes of Law}. 68.
generally accepted, that any thought of regression was overlooked. For him, therefore, there was no difficulty in accepting the universality of natural law and rights regardless of the progress of civilization or lack of it in any country. In theorizing about regression, Lorimer, as a devoutly religious man, may well have had in mind the First Fall as one point where regression occurred. He most certainly had in mind the Reign of Terror waged in the French Revolution. This belief puts the criticisms of his racial views into a different perspective. Lorimer demonstrated his belief that humans were characterised not by their race or being categorised by labels such as ‘barbarian’, ‘primitive’, and ‘civilised’ but by their behaviour, their actions. Supposedly ‘civilised’ man was as capable of regression to behave barbarically as uncivilised man did through lack of exposure to and involvement in civilising processes. Thus the Turks were demonstrating their inferior degree of civilisation through their actions and the prosecution of their religious beliefs, possibly their regression, not through innate racial or religious separateness.

By arguing that continued progression in civilization was not guaranteed, and that regression was always possible, Lorimer further discounted a necessary link between natural law and degree of civilization. Again he distanced himself from Utilitarians whose basis was essentially ‘civilized’ positive law, contract theorists who expected to find a point of first contract, and those who saw a golden age of an idealized ‘state of nature’ inhabited by a ‘noble savage’. His careful presentation of evidence was intended to demonstrate that the extremes of barbarism and regression evident amongst allegedly civilized societies, and formerly civilized ones, showed little difference from the barbarism attributed exclusively to primitive peoples by Schelling and Grant. Lorimer
claimed that Mexico at that time had regressed to a point below the development of the Sandwich Islands; that where Algeria and India had progressed under French and British rule, that the north coast of Africa had never recovered their position under the rule of Tertullian and Augustine; and the degeneracy in South America from the period of the great monuments discovered by the Spaniards. A gruesome example was from the French Reign of Terror, possibly as the most significant example of an extreme degradation, citing a report of a tannery of human skins in Meudon in 1794. These were described as making good wash-leather and breeches; the fair hair was in demand from the common people. While he acknowledged the information as a report, it was his perception rather than its accuracy that was of importance in illustrating his argument.

Further evidence was his reference to the harsh repression of the Paris Commune in 1871 and his fear that France had not recovered from the ‘first Reign of Terror’. In this context the example was of limited value as a gratuitous and less dramatic extension of his graphic eighteenth century example. In the context of the contemporary development of the Law of Nations, however, it was an important though passing allusion to a significant issue of international law. It is evident that although the European powers were concerned with the treatment of and relationship with the colonies and the underdeveloped world, the issue that focused their attention most sharply, given the Crimean War, Treaty of Paris, and the Franco Prussian War was their security in

\[114\] Ibid. 69.
\[115\] Ibid. 70.
\[116\] Ibid. pp. 69-70.
relationship to each other. Drawing upon natural law in the context of international relations became a significant aspect of its use in the nineteenth century.

Lorimer’s involvement in International Law would be evident later. He was at the point of developing his somewhat controversial belief in the application of natural law, and consequently of rights, to different elements of mankind. Pursuing his earlier observations he stated that if we were anthropologically to seek typical characteristics or manifestations of a species, including human, it would be the highest not the lowest that would be studied. Thus, in comprehending the Kosmos, and deducing natural law, Lorimer was prepared to acknowledge that the ability was probably not entirely absent in any human. Nevertheless, he claimed ‘it is in the highest men at the highest times that nature exists in the greatest health and vigour, and it is there and then only that this intuition commonly manifests itself as a self-revealing power’.117 In reference to the contribution of the study of primitive peoples to an understanding of natural law, he disparagingly observed that, viewed as a specimen, ‘if the primitive man resembled a Bushman or an ape, or a spoonful of protoplasm, it would throw less light on the characteristics of humanity than our next-door neighbour’.118 Arguing that the best instructors in anthropology would be the higher races he concluded, ‘For our purposes, the single life of Socrates is of greater value than the whole existence of the negro race’.119 There is little difficulty, therefore, in understanding Lorimer’s dismissal of the concept of an ‘idealised state of nature’ or a ‘noble savage’.

117 Ibid. 71.
118 Ibid. 71.
119 Ibid. 72.
Lorimer set out to determine whether ‘the central creed of humanity has hitherto affirmed or denied the fundamental rectitude of man, and the consequent existence, in his nature, of a law for its guidance’.\textsuperscript{120} He considered over time a number of races and religious groups, including Semitic races, Germanic races, Phoenicians, Carthaginians, Arabs and ancient Greeks using the teaching of Christ and the apostles which he claimed was ‘the only external touchstone by which the accuracy of our natural interpretation of human nature can be tested’.\textsuperscript{121} Despite the specific criticisms he applied to them he concluded that investigation supported the verdicts of Sir Alexander Grant and Professor John Stuart Blackie (1809–95)\textsuperscript{122} in recognizing ‘“a celebration of the beauty of the world, and in a deification of the strong, bright, and brilliant qualities of human nature,” ’ and ‘a recognition of the fundamental rectitude of “the whole nature of man” ’.\textsuperscript{123} He cited as evidence of this, the moral indignation that is felt at sinful behaviour against gods and men; the verdict of the ‘inward judge, and the recognition that the universal conscience is man’s true consciousness of God’.\textsuperscript{124}

It can be seen that Lorimer, in his determination to provide a juridical basis for the concept of natural law, had been involved in an argumentative and evidentiary process to establish the justification for its existence, irrespective of human existence. He then proceeded to look at the means by which humans are informed of natural law and how these should impact on daily lives, not only as laws but also through the rights that are

\textsuperscript{120} Ibid. 74.
\textsuperscript{121} Ibid. 75.
\textsuperscript{122} Professor John Stuart Blackie was Professor of Greek at the University of Edinburgh.
\textsuperscript{123} Lorimer, \textit{The Institutes of Law}. 136. While Lorimer’s conclusions rather than his investigative process are of significance for this investigation, his discussion of the races and religions can be found in the text from pp. 72-136.
\textsuperscript{124} Ibid. 137.
derived from them. From rights Lorimer examined the relationship of duties to both natural law and rights, and to the intrinsic nature of mankind. In examining duties, he was again disputing the opinion of Sir Alexander Grant. Convinced, as he had indicated previously of ‘a radical belief in the self-revealing and self-legislating character of humanity’ Lorimer cited the maxim, or gnome of ‘Simonides that justice consists in “paying one’s debts”’. He noted Grant’s opinion that ‘“It is easy to show this definition inadequate, and yet it was a beginning”’. To Lorimer, the ‘beginning’ also included the end, and showed how, ‘entirely our whole duty, not only to our neighbours, but to God and to ourselves, is included in “paying our debts”’. As ‘proof’ that natural virtue preceded Christian virtue he likened Socratic ethics to the ‘central doctrine of humanity’, referred to the period from Alexander of Hales to Occam, including Aquinas as a ‘complete alliance between the Church and the Aristotelians – a proclamation of the doctrine that the truth of reason is essentially one with divine truth.’ He concluded that ‘“The Christian graces of Faith, Hope, and Charity, are but the complement of the old cardinal virtues of Prudence, Justice, Temperance and Fortitude”’. He believed that this divine character of the law of nature traced through Aquinas, Dominic de Soto, Suarez, Bacon and Grotius. He argued that Martin Luther, for example, in fact opened Christianity further to the law of nature by appealing from ‘the dogma of the church to the dogma of Scripture’. By throwing open the Bible to all, it was as if God then selected his own interpreters. There was something in this argument to upset everyone:

125 Ibid. 138.
126 Ibid. 139.
127 Ibid. 169.
128 Ibid. 170.
129 Ibid. 173.
Catholic and Protestant churchmen alike who are shown throughout to have guarded so jealously their exclusivity in Christian and biblical interpretation. It showed similarity to Drummond’s view which claimed that ‘popish priests annihilate all personal responsibility, and use the hierarchy appointed by God to exalt themselves and oppress the laity’.\footnote{Drummond, \textit{On the Future Destinies of the Celestial Bodies}. 19.} Lorimer particularly saw the churches’ doctrine of universal priesthood, while arguably better demonstrated in theory than in practice, as a ‘bold and emphatic proclamation of the divine element in humanity’.\footnote{Lorimer, \textit{The Institutes of Law}. 173.} He believed that theologians had created a scientific basis for ethics and jurisprudence. Regardless of the sometimes controversial nature of his interpretations, Lorimer’s earnest exposition of his beliefs did nothing to support the view that a role for natural law had disappeared in the nineteenth century Britain. It must also be kept in mind that Lorimer, despite his obvious Christian devotion, was not approaching his argument from a religious or theological viewpoint but from a juridical one.

Having argued the progression from natural law to rights and duties, Lorimer considered the types of rights that he believed Nature revealed. Initially he stated that our nature negatives any rights on the part on the created from the Creator, and that it placed no obligations on the Creator. Because of this absence of primary rights, he argued that jurisprudence is based not on primary rights but on primary facts, and it is by these that all subsequent rights are to be determined.\footnote{Ibid. 205.} In terms of contemporary discussion and disagreement, this observation was significant because, in contrast to the Utilitarians and contract theorists, this structure removed from humans any intrinsic ‘right to rights’,
beyond those that were determined divinely. These alone were what Lorimer acknowledged as ‘natural rights’. They removed ‘our human rights beyond the reach of human volition’ and provided the rules by which positive law determined these rights.\textsuperscript{133} It was a further element of Lorimer’s argument that made much criticism of natural law and rights irrelevant to his conception of it.

Secondly, Lorimer proposed that nature revealed to humans their duties in relation to the Creator. While stating that God had no obligation in duties, people had the duty to show ‘the religious duties of gratitude, adoration, obedience, and faith – or trust in His beneficence’.\textsuperscript{134} He reaffirmed his belief that, in relation to the created, rights precede duties, natural law determined positive law, and the latter prescribed human duties. While he saw rights as received, not inherent in our nature of itself, rights are inherent in the nature that was formed by God. Implied in this was the assumption that the fulfilling and enforcement of these rights was our fundamental duty to God, as well as to ourselves. Lorimer emphasised that rights and duties were in accordance with nature as a whole, so that acts voluntarily performed ‘in opposition to the abnormal and exceptional impulses of our nature’ which were in concord with this concept of ‘nature as a whole’, were the qualities that constituted virtue.\textsuperscript{135} It is particularly interesting that at this point, his consideration of virtue, the language of Lorimer and Bentham and the other Utilitarians converged, despite the fact that the basic premises were quite different. While not using the term ‘universal happiness’ he referred to the popular concept of ‘duties to ourselves’ and argued that these duties, which imply not being an object of self-reproach, should be

\textsuperscript{133} Ibid. 205.
\textsuperscript{134} Ibid. 207.
\textsuperscript{135} Ibid. 211.
considered to extend to behaving with the greatest possible virtue. He argued that the
fulfilment of such duty would be a virtue ‘“to the fullest extent compatible with the
interests of others” because the interests of all are not only reconcilable, but inseparable,
and the highest forms of self-interest and benevolence are ultimately identical’.136
Despite the slight variation in terminology, there was little difference between Lorimer’s
notion of ultimate virtue equating with benevolence and the utilitarian idea of
maximizing the greatest happiness.

Lorimer had expounded his belief that natural laws were divinely instituted and
that natural rights were similarly determined; that the rights and subsequent duties were
an inherent part of God’s creation of man only because of His determination that it be so.
Having most emphatically divorced his thinking from the Utilitarians and contract
theorists, it was necessary for Lorimer to put his analysis of rights into a jurisprudential
context. While fitting the Aristotelian tradition and attributing all natural laws, rights,
and duties to divine imposition, his intent was to establish these as the sole basis for the
development of positive law. For this reason he needed to establish some temporal
framework, based on these divine natural rights, within which positive law could be
ascertained. Lorimer delineated the broad rights, which he claimed nature revealed.
Initially, our actual existence revealed our ‘right to be’: our existence, being self-evident,
constituted an indisputable right, the ‘power of being’. Inherent in ‘the right to be’ was
the right to ‘continue to be’.137 Lorimer saw these as forming the basis for all positive
laws that dealt with the rights to life of all human beings. Nevertheless because of his

136 Ibid. pp. 211-212.
137 Ibid. 213.
earlier argument, this right had no validity against God, and so immortality was contrary to the divine structuring of the universe; instead man had the right to die.

Extending from the rights to live and to continue to do so, Lorimer argued that these implied ‘a right to the conditions of existence’.\(^{138}\) Here Lorimer addressed what was, while not exclusively so, a fundamental nineteenth century European concern – the idea of property. His grounding of positive law in natural law, intentionally or not, became a justification for European expansionism and colonial consolidation. It remained the fundamental irony of natural law that it could be used with equal force both to support and refute European expansion. In the same way that deVitiora’s\(^{139}\) writings had been used as justification by both the supporters and opponents of Spanish conquests, Lorimer’s arguments seemed to provide both conditional support for and opposition to European colonisation at the same time. His arguments, however, provided no justification for intra-European conflict and territorial acquisition, an issue of some possible reassurance to those attempting to codify international law. Some of these problems included:

the revolutionary fervour of 1848, which Britain managed to avoid; Crimean War (1854–56); Prussia’s victory over Austria in 1866; and the ‘potential bellicosity; of Napoleon III; post 1880, the Midlothian campaign 1879–80; the rise of a unified Germany; post-Civil War dynamism of the United States; the threat of Russia in the East; war in South Africa; along with the march of socialism;\(^{140}\)

\(^{138}\) Ibid. 215.

\(^{139}\) Francisco de Vitoria (c.1483–1546) was Prime Professor of Theology at the University of Salamanca and founded the School of Salamanca, which created a moral philosophy based upon an Aristotelian and Thomist interpretation of the law of nature. See Anthony Pagden, “Dispossessing the Barbarian: the Language of Spanish Thomism and the Debate over the Property Rights of the American Indians” pp.79-98. in The Languages of Political Theory in Early Modern Europe edited by Anthony Pagden. (Cambridge: Cambridge University Press, 1987).

\(^{140}\) See Bell, Victorian Visions of Global Order : Empire and International Relations in Nineteenth-Century Political Thought. pp. 6-8.
Lorimer’s sense of the fundamental role of property was unambiguous. Property should be seen ‘in its inseparable connection, not only with the life of man, but also with organic existence altogether’. Importantly then, like all other aspects of natural law, he believed that laws of property also predated human existence. Again the origin predated those of the Utilitarians and contract theorists.

It was in the higher order animals that Lorimer saw voluntary activity demonstrating the relationship between power [possessed by all animals] and right [a human consciousness, which was the basis of the idea of human justice. He differentiated between the needless destruction of a worm or flower as being insignificant on the one hand, and the sense of cruelty in similar treatment of a horse or dog on the other – a violation by man of their rights. It is significant that Lorimer attributed this belief to ‘natural feelings, rather than to any real belief in a metempsychosis’ that involved a doctrine of the absolute sacredness of human life. Again, for him these innate feelings or beliefs preceded any received religion, even though he acknowledged that the latter had been given credit for them in a multitude of varied historical circumstances. The natural extension of this discussion was the taking away by humans of other human life. It is reasonable to assume that his reference to ‘taking away’ of life implied ownership and thus in this context one’s life constituted a form of property. This belief in an ownership of self was a further rejection of what Waldron referred to as ‘the extreme materialistic view taken by Jeremy Bentham who insists that all talk of incorporeal

141 Lorimer, The Institutes of Law. 216.  
142 Ibid. 219.
property is ‘fictitious’ ‘figurative’ ‘improper’ and ‘loose and indefinite’. While acknowledging that Professor Karl Roeder (Röder) (1806–79), and other writers belonging to the school of Krause, expressed the opinion that as life could be taken by God only, every voluntary destruction of human life violated natural law, Lorimer felt that their views were based on a confusion of natural and positive law. At issue here was the morality of capital punishment. His explanation was an intriguing one. As natural law was based on the rectitude of human nature, it was, of necessity, absolute. A law punishing capitally, was positive – realised in a particular time and place. Lorimer explained, ‘The positive law which says a killer shall be killed, is absolute only in so far as it tends to prevent killing, and thus to realize the natural law’. He believed that if there were a cheaper and easier means of vindicating the absolute law, then capital punishment would be forbidden. Although at that time his explanation appeared to overlook the most frequently arising issues in the taking of human life, those of warfare, he provided one other defence of life taking. Capital punishment could be denied on the grounds that God gives life, society does not; so God takes it away righteously, society does not. Lorimer believed that to subscribe to this argument was to admit it as an argument against every form of punishment, because every form of punishment was a greater or lesser implementation of exactly the same principle. His justification seemed consistent with deprivation of life as a form of deprivation of property: life, wealth, possessions, comfort, liberty, and time. He saw the same issue of positive law, being an

144 Karl Krause (1781–1832) a German philosopher, a contemporary Schelling and Hegel, who addressed the philosophical underpinnings of social identity.
145 Lorimer, *The Institutes of Law*. 219, 1n.
imperfect attempt to implement natural law, applying to all. Controversially, he even applied his logic about the deprivation of life to vivisection. Although he conceded his opinion was only a hypothetical one, that if the suffering and loss of life caused by vivisection could be shown to diminish suffering and save lives, particularly life of a higher kind – ‘on the whole, then, to the extent to which it does so, it is justified, but not otherwise or farther’.  

Although Lorimer’s position on vivisection was certainly a provocative one it was one that had little community impact. Of far greater historical importance were his views on human inequality and the social and political implications of this inequality particularly in relation to his presumptions about international law. He felt firstly that rights deriving from organized life were not confined to animal life. He was prepared to concede that, in a sense, a tree, as an organic being preserving its separate existence, could be considered as having a form of property right, although this was clearly a very limited one. LL. Weinreb would not accept Lorimer’s interpretation of natural rights as Weinreb limited natural rights to humans alone. Where Lorimer argued that a tree had rights up to the limits of its capabilities, Weinreb argues that ‘if it is accepted that all, and only, human beings are self-determining, the categories of natural rights and human rights are equivalent’. While not consigning uncivilized peoples to the level of trees, Lorimer plainly identified their rights as inferior to those of civilized peoples. Where the rights of a tree could be regarded as inferior to those of a barking dog, and both inferior

147 Ibid. 223.
148 Ibid. 217.
to those of a human being, Lorimer stressed that, because each had rights up to the limits of development they were not interchangeable. He argued that the rights of man and his potential for development exceeded those of other animals, including apes; in direct proportion to the extent his capacity for development exceeded theirs.

Although these arguments concerning the relative rights of animals and humans were intriguing they were not particularly controversial. Lorimer’s extension of this logic was more singular. Close analysis reveals that his observations were still consistent with his previously expressed views on the application of natural law and rights to all human beings. Nevertheless he opened his thinking to widely divergent interpretations when he said that ‘the same law holds true in reference to individual members and races of the human species’.150 His following statement seemed to cement the impression of a division of inferior and superior racial types when he claimed, ‘It is no more possible to bring natural inequalities to a level by means of education, than to teach music to the deaf or painting to the blind’.151 Yet as racially divisive as these statements appeared, Lorimer’s focus on both individual members as well as races of the human species suggests that he saw the issue on a far more individual level, and that the inequalities of races were more the result of an aggregation of their strengths or deficiencies than an essential component of a particular race.

Lorimer’s continued argument supports this conclusion. He acknowledged firstly that physical growth of an individual depended on parents and a few of those immediately surrounding the person. On the other hand, he stated that ‘the spiritual

151 Ibid. 223.
maturity of a single individual, in so far as it is attainable at all, will be the result of the past and present efforts of the whole human family’.\textsuperscript{152} This focusing on the individual in relation to all humanity, calls into dispute generalised assumptions about the ideas underlying Lorimer’s divisions of racial rights and duties. Although he clearly saw races as more or less developed, and therefore more or less inferior, these statements suggest Lorimer based his divisions on an accumulation of individual genetic inequalities within a race rather than an essential racially based genetic inferiority.

His reasoning showed how Darwinian thinking could be used to support natural law. Lorimer distinguished man from the lower creatures whom he described as having a stationary existence. Man, he believed, was not offered this option; rather he had the choice between either progress or moral and intellectual decay leading to extinction. The undeveloped ‘species’ would not survive. Progress, he saw in people ‘on whom the widest range of historical influences has been brought to bear’.\textsuperscript{153} Lorimer was therefore claiming that while individuals demonstrated genetic and historical differences in ability, superior or inferior races were the result of the combination of the aggregation of these abilities and of historical influences, or lack of them. Where these inequalities had been established, as he noted above, education would not undo them. This thinking was consistent with his rejection of any value in the study of natural law in a ‘state of nature’.

Lorimer established what he believed to be a link between education, rights and powers. A human being had a right to demand such education ‘as he has the capacity to

\textsuperscript{152} Ibid. pp. 223-224. 
\textsuperscript{153} Ibid. 224.
receive’. This would account for his view of the futility of educating savages. He saw education as a right, up to the point of capacity and no further. This provided a significant link to the character of natural rights. ‘All questions as to rights thus resolve themselves into questions as to capacities or powers. Till the presence of these has been established, the rights do not emerge’. Thus for Lorimer, the degrees of natural rights were conditional on a human being’s stage of development. Essentially Lorimer saw natural law as having universal application to all human beings, while natural rights existed only in relation to a person’s ability, capacity and power to exercise them.

Lorimer’s affirmation of Charles Darwin’s theories of natural selection and their appropriateness in a Christian context were clearly shown in his belief ‘that the right to be involves the right to reproduce and multiply our being’. Acknowledging the natural imperative in biblical phrasing he continued with a Darwinian observation that ‘the object of nature, throughout seems to be the reproduction of the same type, not deteriorated, but, if possible improved by individual selection’.

The linking of human rights to property rights noted earlier, underpinned much of Lorimer’s further explanation of natural rights. It would have great significance in his interpretation of international law. He linked the right to life and its transmission to a right of passing on conditions of living. His linking of life and property was emphatic. ‘The right to possess property springs from the right to possess life’. A duty to children

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154 Ibid. 225.
155 Ibid. 225.
156 Ibid. 226.
158 Ibid. 229.
was a right in the parent. He saw it as a right to possess and dispose of property; it was God’s gift ‘it is God alone who can take it away’.  

Lorimer’s most significant conclusion from his juridical argument addressed the international law issue that had preoccupied Europe from the time of Spanish conquests and the writings of de Vitoria – the occupation of foreign lands. His premise was that the rights of a proprietor were limited only by his capacities of use and enjoyment. He illustrated this with the rather intriguing arguments that a blind man was not entitled to burn his library or picture gallery because he couldn’t use it, nor could a total abstainer build up a cellar: either his belief should bind him to destroy it, or to otherwise share it if he didn’t condemn drinking in others. The essence of Lorimer’s case was that ownership of any property, under natural law, implied obligation of use, not just proclamation. This had considerable significance for his position on international law. He affirmed ‘the inseparable relation between rights and powers of use and enjoyment’. When he transferred this reasoning to the area of international law he applied it to foreign occupation.

On the basis of the previous argument he emphatically supported the generally accepted view that possession did not mean the mere exclusion of others. The right of ownership was not conferred if the sole intent was to exclude others from its enjoyment. Thus international law determined that ‘an unoccupied country cannot be acquired, even by the first discoverer, by a proclamation, the setting up of a flag, or the like, but must be actually taken possession of, and occupied’. He proclaimed ‘the inseparable relation

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159 Ibid. 231.
160 Ibid. 231.
161 Ibid. 231.
between rights and powers of use and enjoyment’. Thus Lorimer developed his strong juridical link between natural law and the rights it conferred on humans on the basis of their capacities and powers; this link extended from personal property to territorial acquisitions internationally.

Lorimer determined that ‘all of our subjective rights resolve themselves into the right to liberty’. Not only did he argue that the right to liberty embraced the other rights, but it transcended them. He saw liberty as having two complementary sides: the right to exercise our subjective powers, that is not to be hindered; but also the right to be helped. Thus the right to liberty had both active and subjective elements. While a person had the right not to be hindered, this obversely implied the obligation (another form of right) not to hinder others. Where there was the right to be aided, then this determined the obligation to aid others. This interrelationship of rights, duties and obligations formed, for Lorimer, the basis of positive jurisprudence. He didn’t believe that human rights were absolute and unlimited – these rights and powers exclusively belonged to God. For humans it was the right to be allowed free exercise and development of our physical and rational powers within the confines set by God. The greatest limitation of these powers was death.

Significantly, once again, Lorimer countered Utilitarian thinking when he described his limitations on rights. Where utilitarian thinking indicated that subjective rights were limited by the exercise by others of their rights, he disagreed. He claimed

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162 Ibid. 231.
163 Ibid. 235.
instead that they were limited ‘in their own nature’. \footnote{Ibid. 236.} When death caused the powers to cease, the rights also became nonexistent. The principle of order demanded the recognition of the rights of others as much as the exercise of one’s own. He concluded that that order was not, as despotic governments had maintained, an end in itself, but a means of ensuring liberty.

Lorimer believed that a science of jurisprudence could only be possible if the objective rights of man derived from the same source as subjective rights. He stated that ‘Nature reveals \textit{objective rights which exactly correspond to our subjective rights}'. \footnote{Ibid. 238.} This formed part of his contradiction of utilitarianism and the Hobbesian modern interpretation of natural law as a doctrine of ‘human selfishness’. He subscribed to the dictum of Grotius, ‘it is false to say that, by nature, every animal is impelled to seek only its own advantage'. \footnote{Hugonis Grotii, \textit{De jure belli et pacis libri tres}. Prolegomena vi. Cited in Lorimer, \textit{The Institutes of Law}. 239.} Again his position on natural law theory was traditionally Aristotelian. He argued, in fact, that the principles of the ‘selfish’ system were self-repudiating. The rights of the Ego were not self-vindicating; an essential obligation imposed on them by nature was the provision of voluntary aid to other forms of created existence, including, of course, mankind. Thus the rights of the Ego guaranteed the rights of others. His argument didn’t stop at that point, however. The recognition of another’s human life, of necessity, involved the recognition of the conditions of that person’s life – the person’s rights. He considered that any other position implied a contradiction. The fulfilment of a person’s rights was inextricably linked to the implementation of the rights
of others. Again he stressed that that the recognition of objective (or general) rights, as well as our subjective (or personal) rights and those of others, depended neither on a sense of one’s own interests, nor ‘a voluntary tenderness for those of others’. Neither did it depend on any contract, nor on any man-made law, but ‘its roots are in a nature of which we all were passive recipients…of which none of us has or can have the slightest control’.  

This intrinsic correspondence of the rights and duties of oneself and others was the justification for all the laws of war and of criminal behaviour, particularly concerning restraint and punishment. Again Lorimer was carefully using juridical argument to distance his position not only from that of the utilitarians and the contract theorists but also those proposing a Hobbesian modern interpretation of natural law theory.

Lorimer offered an explanation of the evolution of and human cognizance of natural law. Having determined that rights and duties had a necessary interdependence as a result of our ethical nature, he concurred with Rousseau that, anterior to our reasoning came two principles: one supporting our own well being and self-preservation, and the other demonstrating a repugnance to the suffering of other beings. He acknowledged that it very much resembled the concept of ‘conscience’. Lorimer continued to explain the means by which he believed that humans became cognizant of these laws. He determined firstly that ‘Natural laws are rational inferences from the facts of nature’. He claimed our consciousness revealed to us neither abstract nor concrete law. Nature revealed to us that all organized existences, particularly humans, possessed individual

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168 Ibid. 243.
169 Ibid. 244.
powers, with correspondent individual rights. This was a reinforcement of his earlier position that saw rights as consistent with powers. He then addressed the question posed by this statement, as to how natural laws would be determined. He saw natural laws as ‘necessary inferences from the facts of nature’.\(^\text{170}\) He referred to the moment of recognizing an objective existence as a moment when recognition of its proportional rights was forced upon us. He considered that knowledge of natural law was intuitive and that while there would be different degrees of recognition from one person to another; ‘each man will recognize them more and more as he becomes more and more of a man – becomes, as we say, more “humane”’.\(^\text{171}\) This position was entirely consistent with Lorimer’s focus on individuals rather than races, and was his explanation of why savages, without the experiences and history of more developed races, would, of necessity, have a lesser cognizance of natural laws, and thus remain ‘more savage’. It was further evidence of the futility of trying to discover a noble savage in a primitive environment. He emphasized again that knowledge of the facts of nature, and an understanding of natural laws was independent of our volition.

The belief that for Lorimer, as a jurist, was central to his thinking, and at the heart of his argument, was that ‘natural laws determine the ultimate objects of positive laws, and fix the principles of jurisprudence as a whole’.\(^\text{172}\) [My emphasis] For this reason he stated that ‘what we call natural or abstract laws are a statement of the necessary’.\(^\text{173}\) They fixed, in his view, the permanent conditions in which positive laws were to be

\(^{170}\) Ibid. 245.  
\(^{171}\) Ibid. 246.  
\(^{172}\) Ibid. 247.  
\(^{173}\) Ibid. 247.
determined. He saw a clear juridical structure developing natural law into positive law and ultimately to its judicial interpretation. He divided the principles of jurisprudence into three stages: ‘natural laws, or principles in the abstract’; principles of legislation, *(i.e., the framing of positive laws)*; and principles of jurisdiction, *(i.e., the applying of positive laws to specific cases).* 174

The centrality of this belief to Lorimer’s thinking accounts for his fierce criticism of the beliefs of Bentham, Mill and the utilitarians, to contract theorists and to those who saw laws originating from an idealized state of nature. No law, in his views, could have any credibility without a basis in natural law. Because natural law was beyond human volition and its comprehension was linked to human development, any lack of implementation in savage or primitive societies could be attributed, not to its non-existence, but to human ignorance. He expressed some unease that whilst positive law was studied with infinite care, less effort was made to overcome what he saw as of far greater concern, ignorance of the laws of nature. As previously noted, while he didn’t reject the validity of positive law that was in opposition to natural law, he did insist that such law demanded immediate repeal. 175

In stressing the universal applicability of natural law he drew on his characteristic example of a distant, and, in European conception, lesser civilization, China. While any similarity between Chinese and British heraldry, for example, would be a ‘wonderful’ but quite unexpected coincidence, any divergence of Chinese science from European science would mean it was no science at all. Demonstrating his customary prejudice he noted that

the same scientific rules would apply to their chemistry, physiology, and their psychology ‘at least to the extent to which the bodies and souls of Chinamen resemble those of other human beings’.\textsuperscript{176} Natural law applied to them equally, and though it remained constant, human interpretation was subject to many errors. Interpretation of natural law differed ‘in proportion to the extent to which they are the result of differences of original genius or of stages of intellectual and moral development in the people, or of climate and other conditions of inanimate nature’.\textsuperscript{177} Basically he argued that two congruent nations would have congruency in their positive interpretation of natural law. The underlying imperative for all nations was, in the Aristotelian tradition, to bring positive laws as nearly as possible into conformity with the principles of natural law. In this regard Lorimer believed that history held out no hope that ‘the upward progress of humanity will ever be otherwise than intermittent and indirect’.\textsuperscript{178} The latter statement indicated his cyclical rather than linear view of history.

Stating that all human laws were merely declaratory he agreed with Burke that it would be hard to find an error more subversive to the peace and happiness of society than to claim ‘“that any body of men have a right to make what laws they please”’ or that laws could derive their authority ‘“from their institution merely, and independent of the quality of their subject-matter”’. He argued, therefore, that while humans may alter the mode and application of laws, they ‘“have no power over the substance of original

\textsuperscript{176} Ibid. 252.
\textsuperscript{177} Ibid. 253.
\textsuperscript{178} Ibid. 255.
The implications of this for Lorimer were profound. Having determined that laws were inferences from powers and rights he then considered it was obvious that powers and rights couldn’t owe their origins to laws. He therefore condemned what he considered an absurd popular belief, even held by jurists and philosophers ‘that rights may be “conferred,” “constituted,” “modified,” “limited,” “adapted,” and even “altered” by law’. He acknowledged that such action could be taken nominally but only because anything, however absurd, could be done. Nevertheless rather than changing rights he believed it would ‘outrage them’ and ‘proclaim falsehoods’.

These arguments demonstrated his very specific interpretation of natural law and rights underscoring his belief that it was from the origins of natural law, and its primary role in the ordering of the universe, that all rights duties and obligations were derived. Again it was his assumption that these preceded all human existence that set him apart from and in opposition to the utilitarians and the contract law theorists. Rights were neither determined nor proscribed by those of others, nor were they the result of a primitive contract. They developed from natural law of divine determination and were beyond human intervention.

Lorimer would have found little objection to his belief that in international law the *de facto* existence of a state was grounds for *de jure* recognition. Similarly in

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unappropriated territories it was widely accepted that evidence of actual possession *and use* would be required to precede a claim to exclusive title. Because Papal Bulls dividing territory in earlier times were not based on the elements of fact that he believed rights required; they had to be dismissed as violating natural rights. The legitimacy of claims in savage and semi-civilised nations became far more complex because, while Lorimer claimed rights were beyond human determination; their interpretation depended on a very human definition of use. This was of particular significance as the definition was the basis for allowing, limiting, or proscribing rights. Lorimer’s definition was predictably European and ‘civilised’. Duncan Bell points out that ‘the most important divide separated the *civilized* and the *non-civilised* [savage or barbarian] spheres. And it was argued that the relations between civilised communities should assume a very different form from those governing the relations between the civilised and non-civilised’.  

Lorimer argued that even partial occupation ‘is held to confer an exclusive right only to such portions of territory as are actually occupied industrially, and not simply wandered over, or occasionally resorted to as hunting-ground or pasturage’. Because Lorimer’s concept of rights depended on power, this statement reinforced his principle that variations in natural rights were based on the differences in the power of people to utilize and enforce them. He saw two errors that affected international legislation – those of permanence and equality. Both errors would be removed by acknowledging that: ‘there is no right which does not arise from, and continue to depend upon, power’ and also that the

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‘law cannot carry a proprietary relation beyond the bounds of its possible exercise’.\textsuperscript{184}

There could be construed from this a clear justification for imperial expansion at the expense of ‘savages’ while Lorimer acknowledged that the application was far more difficult in the case of the ‘civilized community’. He would have been particularly mindful of the justification for territorial disputes within Europe. He again linked the concepts of laws, rights and individual property, where the law could only be based upon what ‘alone can be \textit{declared} to be his which \textit{is} his, and that alone is his which he \textit{has made}, and \textit{continues to make}, his’.\textsuperscript{185}

Lorimer made a fine distinction between peoples in explaining his view that all organic things had natural rights that all humans had natural rights, but that amongst humans there were different degrees of rights. His explanation confirms my belief that his discrimination amongst peoples was neither racial nor between peoples as such, but rather between individuals where a people was merely the aggregation of the strengths or deficiencies of the individuals within it. The importance of this argument is that, while it doesn’t imply that Lorimer believed progress amongst savages would ever be significant, it didn’t exclude from his thinking that, given a different mix of heredity and environmental factors within individual members, all people were capable of greater levels of civilisation. While stating that a civilized community or a cultivated man was better able to enjoy objects than undeveloped community or individual, he noted that within the same community ‘those who are more or less gifted by nature and developed by education, stand in precisely the same relation to each other, in kind, as the rights of

\textsuperscript{184} \textit{Ibid.} 261.
\textsuperscript{185} \textit{Ibid.} 261.
superior and inferior, or of the civilized and savage races of mankind'. 186 Once more Lorimer singled out individuals from groups, while not limiting internal differences to civilized communities; undeveloped communities would also contain these differences. In referring to the ‘error’ of over-energising peoples beyond their capabilities and the need to bring them back to conformity with natural law’ he considered the ‘case of individuals, of classes, or of communities’, once more referring to individuals specifically. 187

While further explicating his belief in varied natural rights Lorimer declared that ‘All men being equally men, and as such capable of energizing humanly – i.e., of using and enjoying the means of human existence – are equally entitled to use and enjoy them’. 188 He made no distinction between the intrinsic nature of rights available to savages or civilized people. Nevertheless in linking actual rights to powers he further claimed ‘All men not being equal men, are not capable of energising equally …all men, consequently, are not entitled to the same means of energising’, or in other words, the same natural rights. 189 Lorimer was profoundly antisocialist claiming that any attempts to use legislative enactment to equalize distribution of means would be ‘a sin against nature’. 190 While admitting that he was sensible of the danger of ‘“society becoming top-heavy with unbounded wealth at the top and discontent, poverty and comparative
barbarism at the bottom”, he said he shrank from most of the remedies that were proposed.\footnote{Review in \textit{Glasgow Herald}, July 25, 1871. Cited in Lorimer, \textit{The Institutes of Law}. 267.}

The issue of rights being proportionate to powers that would, by definition, limit one’s rights concerning unlimited acquisition of property, seemed to trouble Lorimer. On the one hand, excessive possession of property would lead to a waste of means. Such acquisition would exceed the person’s natural rights. On the other hand he had stated that, on the basis of his juridical argument, legislating redistribution would sin against nature. This conundrum of Lorimer’s own making appeared to have no solution that would not invalidate his own arguments. His resolution was a technically possible, but highly unlikely one. ‘No substantial loss of physical enjoyment would, I believe, be demanded by a voluntary \textit{[my emphasis]} redistribution of wealth which would remove all force from the argument that a waste of means resulted from the accumulation of property’.\footnote{Lorimer, \textit{The Institutes of Law}. 267.}

When claiming that there were limits to what was reasonable to desire or to expend, he ironically proclaimed what he saw as the one proper use of utilitarianism: at the point where use ceased and waste began, utilitarian principles could be turned to their true use – ‘that, namely, of guiding us to the means by which natural law is realized’.\footnote{Ibid. 268.}

His claim to the added benefits of voluntary redistribution further reinforced my argument that his identification of uncivilized behaviour was attributable to individuals, and aggregations of them, rather than racial groups. He believed that such redistribution would increase the numbers of the cultivated classes, thus, ‘a really trustworthy barrier would be erected against those barbarian influences from within, – that “republic from
below,” as the Spaniards call it’.\textsuperscript{194} Clearly Lorimer was more concerned about the ‘barbarians’ within his own society, or racial group, than he was about those in uncivilized communities, as he feared the former would ‘endanger the upward progress of humanity far more seriously than any barbarian aggression from without’.\textsuperscript{195}

Lorimer was not one to confuse natural laws and rights. He saw property rights as having temporal as well as local limits. Because he linked rights to powers, changes of power over time would redefine rights, thus ‘permanency, when applied to human rights, becomes almost as unmeaning a word as infinitude’.\textsuperscript{196} An old right would either be extinguished, or transmuted to a new right. ‘So long as, and to the full extent to which, the facts on which rights of property formerly rested remain unchanged, these rights are inviolable; but no longer, and no farther’.\textsuperscript{197} One can speculate that had such thinking been enforceable centuries earlier, the Hundred Years War would have been redundant.

Prior to concluding his analysis of the general principles of natural law and rights Lorimer, having earlier shown his rejection of socialism, demonstrated a preference for what would be later referred to as a free market economy. Consistent with his interpretation of natural rights he argued that the price a seller could obtain for a product uninhibited by legislative interference was the pecuniary measure of his right. ‘Law could not change the price of any commodity’.\textsuperscript{198} He argued, ‘if a nominal price be set on it, or a right in it be “constituted by law,” different from its market value, a wrong is done’.\textsuperscript{199} He summed up his position on the principles of the science of jurisprudence by stating,

\textsuperscript{194} Ibid. 267.  
\textsuperscript{195} Ibid. 267.  
\textsuperscript{196} Ibid. 270.  
\textsuperscript{197} Ibid. 270. Discussed previously in Lorimer, The Institutes of Law. 215.  
\textsuperscript{198} Ibid. 274.  
\textsuperscript{199} Ibid. 275.
‘that the object of that science is not to redistribute God’s gifts according to any principle, either just or unjust, but to discover and to recognize the distribution which He has made’.  

Lorimer, thus, proved himself to be a particularly strong advocate of natural law and natural rights in the Aristotelian tradition. In fiercely opposing utilitarians and contract theorists, his particular juridical interpretation of the concepts lessened his exposure to a number of the criticisms frequently levelled at natural law supporters. He brought these convictions also to his involvement in the framing of International Law.

200 Ibid. 276.
CHAPTER FOUR: DENIS CAULFEILD HERON

Denis Caulfeild Heron (1824–81) was an Irish Catholic lawyer, QC, university professor and politician.\(^1\) Heron (1849–59) and Hugh Law (1849–59) were the first professors in the Law Faculty at Queens College Galway (QCG). Liam O’Malley notes that both ‘appear to have been scholars of exceptional talent, industry and dedication’.\(^2\) Law was head of the Irish Liberals and was Lord Chancellor of Ireland when he died in 1883. Caulfeild Heron was the college’s first Professor of Jurisprudence and Political Economy. He was the author of books on economics and jurisprudence. He was the first college examiner for Jurisprudence and Political Economy, sometime acting Dean of the Law Faculty, becoming a Sergeant-at-Law and also MP for Tipperary. As a student, his time at Trinity College Dublin was marked by controversy. His Catholicism, and therefore his refusal to make the mandatory religious declaration against transubstantiation, prevented his obtaining one of sixteen foundation scholarships at Trinity even though he was fifth in order of merit. He was nevertheless awarded a BA, a LLB and finally a LLD in 1857.\(^3\) An early personal involvement with judicial matters was as result of this failure to receive a scholarship when he appealed to the visitors; his case being heard on the eleventh and twelfth of December 1845.

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\(^1\) There is variation in the spelling of Caulfeild, being written ‘Caulfield’ in the Oxford Dictionary of National Biography and in The Times. I have chosen the spelling that appeared in Heron’s own work as possibly more appropriate. O’Malley notes that while he was known as Caufield earlier, it changed to Caufeild about 1860 in both reports and his published works.


appeal body was impressive as the case was one which could be seen as setting a precedent for future similar claims on the university. It was:

Argued before their Graces The Lord Primate of All Ireland and the Archbishop of Dublin, Visitors, and the Right Hon. the Judge of the Prerogative Court, their Assessor, at a Visitation holden in the Dining Hall of the College, on the 11th and 12th days of December, 1845.4

The determination was ultimately not in Heron’s favour, the visitors finding that whilst Heron’s argument, concerning the influence of his being Catholic, yet being a superior applicant, had merit, the freedom of the electors to make their own individual choices was paramount. To what extent this experience influenced Heron’s later outlook is uncertain, but it demonstrated the religious division in Ireland that paralleled a similar division in Britain as a whole, evident in the conflict over transubstantiation, and over Papal rights, which fuelled the Twiss-Bowyer exchange. Philip Schofield in the Oxford Dictionary of National Biography (2004) observed that Heron subsequently pressed the case for separate universities for Catholics in Ireland.5

Heron’s writing of An Introduction to the History of Jurisprudence (1860) could well have been catalysed by the difficulties reported in the teaching of Jurisprudence in the other QCG colleges at Cork and Belfast. The views of Professor Mills from Cork are instructive regarding the general ambiguity of understanding of Jurisprudence. When questioned by members of the Queens College Commission as to what he taught in jurisprudence he indicated he found the subject indefinite. He stated that:

There are almost no books upon Jurisprudence. There is such a variety of subjects

4 John Francis Waller, Report of the Case of Denis Caulfield Heron, Appellant against the Provost and Senior Fellows of Trinity College Dublin. (Dublin: Grant and Bolton, 1846). 11. Waller was himself a Barrister-at-Law, preparing the report for Lord John George, Archbishop of Armagh.
comprised under the term Jurisprudence, that it is not very easy to know what to teach. The London University, so indefinite is the subject, calls it the Science of Legislation, and the book they examine on is Bentham. In other Colleges they take selections from Whewell’s *Elements of Morality*, parts of Justinian, and some German authors. In the Queen’s Colleges there is greatly in use a book called Reddie’s *Inquiries in the Science of Law*, but none of us think it a very desirable book if better could be had. ...  

The book to which Mills was referring was, in fact, the book by James Reddie *Inquiries in the Science of Law* (1847), which was discussed in the earlier chapter on James Lorimer. The Scottish writer’s arguments against the views of his son, John, and utilitarians such as Bentham, proved to be equally relevant in reference to Irish Jurisprudence, however imperfect it was judged to be by Mills. Of particular importance was Reddie’s belief in and support of natural law. Of interest also was the fact that at that stage, London University largely interpreted jurisprudence in terms of Bentham’s writing.

In writing his *Introduction to the History of Jurisprudence* in 1860, Caufeild Heron acknowledged ‘“I have taken whatever appeared most valuable from the works of former writers”’. Although an unsurprising admission it did acknowledge his intent to reflect on the impact of those writers on the nature of contemporary law as he understood it. The significance of this understanding was his belief in natural law theory. As did a number of later century jurists, Heron saw no conflict between an acknowledgement of the role of natural law, and the growth of positive law. Also, unlike John Austin, he could accept both the underpinning function of natural law, and its ability to exist without a sovereign to enforce it. While seeing different functions for natural and positive law, he

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7 D. Caulfeild Heron, *An Introduction to the History of Jurisprudence* (London: John W. Parker and Sons, 1860). iii.
could also accept that they required different definitions. He was comfortable with their conflation with the growth of Common Law, tracing, as he did, its development back to the ancient Greek and Roman law, through the Salamanca school, to contemporary jurists and philosophers.\textsuperscript{8} Heron approached the concept of law with considerable flexibility: where John Austin argued that natural law was merely divine law misnamed, Heron saw clear division between the two. Charles Foster, James Lorimer, and Robert Phillimore identified natural, international and positive laws, while seeing natural law as an extension of the law of the Deity, partly explicated through Christian received law. Martti Koskenniemi observed that ‘British lawyers such as Lorimer or Sir Robert Phillimore (1810–90) argued on the basis of God’s will and natural reason’.\textsuperscript{9} The religious preoccupation of Henry Drummond and the scientific emphasis of George Combe while carefully linking divine and natural law with its implications for man-made law restricted their individual focus and consequently limited the extent of their analysis. Heron clearly determined four ‘great divisions of Law...Divine Law, Natural Law, International Law, and Positive Law’.\textsuperscript{10}

It was significant that Heron distinguished between his definitions of Law and Jurisprudence. It was part of his capacity to accept the coexistence of both natural law and elements of the utilitarianism of Bentham. ‘Jurisprudence is the Science of Positive Laws’.\textsuperscript{11} Interestingly where Mackintosh and Foster saw Jurisprudence as a developing science, Heron and Lorimer along with Phillimore could regard its position as a science
confirmed, Phillimore being able to extend this recognition to international law. Heron referred to Bolingbroke’s suggesting that there were two principal vantage grounds to enable a commanding view of the field of Law and Legislation: History and Metaphysics.\textsuperscript{12} This positioned his thinking with Henry Drummond, scientist and evangelist, who saw a linear progression of natural law from the material to the ethereal. An acceptance of the compatibility of natural and positive law required some flexibility in defining the term ‘law’. It was a flexibility that Bentham and Austin rejected once the concept of proclamation by the Deity was questioned. It required an acceptance of the term when applied to: the behaviour of scientific phenomena; received religion; positive law; and an intrinsic sense of morality imbued in the human spirit. It was an acceptance of this flexibility which allowed the continued use of the theory of natural law and rights in varied forms. Heron demonstrated his own flexibility of interpretation when he referred to the use of ‘law’ firstly in relation to the physical laws of matter. He then continued, ‘And the term Law, in its general philosophical sense, is no less applicable to the phenomena of mind than to the phenomena of matter. The processes of the mind are as uniform as the processes of matter’.\textsuperscript{13} Having been willing to broaden the application of ‘law’, Heron had no difficulty with the compatibility of natural and positive law, nor with the dependence of the latter on the former stating:

\begin{quote}
Still, the first principles of Jurisprudence are maxims of reason which pervade all human laws, and the observance of which is discovered by experience to be essential; to happiness and security.\textsuperscript{14}
\end{quote}

\begin{flushleft}
\textsuperscript{12} Ibid. 4. Henry St John, 1\textsuperscript{st} Viscount Bolingbroke (1678–1751), was an English politician and philosopher, who drew on Locke to explain his own understanding of the attainment and limitations of knowledge, and its links to God and religion.
\textsuperscript{13} Ibid. 5.
\textsuperscript{14} Ibid. 4.
\end{flushleft}
While this statement was consistent with natural law theory it was not incompatible with utilitarian or positivist thinking either. Heron, however, confirmed his belief in natural law when, alluding to Francois Guizot, he declared:\textsuperscript{15}

The distinction between moral good and evil – the obligation to shun the evil and do the good – are \textit{laws} which, like the laws of logic, man discovers \textit{in his own nature} [my emphasis], and which have their origin in himself, as they have their application in his actual life. Moral laws are put into a man’s soul or mind as into a treasure or repository, some in his very nature, some in after actions, by education and positive sanction’.\textsuperscript{16}

In the same manner as Foster, Heron drew on Sir James Mackintosh when he distinguished between the physical and moral sciences. Where he saw the role of the physical sciences being to answer the question, ‘what is?’ specifically questions of fact, it was the role of the moral sciences to answer \textit{both} the questions, ‘what is?’ and ‘what ought to be?’ – to determine the rules [\textit{laws}] governing voluntary actions.\textsuperscript{17} It was the application of natural law to the ‘\textit{ought to be}’ that Austin rejected in the writing of Mackintosh. As discussed earlier, it was, in turn, the rejection of this belief that Charles Foster, a former student of Austin, condemned in Austin’s positivist/utilitarian approach.\textsuperscript{18}

Heron mounted a strong defence against the attack of utilitarianism, when in disputing this thinking he asked, ‘Does such a treatment mean that there are no \textit{a priori} or intuitive principles of moral guidance, which, instead of deriving their authority from experience, are fitted and intended to sanction experience?’ He believed this type of

\textsuperscript{15} Francois Pierre Guillaume Guizot (1787–1874) was a French historian orator and statesman.
\textsuperscript{16} Heron, \textit{An Introduction to the History of Jurisprudence}. 20
\textsuperscript{17} Mackintosh, \textit{On the Progress of Ethical Philosophy}. 8. Cited in Heron, \textit{An Introduction to the History of Jurisprudence}. 17.
\textsuperscript{18} Foster, \textit{Natural Law: A Lecture}. 17.
utilitarian logic argued legal principles in reverse – universal moral principles and laws should dictate the development of positive laws to monitor experience; experience should not determine laws, otherwise there is ‘the danger of substituting empirical generalizations and accidental associations for necessary truths and eternal principles’.

When considering the arguments that rejected intrinsic natural law based on the inappropriate behaviour of primitive peoples and children, Heron dismissed them. By analogous argument he likened the imperfect manifestations of moral nature to the physical appearance of goitre or a club-foot. Although both were depressing physical conditions, neither could be regarded as typical physical conditions. Similarly Heron believed that evil behaviour of individuals, tribes, or even nations did not diminish the innate goodness in human beings. With the general assumption of human sociability and human goodness, this was basically a conventionally post-Enlightenment based concept of natural law.

There was one important variation from the conventional concept of natural law which further demonstrated both its continued existence and its undergoing mutations. Where Heron’s thinking was largely consistent with the other jurists mentioned, he differed in accepting that Hobbes’ view had some application:

The theory of Hobbes is not wholly wrong, that, agreeably to the lowest law of Nature, man aims at the injury of his neighbour when a stranger to him. To savages all strangers are enemies; everything unknown is an object of fear.

The importance of this concession by Heron is difficult to underestimate. What were essentially two diametrically opposed general theories of natural law could be

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19 Heron, An Introduction to the History of Jurisprudence. 20.
20 Ibid. 18.
21 Ibid. 49.
argued to coexist in different circumstances. In primitive society, Hobbesian modern natural law theory explained an atmosphere of human hostility to suspected enemies – all people who were strangers. At the same time, traditional natural law explained man’s behaviour in a context of familiarity. His point was that initially, this circle of sympathy extended only to family and immediate associates. As civilisation extended its influence then the circle of familiarity and sympathy extended and the understanding of the natural and moral laws supplanted this thinking. He felt particular evidence of this was the existence in advanced civilisations of poor laws for social outcasts and even humane laws for the treatment of animals.22 These could not have occurred in a state of human selfishness. Where the other theorists, while rejecting Hobbesian thinking, had acknowledged obvious differences in stages of civilisation and barbarism with consequent variations in adherence to natural law, they did not analyse primitive tribal behaviour further. Nor did they specifically investigate the applicability of Hobbesian theory to the behaviour of civilised society when suspicious of strangers Heron, however, applied Hobbes’ modern natural law theory to account for primitive conduct. Heron repeatedly observed, ‘The natural rights of man are Life, Liberty, and Property’.23 Believing that these natural rights existed at the beginnings of civilisation, and could be well accounted for by both traditional and modern natural law theories, he saw that, as civilisation developed with greater complexity, the process of developing positive laws grew. With this in mind he stated, ‘The end of Government is the Security of Rights’.24

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22 Ibid. 49.
23 Ibid. 67.
24 Ibid. 49.
Evidence that, with the growth of nationalism, the notion of ‘civic rights’ or ‘citizens’ rights had not eliminated belief in universal natural human rights could be found in Heron’s condemnation of slavery. Two other jurists made statements highlighting the role of natural law in condemning slavery. Herbert Broom in his book *Constitutional Law* (1885) ‘noted how in *Forbes v Cochrane* the court had developed broad views ‘in regard to the illegality of slavery as opposed to the Law of Nature generally, to the law of England in particular, and as unfit to be here recognised in virtue of the comity of nations’. The presiding justice in the case, J Best, also stated ‘“the proceedings in our courts … are founded upon the law of England, and that law is again founded upon the law of nature and the revealed law of God”’. It would have been less surprising if Best had cited English Common Law but the evidence of all three jurists; Heron, Broom and Best point to a healthy natural law tradition functioning in the later part of the nineteenth century in England as well as Scotland. There could scarcely be a more optimistic and idealistic rejection of nationalism and an affirmation of ultimate universalism in an nineteenth-century British context than Heron’s rather Kantian declaration of belief that while nations had yet to arrive at it, all nations had a ‘slow but certain tendency’ to reach a state ‘in which men shall entertain the same sympathy towards all mankind which has been felt by them for family, tribe, nation, race’. This would be a time when killing in war was regarded as murder, the liberty of the individual would be complete and a time:

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25 Herbert Broom, *Constitutional Law Viewed in Relation to Common Law and Exemplified by Cases*, Second ed. (London: W Maxwell & Son, 1885). 107. The details of this case and its date are not specified, although it followed an 1878 decision of Lord Stowell who ruled that slavery as such was not an offence under the law of nations. Broom made specific mention of not wishing to reject this ruling.

In which the absolute power of individual governments disappearing, men, true citizens of the world, shall possess over the earth their rights, and by the Law, the means of enforcing them.\textsuperscript{27}

It is important to recognise that these anti-nationalist, universal human rights aspirations were voiced, not by an evangelist, such as Henry Drummond, but a practising British jurist. Heron’s capacity for adaptation of his definition of law was evident in his acceptance of both the conflicting definitions of traditional and Hobbesian modern natural law theories in different circumstances. Even more surprising was that, unlike Foster, who rejected Bentham’s utilitarian arguments, particularly as developed by Austin, and Lorimer, who expressed contempt for Bentham,\textsuperscript{28} Heron, while rejecting his utilitarianism as a theory, was quite comfortable drawing on Bentham’s definition of property stating:

In the Right of Property, Bentham includes four things:
1. The right of occupation
2. The right of excluding others
3. The right of disposition, or the right of transfer to others
4. The right of transmission.\textsuperscript{29}

Heron’s ability to accommodate apparent contradictions in theories reflected a trend amongst a number of nineteenth-century thinkers who saw the arguments not as contradictory but complementary. Kant’s cosmopolitanism was a reasonable conclusion of a growth towards human perfection; this was the ultimate development of positive law through common law, which in turn had been developed from a progressive understanding of natural law. Kant’s cosmopolitan vision extended to a ‘federation of

\textsuperscript{27} Heron, An Introduction to the History of Jurisprudence. 55.
\textsuperscript{28} Foster’s and Lorimer’s views on Bentham and utilitarianism see discussion of them in separate chapters as well as Foster, Elements of Jurisprudence. v, and in Lorimer, The Institutes of Law. xi.
\textsuperscript{29} Heron, An Introduction to the History of Jurisprudence. 71.
free states’, contradicting again the concept of ‘a state of nature’, of ‘savages in their anarchy... [preferring] perpetual combats of licentious liberty’. Ultimately Heron reinforced his own universalist belief that ‘Union in society is the destiny of man’, but in a further rejection of contract theory he observed, ‘this does not arise from the social compact of which the philosophers of the eighteenth century dreamed’. He believed rather that, based on property, it would arise from the development of the family and the aggregation of other families. His analogy linking the rights of property to natural law that preceded and ranged beyond contracts, utilitarian law and positive legislation highlighted the most primitive development of a sense of property. ‘The child knows he owns his toy as well as the peer knows he owns his land’.

Heron’s natural law theory largely, though not entirely, rejected the modern form as expounded by Hobbes in favour of a traditional form more in the Thomist and Enlightenment traditions. To the extent he did, he conformed to the thinking of other jurists Foster, Lorimer, and Phillimore. Unlike them, he accepted that, in a primitive society, Hobbes’ modern interpretation had some applicability. Similarly, while opposing Bentham’s utilitarianism, he could include aspects of his definition of property. Like the other jurists, he was able to discount the issue of man in the state of nature. Man comprehended natural law with advancing intellectual development through inductive determination. As natural law was an intrinsic quality infused in man by the Deity, the arguments of contract theorists also became irrelevant. Following a developing pattern amongst nineteenth-century jurists Heron was able to accept the conflation of natural and

31 Heron, *An Introduction to the History of Jurisprudence*. 75.
positive law, not finding them mutually exclusive. The writings of Bentham, Austin and similar theorists who confined themselves to positive law were not procedurally incorrect, merely philosophically incomplete.
SECTION B: INTERNATIONAL LAW AND NATURAL LAW

INTRODUCTION

I have indicated previously that some commonality among descriptions of natural law theories, rather than precise definitions thereof, was the necessary starting point for an examination of the theories’ continuance and mutation in nineteenth-century Britain. While there was perhaps less disagreement in understanding of International Law or the Law of Nations, there was similar divergence of opinions concerning the values that underpinned it, particularly with regard to the role of natural law and natural rights theories. These differing views accounted for the varied interpretations of the character of international law, and particularly the methods by which it should be implemented. In a period when colonial expansion and imperialism had raised the importance of civic or citizens’ rights, allegedly supplanting natural rights, I argue that the concept of natural law and natural rights remained a significant force in the interpretation of international law throughout nineteenth-century Britain. Duncan Bell points out that Casper Sylvest ‘revises the standard narrative that describes the gradual, but inexorable, defeat of natural law by positivism...naturalism was never fully supplanted, and indeed, positivism and naturalism co-existed – sometimes comfortably, sometimes in tension’ [my emphasis].

This points to one significant difference in nineteenth-century natural law – rather than disappearing, it continued to inform international law. Austin’s concern about the absence of any sovereign to enforce international law highlighted a very real inadequacy of attempting to ground international law on any other basis than natural law. Natural

1 Bell, Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought. 11.
law, in no small way owed its continued influence and existence to its importance in international law. Bell notes in his introduction how Sylvest argues that the resolution to the problem of the spectre of Austin ‘was to be found in the idea of legal evolution, of ‘international law as law in the making’, which ‘obtained a standing in international legal argument that was not far removed from that formerly occupied by natural law’.2

Like natural law theories generally, the law of nations was primarily a Euro-Judeo-Christian concept. Robert Phillimore could trace agreements amongst nations concerning their mutual relationships back to at least the Ancient Greeks and Romans. However the modern attempts to codify international relationships into positive laws grew from social advances. These had led both to more complex relationships between European nations and the need to incorporate colonial expansion into the law theories. Where Martti Koskenniemi claims that international law came into existence in the aftermath of the Franco-Prussian War of 1870–71 with the adoption in Ghent of the Statute of the Institut de droit international in 1873,3 and could have only functioned from the Esprit d’Internationalite is strongly criticised by George Galindo. In reviewing The Gentle Civilizer of Nations, Galindo appropriately criticises Koskenniemi for his Foucault-style preoccupation with discontinuities, seeing a discontinuity between the early nineteenth-century approaches to the Law of Nations and those of the second half, where none in fact existed. Regarding the view as ‘extreme’, Galindo notes that ‘Unlike the vast majority of authors, he

2 Ibid. 12.
[Koskenniemi] claims that international law emerged in the second half of the 19th century — at least international law as it is understood today’.4 Considering, at the least, that Bentham coined the term ‘International Law’ to replace the ‘Law of Nations’ in 1789, Galindo is correct in accusing Koskenniemi of seeing discontinuities when they weren’t there. Arthur Nussbaum, more appropriately considers International Law in the broad sense ‘conterminous with the documentary history of mankind’.5 Phillimore may well have challenged Koskennemi’s very particular dating of the beginnings of international law from 1873 as he had stated in 1843, ‘A race of men sprung up whose noble profession it became to apply the laws of natural justice to nations, and to enforce the sanction of individual morality upon communities’.6

Lorimer also while considering international law ‘modern’ in its ‘conditions of existence’ [my emphasis] believed it existed from the beginning of civilization, although like natural law, being imperfectly understood. The law of nations, however, is as old as the subjects which it governs, for these, as moral entities, had, inherent in them from the first, both rights and duties, however little they may have been known or enforced.7 Lorimer was reiterating his belief, as discussed earlier, that natural law, existed from the dawn of mankind, and that the law of nations, as positive law emanating from it, existed for the same period. Both he acknowledged were imperfectly understood initially; an appreciation of them by humans grew with developing civilisation and intelligence.

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Rather than seeking evidence of its character in a so-called ‘Natural Man’, Lorimer’s concept easily accommodated the bestiality of primitive man whose limited civilised development was insufficient to understand and appreciate natural law. A similar conception of natural law allowed Henry Drummond to maintain belief in it in the face of the murderous and lawless behaviour of some African natives during his African travels.

It is significant that while international law was necessary in colonial expansion, consolidation and trade, it was of greater importance, particularly during and after the Crimean War (1853–56), in the relations of European nations with each other. Britain was able to cooperate with France in the conflict to safeguard the Ottoman Empire along with trade routes to India, due to increased Russian aggression. Britain was, however, concerned about France’s ambitions in Italy, Mexico, and Germany; and tended to favour the South in the American Civil War. The further conflicts involving France, Austria and Sardinia, were evidence of hostilities which highlighted the particular need for the development of international law.

By the end of the nineteenth century, Sir Sherston Baker, in a text written as a teaching guide for students, defined international law as ‘the rules of conduct regulating the intercourse of states’.⁸ This statement was hardly surprising. What was more surprising, however, given the view of many historians, was his analysis of it in terms of the post-Enlightenment natural law tradition. Baker’s division of international law into the ‘natural law of nations’ and the ‘positive law of nations’ was entirely consistent with that and the post-Enlightenment tradition. Baker further subdivided ‘the natural law of

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nations’ into the Divine law and the application of the law of God to the States. His understanding of the natural law theory was rendered completely unambiguous when he developed his view that:

The rights and duties of States, which require an international law for their regulation and enforcement, result from the law of nature [my emphasis], or by the will of God, and that the rules of this law, whether resulting from compact, custom, or usage, outwardly express the consent of nations to things which are naturally [Baker’s emphasis], that is, by the law of God, binding upon them.9

Baker’s interpretation was significant for several reasons. His views demonstrated the extent to which natural law theory was still influential at the end of the century despite historians’ theories to the contrary. The works of nineteenth-century philosophers, jurists and international lawyers, particularly throughout the second half of the nineteenth century had reinforced the role of natural law theory rather than diminished it. Baker was an associate of the Institut de droit International in 1879. He had published several books about the role and duties of the office of Vice Admiral of the Coast. He was joint editor of The Law Reports 1881 to 1885. He was thus a significant legal figure having a direct involvement with international law. As the writer of a law textbook, he was passing on his understanding of the role of natural law in international law to future practitioners. Interestingly, had Austin, while dismissing natural law as misnamed God’s law, accepted the role of God’s law in the absence of a temporal sovereign, he may have been able to accommodate the concept of international law.

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CHAPTER FIVE: ROBERT PHILLIMORE

In 1871 Sir Robert Phillimore D.C.L. (1810–85), Member of Her Majesty’s Most Honourable Privy Council, and Judge of the High Court of the Admiralty published his Commentaries Upon International Law. His judicial position was of considerable significance as the High Court of the Admiralty operated under civil law based on natural law.¹

A lifelong friend of William Gladstone, Phillimore had an impressive legal career as both a civil and common law practitioner. Norman Doe, in his Oxford biography of Phillimore observes that ‘his decisions as dean [of arches] contributed significantly to contemporary ecclesiastical jurisprudence, being moulded by his view of the Church of England as part of the true Catholic Church’.²

In his ecclesiastical jural roles Phillimore emphasised the integral connection between natural law and religious teaching where he cited Lord Stowell on the nature of the marriage contract. He particularly noted that Stowell had determined that marriage ‘is a contract according to the law of nature antecedent to civil institutions...our first parents lived not in political society, but as individuals, without the regulations of any institutions of that kind’. Stowell stressed, ‘A marriage is not every casual commerce; nor would it be

¹ The Times reported Phillimore’s appointment to the High Court in 1875, which required his relinquishing of all duties except that of Judge of the High Court of the Admiralty. His attachment to the Probate, Divorce and Admiralty Division involved him in prosecuting duties in natural law based civil law. See "Sir Robert Phillimore - the Law Journal," The Times, Nov 01 1875.10. For reference to his resignation in 1882 where he was described as ‘the learned judge [who] has been the longest on the Bench of all the judges’, see Martin I Klauber, "Henry Drummond: A Perpetual Benediction, Review of Book Edited by Thomas E. Corts," Journal of the Evangelical Theosophical Society 45, no. 3 (2002). 564.
so even in the law of nature...such lasting cohabitation, that, in a state of nature, would be a marriage, and in the absence of all civil and religious institutions might safely be presumed to be’. Phillimore was writing in the context of determining the nature of marriage in church ecclesiastical law. He concurred with Lord Stowell that it was neither entirely a civil function nor an ecclesiastical one. His statement was important in that it highlighted his belief that natural law preceded civil and religious law, and in fact influenced both. His statement that ‘“systems of law receive different modifications by the laws of different communities”’ also showed his acceptance of the fact that the interpretation of natural law could vary from one society or culture to another but that it still underpinned their laws, conventions and practices. In this context he differentiated the more legal interpretation of the established church from the sacramental understanding of marriage in the Roman church while preserving the natural law and religious prohibitions based on consanguinity.

In 1843 Phillimore wrote and lectured on the seemingly incongruous linking of the ecclesiastical courts with their religious rulings, the government of universities, and the High Court of the Admiralty whose role encompassed the law of nations. Their link was their common use of civil law and its historical link with canon law. His book, *The Study of the Civil and Canon Law* (1843) was prefaced by an undated quote from a *Report of Commissioners for inquiring into the Ecclesiastical Courts* stating that:

> The study of the Ecclesiastical Law requires an accurate acquaintance with the principles of the *Civil Law*, upon which the Law of the Admiralty is founded; and the Civilian is led to the investigation of those principles of general jurisprudence by which the intercourse of Nations is governed, and the rights and obligations of

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belligerents and neutrals in time of war is defined.\textsuperscript{5}

It was followed by a quote from Samuel Hallifax’s *Analysis of the Roman Civil Law, Compared with the Laws of England* (1775) stating that ‘It is the very Law by which the two Universities are governed, by which all Civil controversies, excepting pleas of frank tenement, are directed to be decided’.\textsuperscript{6} Phillimore explained that the role of civil law in the spiritual courts traced back to James I, and was an almost universal arrangement throughout Christendom at the time. With the introduction of the High Court of the Admiralty, about the time of Edward I, civil law and maritime customs were the basis of its determinations.\textsuperscript{7} Such was the link between natural law, canon law and the law of nations, that in the book *Ecclesiastical Law* by Richard Burn, extensively abridged by Robert Phillimore in 1842, it was stated that in the case of an appeal ‘a provocation from an inferior to a superior judge, … it is laid down in the books of civil and canon law that an appeal, as well as a judicial process, derives its origins from the law of nations’.\textsuperscript{8}

In 1848 when the ecclesiastical courts and the judicature of the Doctors Commons were threatened with extinction, and particularly in response to an attack on them in parliament by Mr Pleydell-Bouverie\textsuperscript{9}, Phillimore wrote a spirited defence of them in a letter to


\textsuperscript{7} Phillimore, *The Study of the Civil and Canon Law*. 6.


\textsuperscript{9} As the self-appointed defender of those courts, Phillimore was reacting specifically to Pleydell-Bouverie’s speech on 30 May 1848.
William Gladstone, whom he counted among his friends. Pleading for a balanced analysis of the role of the courts he indicated that regardless of the result ‘I shall still remember, without blushing, that I belong to the profession of Lord Stowell’. He took the opportunity to restate the responsibilities of the courts. ‘The Courts at Doctors’ Commons exercise jurisdiction over subjects of Testamentary, Matrimonial, Maritime and Ecclesiastical law’. He took the opportunity to restate the responsibilities of the courts. ‘The Courts at Doctors’ Commons exercise jurisdiction over subjects of Testamentary, Matrimonial, Maritime and Ecclesiastical law’.11

From 1867 to 1875 Phillimore was the last judge of the High Court of the Admiralty. In 1875 the Judicature Act reorganised the courts to standardise the courts of common law and equity into one, with divisions. Phillimore’s appointment as judge of the High Court of Justice, Probate and Admiralty division required his resignation from his Positions in the Court of Arches. On the occasion of his resignation from the position of Judge in the Arches Court of Canterbury, The Times editorial referred to ‘a curious anomaly that the Admiralty Court and the Court of Arches, dealing as they do with a totally different class of subjects, should be presided over by the same Judge’. Although The Times mentioned there were ‘historical reasons for this strange combination’ the most logical explanation was that they both practised civil law not common law.13

11 Ibid. 19. With the passing of acts of parliament that transferred these functions to common law courts, particularly the Court of Probate Act in 1857 and the High Court of Admiralty Act in 1859, the ecclesiastical courts gradually became redundant and the Doctors’ Commons was wound up and sold in 1865.
12 The Court of Arches remains an ecclesiastical court of the Church of England. Several specialised courts including the Court of Arches and the Admiralty courts practised civil Roman law rather than English common law. At Phillimore’s time, lawyers for these courts were associated with Doctor’s Commons, whose members were civil lawyers.
13 "Sir Robert Phillimore, as He Himself Announced," The Times, Oct 23, 1875. 9
Along with that of James Lorimer, Phillimore’s approach to international law and the law of nations is regarded by Koskenniemi as ‘idiosyncratic’ being grounded solidly in the theory of natural law. Phillimore’s exposition of beliefs was interesting as he linked his affirmation of natural law theory to the juridical underpinning both of positive law within a nation and as the basis of and justification for international law. In providing a philosophical and legal justification, his was one which countered the widely accepted argument of John Austin that international law could not exist because there was no sovereign or authority figure to legislate and enforce it. Phillimore’s underlying hypothesis was that in many respects sovereign states could be regarded legally as similar to individuals: subject to laws, having responsibilities, rights and obligations. In this capacity they were ‘free moral agents’. Like humans, they would have relations and dealings with others, although they would of course have internal relations also. From this he drew the important Aristotelian and Kantian conclusion that in the manner that God ordained, an individual man was expected to fully develop his faculties through his interaction with other humans, ‘so it is divinely appointed that each individual society should reach that degree of perfection of which it is capable, through its intercourse with other societies’. Phillimore’s position was consistent with Kantian cosmopolitanism; Kant seeing ‘the homage which all states render to the principle of right, if even consisting only in words, is proof of a moral disposition’. Kant believed that this ‘disposition’ tends ‘vigorously to subdue in man that evil principle, of which he cannot

15 John Austin, Lectures on Jurisprudence, or, The Philosophy of Positive Law. (London: John Murray, 1880.) pp. 5-7
17 Ibid. 48.
Philimore’s belief highlighted one of the vexed issues of the period, namely what types of intercourse with other nations were acceptable. The concept pointed to, but did little to resolve questions concerning the legitimate approach of civilised countries to uncivilised ones. Nor did it resolve the more pressing question given the potentiality for intra-European instability and conflict evidenced by the Crimean War, concerning the dealings of European nations with one another. What were the limits upon a nation exploiting or conflicting with another while attempting to ‘reach that degree of perfection’? 19

The wide acceptance of John Austin’s analysis of English Law caused difficulties for International Law theorists. Rejection of natural law, combined with his belief that positive law needed a supreme authority to determine and impose it left no means of implementing international law among independent states. By determining that natural law was merely incorrectly interpreted Divine Law; Austin left no temporal power which could implement international law. While his belief acknowledged a physical reality, it foundered philosophically on the questions of enforcement. 20 Should international law have required enforcing, then the only arguable method would have been Divine intervention. This would have brought up issues of religious authority, contradictory religious beliefs, papal influence, reviving anachronistic issues of Church and State, none of which were being contemplated by Austin or other post-Enlightenment jurists. Neither Charles Foster, James Lorimer, nor Robert Phillimore encountered this difficulty as their beliefs disregarded the issue of sovereign enforcement. Where Austin had clearly

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18 Kant, *Perpetual Peace. 20.*
19 Phillimore, *Commentaries Upon International Law. 48.*
20 Austin, *Lectures on Jurisprudence. 5.*
separated divine from temporal law, these jurists saw them as either congruent, or that, at
the very least, natural laws were a temporal manifestation of divine law.

Phillimore’s position was quite unambiguous. As ordained by God:

From the nature then of States, as from the nature of individuals, certain rights
and obligations towards each other necessarily spring; these are defined and
governed by certain laws. These are the laws which form the bond of justice
between nations, “quae societatis humanae vinculum continet,” and which are
the subject of international jurisprudence.\textsuperscript{21}

By his associating the behaviour of states with that of human individuals
Phillimore argued the same division between their moral and legal obligations, or
between natural and positive law, as were understood by traditional natural law theorists.
This presumed some nebulous divine justice or retribution for noncompliance – temporal
according to George Combe, or supernatural according to most others. Within the
temporal world, however, Phillimore was able to use his analogy with the individual to
account for the enforcement of international law. By identifying authority, not with a
sovereign but with the body politic, he could posit a democratic solution to the problem
of ‘authority’. He claimed, citing Hooker, the strength of international law was that no
individual state could severally overrule that which had been determined jointly ‘so there
is no reason that any one commonwealth of itself should to the prejudice of another
annihilate that whereupon the whole world hath agreed’.\textsuperscript{22}

Of course the Hobbesian analogy of states to individuals had limitations,
particularly where it related to Austin’s concern about the lack of a sovereign to enforce
international law. Phillimore’s theory accommodated this problem by noting several

\textsuperscript{21} Phillimore, \textit{Commentaries Upon International Law}. 49.
\textsuperscript{22} \textit{Ibid}. 49
differences. Observing that while States were capable of rights, and liable to obligations, ‘it must be remembered that they can never be the subjects of criminal law’. His solution to Austin’s problem, and an effective one, was to focus on the differences understood between a ‘natural’ person, who was subject to criminal law, and a ‘legal’ person which, while composed of individuals, was not a person at all, but rather a corporation. He noted that the greatest corporation was the State which, as a legal person, had ‘a will competent to acquire and possess property, and the rights belonging to it’. The mistake Phillimore had seen regarding the interpretation of international law concerned nations’ liability to punishment. While this was evidently a problem for Austin, Phillimore’s significant observation was that he believed it originated with Grotius’s and Vattel’s understanding of the State. If a State was regarded as a legal not a natural person then, Phillimore believed, the issue of its punishment did not arise, as punishment applied to natural persons under municipal law. This explanation, of itself, did not satisfactorily clarify the problem of obvious military conflict between sovereign states. His position was that the doctrine did not exclude the right of a State to seek redress by war for an injury or insult. Such military action did not constitute ‘punishment’ but was rather an act of state policy intended to serve an end. It was, however, Phillimore’s tracing the source and describing the character of the laws of nature which he believed directed human behaviour generally, and underpinned the law

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23 Ibid. 49
24 Ibid. 50
25 Ibid. 50. While Phillimore did not mention the specific references in Grotius or Vattel, he did indicate the two causes he saw for the error: misunderstanding the true nature of the State; and ‘confoundin the individual rulers or ministers with that of the nation which they govern or represent’.
26 Ibid. 51.
of nations, that was one particularly significant contribution to natural law theory in
nineteenth-century Britain.

On June 20 1801, Sir William Scott (Lord Stowell), Judge of the High Court of
the Admiralty (Prize Court), a predecessor of Phillimore, delivered his second judgment
concerning the fate of ‘The Hurtige Hane’.\textsuperscript{27} This was a ‘prize’, a vessel transporting
cargo from Saffee in Barbary ostensibly bound for Hamburg in April 1799, seized during
a blockade. While confirming his original judgment on the legitimacy of the vessel’s
seizure, Lord Stowell reflected briefly on issues concerning the Law of Nations. It was on
this statement that Phillimore based his probing of the sources of international law. The
practical issue Lord Stowell was addressing concerned the applicability of what he
acknowledged as essentially European Law to other nations, in this case the Kingdom of
Morocco. It had been argued before the court that it would be ‘extremely hard on persons
residing in the kingdom of Morocco if they should be held bound by all the rules of the
law of nations as it is practised amongst European States’. Stowell acknowledged that
‘they may on some points of the law of nations be entitled to a very relaxed application of
the principles established, by long usage, between the States of Europe’.\textsuperscript{28}

Phillimore noted that Stowell had observed It is a law ‘made up of a good deal of
complex reasoning, and though derived from very simple principles, altogether to
comprise a very artificial system’.\textsuperscript{29} While Stowell acknowledged that in some

\textsuperscript{27} For details of his original judgment, where he ordered the confiscation of the ship and its cargo
describing their action as ‘highly criminal’, see E S Roscoe, Reports of Prize Cases Determined in the
High Court of Admiralty, before the Lords Commissioners of Appeals in Prize Causes, and before the
Judicial Committee of the Privy Council from 1745 to 1859. Vol. 1 of 2 Vols. (London: Stevens and
Sons, Ltd., 1905). 205.

\textsuperscript{28} Ibid. 317.

\textsuperscript{29} Phillimore, Commentaries Upon International Law. 55.
circumstances the law could be relaxed, in this case *the breach of a blockade*, one of the
most universal and simple operations of war in all ages and countries … no such
indulgence can be shown*. Stowell’s judgment confirming the seizure and confiscation
highlighted some of the problematic areas of international law. It was plainly a Euro-
centric construct as evident in its variable application to non-European nations. This
variability highlighted the perceived physical, economic and educational inequality
amongst nations which were theoretically to be treated as independent and juridically
equal ‘legal persons’. The tension between the physical reality and the legal explanation
produced inexactness in implementation which was capable of exploitation on all sides.
This was the dilemma that had caused Austin to deny the possibility of international law,
there being no sovereign authority to enforce it. It did also admit fundamental
assumptions shared by some natural law theorists. Lorimer, Foster, Drummond, Seeley,
Combe, and Phillimore shared the Kantian belief that natural law had universal
application from the lowest barbarian to the most intellectually developed European. Like
Kant, however, they also believed that understanding of it came with progressive
intellectual development and thus its implementation would vary accordingly. The most
important of these for Phillimore’s argument was that at every level of human
development *some* degree of natural law was understood and applied, even at the most
primitive. This assumed a development of law that predated humans rather than a legal
invention through a form of utilitarian expediency. This explanation was consistent with
other jurists, Foster and Lorimer, in rejecting contract theory and utilitarianism but it was
able to accommodate natural law with the historical development of common law.

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30 Roscoe, *Reports of Prize Cases*. 318.
In 1753 the British Government had made a statement to the Prussian Government defining its concept of International Law or the Law of Nations. It stated, “The Law of Nations” is said to be “founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage.” 31 This governmental positioning reflected its belief in the value in law of a combination of traditions notably in Britain as manifested in common law and the principles of equity underlying natural law and rights. Phillimore believed that this statement embraced, while not completely describing, everything that could be said on the subject. His acceptance and interpretation of the statement highlighted not only his belief in the role of natural law in maintaining both ‘justice’ and most particularly ‘equity’, but the ready compatibility of natural law with common law, ‘being confirmed by long usage’. Phillimore considered that it was his task to explicate the definition. While in complete agreement with Lorimer’s interpretation of the Law of Nations, he left no doubt that from his perspective, the problems seen by Austin were not issues to be considered.

Philimore’s initial Kantian premise was that:

Moral persons are governed partly by Divine, Law (leges divinae), which includes natural law – partly, by positive instituted human law, which includes written and unwritten law or custom (jus scriptum, non scriptum, consuetudo) 32

Rejecting the concerns and arguments of Austin, Phillimore made clear his belief in the agreement of Divine and natural law and the necessity of their separate terms seeing natural law as an element of Divine Law, not like Austin as identical. Phillimore’s

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32 Phillimore, Commentaries Upon International Law. 55.
position was similar to Lorimer’s in arguing that natural law preceded Christianity and the latter informed it:

Divine Law is either (1) that which is written by the finger of God on the heart of man, when it is called Natural Law; or (2) that which has been miraculously made known to him, when it is called revealed, or Christian Law. 33

Phillimore’s distinction between natural and received law was important because it enabled the assumption that natural law applied also to heathens and barbarians. While natural law regulated the behaviour of European nations to each other and the treatment of other races by them, it, just as importantly, could be used to justify retribution on native peoples who were seen to transgress its rules in their dealings with Europeans. Phillimore justified his belief in the universality of natural law arguing that it had been always recognised by civilised heathen nations. Acknowledging a widely held belief that the Greeks and Romans recognised no such law in their external relations, he claimed that the conclusion was ‘founded on slender and insufficient premises’. 34 While he accepted that the Greeks, for example, never codified the principles of their international relations, he noted that those principles were not unknown to them citing observations by Aristotle, Thucydides, Plutarch, and Plato concerning relations between city-states and nations. 35

Phillimore referred particularly to Cicero’s praise of Pompey for being well versed in both Diplomatic Law and the ‘whole jurisprudence relating to Peace and War.’ In De Republica Cicero had claimed ‘Where there is a common law, … there is a common right, binding more closely and visibly upon the members of each separate

33 Ibid. 56.
34 Ibid. 56.
State, but so knitting together the Universe, “ut jam universus hic mundus una civitas sit, communis Deorum atque hominum existimanda”.36 This evidence confirmed for Phillimore that natural law predated civilisation and required no human contract, implicit or explicit, to establish it. Phillimore was quite unambiguous on this point, observing how claims that ‘polished nations of antiquity’ failed to recognise international obligations were used to deny any International law outside positive compact. This view was also extended to deny its applicability to relations with non-Christian nations. Phillimore deplored this view stating the first important consequence flowing from the influence of Natural upon International Law was that ‘it [International Law] subsists between Christian and Heathen, and even between two Heathen nations, though in a vaguer manner and less perfect condition than between two Christian communities’. He restated his belief that Law applied ‘before usage or custom has ripened into a quasi contract, and before positive compacts have sprung up between them’.37

This significant obstacle for natural law theorists was reconciling the conflicting issues of applying natural law to all humans at all times with the perceived evidence of barbarism in primitive tribal communities. The conflict was a justification for contract theorists who believed that law could only be developed when humans were sufficiently intellectually developed to agree upon its nature and application. Where Phillimore and Lorimer as jurists believed in its prior existence, and regarded primitive peoples as merely less able to interpret it, Phillimore cited several authorities in support of his position. Montesquieu when referring to the barbaric behaviour of the Iroquois had said

36 Ibid. 58.
37 Ibid. 59.
‘“Toutes les nations ont un droit des gens;”’ that these nations ‘even while polluted by such abominations’ still reciprocally observed certain rules of conduct when dealing with each other. 38 He also cited Foster whom he regarded as ‘an eminent writer on English Criminal Law’ where the latter discussed immunities for Ambassadors. Foster stated that not only offences of great enormity such as murder ‘which are against the light of nature and the fundamental laws of all society’, but for all declared laws, ambassadors had the same liability to answer as did others. ‘“They are to be considered as members of society, and consequently bound by that eternal universal law by which all civil societies are united and kept together”’. 39

A most significant point that Phillimore made was that ‘the principles of international justice do govern, or ought to govern, the dealings of the Christian with the Infidel Community’. 40 This placed clear obligations on European nations to treat uncivilised countries using the same principles as governed their dealings with each other. This continued the debate over the treatment of barbarians and its relationship to natural law. It had persisted since de Vitoria’s writings on natural law had been drawn on both to attack and defend the rights of uncivilised peoples – most notably the treatment of Incas and Aztecs by Spanish invaders in 1521. Where, with the imperialist extension of colonialism, it was being argued that natural law and rights theories had given way to civic, or citizens’ rights, as suggested by Coleridge, Phillimore, a most distinguished British jurist, was still asserting in 1879 that natural laws and rights were the preeminent arbiters of international relations.

38 Ibid. 59.
39 Ibid. 60.
40 Ibid. 60.
It is not to suggest that the law of nations was entirely insulated from common law, or at least its principles. This was evident in Sir George Cornewall Lewis’s (1806–63) position on the extradition of criminals from foreign jurisdictions where he stated regarding the legal doctrine determined by Lords Lyndhurst, Brougham and Lord Chancellor Cranworth that ‘If, therefore this doctrine be well-founded, it is a rule of our Common Law that ...all acts done in the country, which by insulting the character, or by threatening the persons of foreign Sovereigns...are criminal...but also all conspiracies to do such acts in foreign countries’. At this point he quoted Phillimore, speaking on international law, stating that ‘International law [says Dr. Robert Phillimore] considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right’. 41 The natural law principle of self-preservation applied in this case to the state which was threatened by criminals, giving it the right to violate the territory of another state which was affording them shelter to seek redress. The principle was seen in both common law and the law of nations. In regard to the same principle Phillimore’s judgment was cited by the Chicago Daily Tribune of Nov 29 1873 concerning the law applicable to the Spanish capture of the ship ‘Virginius’. The ship, a blockade runner, flying an American flag, was transporting munitions and rebels to Spanish controlled Cuba. The capture of the ship by a Spanish warship and the subsequent brutal execution of a number of crew members raised the prospect of war. The Daily Tribune pleaded for calm on two grounds. Firstly it was suspected that the ship was flying the American flag

41 Sir George Cornewall Lewis, Foreign Jurisdiction and the Extradition of Criminals (London: John W. Parker and Son, 1859). 67.
illegally, and that the occupants were pirates. If that were not the case and it was covered
by American sovereignty then Phillimore’s judgment that it was proper to enter foreign
territory to seek redress on the grounds of self-preservation applied. The newspaper
wrote:

> It is a well-settled principle of international law that the doctrine of territorial
inviolability is modified by self-preservation; that this latter is the first law of
nations as well as of individuals, prior and permanent to the former.42

Subsequently reparations were made and war was avoided.

Sir Robert Phillimore, through his membership of the Privy Council, Judge of the
High Court of the Admiralty, and his writings, most notably Commentaries Upon
International Law demonstrated his conviction that natural law not only was being
maintained throughout eighteenth-century Britain but it was perfectly compatible with
and in fact an essential underpinning of man-made civic legislation. His differentiation
between people as ‘natural’ and states as ‘legal’ persons effectively countered Austin’s
rejection of international law and reinforced the continued application of natural law
theory.

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42 "The Law Applicable to the Virginius,". *Chicago Daily Tribune* Nov 29, 1873. 4. Phillimore discusses
the doctrine of territorial inviolability further in Commentaries Upon International Law. pp. 187-188.
CHAPTER SIX: TRAVERS TWISS and GEORGE BOWYER

Although Travers Twiss (1809–97) and George Bowyer (1811–83) were both, as lawyers, members of Doctors Commons and committed advocates of natural law theory, they were to disagree over its interpretation and relevance to the nature of the pope’s authority within the sovereign territory of Britain. Where Bowyer, a Catholic, supported the appointment of British bishops by the pope because of his religious authority over Catholics, Twiss opposed it aggressively as a practice which intruded on an element of the sovereignty of the monarch. Both, however, made significant contributions to the discourse on natural law, although Twiss’s was in the context of a tumultuous personal life.

In August 1862 Sir Travers Twiss blighted his career as an eminent jurist, university teacher and international authority on the Law of Nations by announcing his marriage to Marie Pharialdé Rosalind Van Lynseele, who was to be subsequently accused by an Alexander Chaffers of being a prostitute. The collapse of Twiss’s libel case against Chaffers accompanied by Lady Twiss’s sudden flight from London was described with shock by The New York Times of March 29 1872, drawing its information from The London Standard of March 14. The Times stated: ‘Such a conclusion and such a collapse are calculated to leave but one impression upon the minds of all who have watched the course of the prosecution’.1 The breadth of the awareness of the scandal underlined Twiss’s previous fame and respect. A Register of Members of Doctor’s Commons, a society of civil law lawyers, recorded his membership from November 2nd 1841, his

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knighthood in 1867 and his forced resignation from all offices and practice March 21st 1872. Nevertheless this disgrace and resignation from all public offices did not end his involvement in the field of international law, which included the publication of his most significant work, *The Law of Nations Considered as Independent Political Communities*, published between 1861–3 and subsequently in a number of editions including a French translation in 1887–9. An important feature of his widespread juridical respect was his belief in the importance of natural law and rights in underpinning international law, evident in his involvement in the legal argument surrounding the capture of the ‘Springbok’.

Twiss considered that Francisco Suarez (1548–1617), a member of the Salamanca School, was the first person to point out that ‘the intercourse of independent states was regulated not merely by principles of natural law, but by usages long observed and uniformly acted upon’. The significance for Twiss was that it was the ‘first recognition of an usage or *consuetudo* amongst nations, which was binding as a rule of intercourse amongst them’. Twiss was acknowledging a historical process of development of international law which would not have found objection from Maine.

In continuing this development, Twiss conjectured that Grotius, in naming the concept ‘Law of Nations’, used the reasonable justification of discussing the rights of war and peace in a time of military conflict to teach mankind that ‘there was a law distinct from the Law of Nature’ which existed through usage without codification. Twiss

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stressed that Grotius’s use of the term to distinguish it was ‘not as intending to deny the application of the great principles of natural law to the relations between Commonwealths, but wishing to reduce into a system the rules of intercourse, which were practised between Nations, instead of leaving the entire fabric to rest on general principles’. Here he was restating a position he had explained in 1856. While in this statement Twiss was acknowledging his belief in the permanence of natural law and its significance in underpinning the law of nations, importantly he was acknowledging that natural law was a series of ‘general principles’ which needed to be further interpreted and codified. This was consistent with advocates of natural law such as Foster, Lorimer and Drummond, among others, who while recognising natural law as the foundation of all laws understood both its general nature and the link between its interpretation and degree of sophistication of civilisation. It was in fact a defence of natural law from its positivist and contract theory critics.

Specifically he dealt with the criticism that ‘the doctrine of Law of Nations, resting on the common agreement of mankind, was an empty fiction, to which nothing in fact really corresponds’. This plainly addressed the Benthamite description of natural law as ‘nonsense on stilts’. Twiss asserted that Grotius never intended to set up a rule like the Golden Rule of Vincentius Lirinensis. Rather, the law could be ascertained from the ‘nature and circumstances of mankind, or by observing what is generally approved by all

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5 Twiss, *Two Introductory Lectures*. pp. 18-19.
7 Vincentius Lirinensis was a distinguished presbyter of 5th century Gaul who recorded a set of precepts which he believed were obligatory on all Christians, and a defence against heresy.
Nations, or at least by all civilised Nations’. While considering it would have been appropriate for Grotius to have supported his discussion with evidence of the law’s practical application in law and politics, Twiss touched on one of the issues that dogged theorists of natural law and the law of nations, where it was believed to be derived from natural law. The issue was the distinction between natural law and morality. He observed ‘the principles of natural law are so interwoven with those of ethical science, that an entire separation of them was not very feasible, perhaps not altogether desirable’. While the principles may have been interwoven, he saw the application of sanctions as the defining quality of ‘law’. Twiss considered Grotius’s explanation of the Law of Nations, while correct, somewhat ‘disorderly’. He preferred and concurred with that of Dr Zouch which he felt defined the division between natural and positive law in dealings between states as free of all ambiguity. Dr Zouch stated:

“When many persons affirm... the same thing at different times, that fact ought to be referred to some universal cause, which cannot be any other than a right conclusion drawn from the principles of nature, or a general consent, of which the former indicates the Law of Nature, the latter the Law of Nations”.

Positive law, Zouch determined, concerned those treaties which ‘were intended to supplement the defects in the unwritten or common law or ... intended to modify it and to accommodate it to the progress of civilisation’. Zouch’s definition would have satisfied not only Twiss, but also the other advocates of the role of natural law in the law of

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8 Twiss, Law of Nations. xx.
9 Twiss, Two Introductory Lectures. 24.
10 Dr Zouch was a Regius Professor of Civil Law, Fellow of New College and Principal of Alban Hall at Oxford University, and a Doctor of the College of Advocates. He was also Judge of the High Court of the Admiralty. He wrote a treatise De Jure Feciali around 1650 in the first part of which, De Jure inter Gentes, he considered the general obligations of the law of nations.
12 Ibid. xxiii.
nations being discussed. Between the publications of the first (1861) and second (1884) editions of his book, the Treaty of London (1871) was signed. For Twiss, this Treaty’s great value was its repudiation of the doctrine of Spinoza\(^\text{13}\) that ‘“States are not bound to observe their treaties longer than whilst the interest or danger, which first gave rise to the treaties, continues to exist”’.\(^\text{14}\) It appears Twiss felt that Spinoza’s doctrine repudiated, to some extent, an element of natural law within the law of nations and was a misinterpretation of it. Twiss had also considered the earlier General Treaty of Paris (30\(^\text{th}\) March 1856) to be an important rights treaty, particularly because the Ottoman Porte was a signatory, as it reinforced ‘a cardinal principle of that System [of Concert] that the rights and obligations of Nations are reciprocal’.\(^\text{15}\) This interpretation caused international law practitioners considerable difficulty when its implementation extended beyond the bounds of nations covered by what Martens referred to as ‘“the Public Law of Europe and the System of Concert attached to it”’.\(^\text{16}\) The Ottoman Porte, the central government of the Ottoman Empire, which was regarded with some distrust had, nevertheless, signed the treaty. On the other hand, dealing with barbarians, particularly with regard to the issue of reciprocity and national equality, was much more difficult to accept. Bell points out that Jennifer Pitts argues ‘that international lawyers placed the idea of civilisation at their conception of law, and in particular she illustrates how they focused on the notion of ‘capacity as reciprocity’.\(^\text{17}\)

\(^{13}\) Baruch Spinoza (1632–77), later known as Benedict De Spinoza, was an important post-Cartesian philosopher in the second half of the 17th century.


\(^{15}\) Ibid. 91.

\(^{16}\) Ibid. 91.

\(^{17}\) See Bell, *Victorian Visions of Global Order : Empire and International Relations in Nineteenth-Century Political Thought*. 12.
Twiss further developed his definition of the law of nations. He stressed that the subjects of the law of nations were independent political communities capable of discharging the obligations of natural society to other communities. Twiss, like Bowyer, recognized the earlier criticism of Austin by acknowledging immediately that these rules were implemented ‘without the consent of any Political Superior, the rules result from their mutual relations.’ 18 Twiss directly rejected Austin’s criticism by discarding the need in international law for a sovereign authority:

It is however not a valid objection to the existence of juridical relations between Nations, that they are not, like the domestic law of a State, defined by the Sovereign Power, or that they are not enforced by the executive authority of a political Superior.... They are not merely relations of Morality, but relations of Law.19

Twiss argued that larger powers used their individual strength to enforce the rules of law, or lesser powers combined to do the same. Essentially he saw that the balance of power amongst nations was the means of enforcement, the means of maintaining peace, and the substitute for a sovereign power. In this regard the maintenance of balance was in the interests of all parties. For the same reasons that European powers considered territorial rights as not merely important for issues of colonial expansion and empire, but for protection from each other, so a stable balance of power was important assurance of their own security.

Importantly, Twiss distinguished two separate divisions of the law of nations. ‘The Law of Nations accordingly divides itself into Natural or Necessary Law, and

18 Twiss, Law of Nations. 145.
19 Ibid. 175.
Positive or Instituted Law’.

The latter Twiss determined as originating from the Peace of Westphalia. The problem of sanctions, being mindful of Austin’s criticism, was similarly divided in two. Twiss saw the sanction for violating the natural law of nations as the termination of the independent state, where that for the positive law of nations was the isolation of the offending state. Believing that independent states suffer certain things to be done by other states while considering them to be unjust, to take action against them would violate the state’s liberty and destroy the ‘foundation of their natural society’. Twiss noted this as an example of the Natural Law of Nations.

Like Lorimer, Twiss distinguished his use of the term law of nature from its use in a scientific context, such as the phenomenon that an object lighter than water floats on the surface. In this physical situation he claimed that it was merely representing a ‘universal fact’ not a division of Law as described in The Institutes. Although this division would have found little objection from jurists, it was not consistent with theorists who focused on the spiritual application of natural law, notably George Combe and Henry Drummond. Combe, the phrenologist, in The Constitution of Man (1847) argued the interdependence of physical and spiritual natural laws in the temporal world. He saw the reward and punishment for spiritual and moral behaviour as being dispensed in the physical world by the operation of physical ‘laws’. Henry Drummond, scientist and evangelist, also linked

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20 Ibid. 146. Twiss, on the same page, footnoted Puffendorf’s explanation of Natural Law as ‘that which is so exactly fitted to suit with the rational and social nature of man, that human kind cannot maintain an honest and peaceful Fellowship without it’. This was an ancient and Thomist view of Natural Law based on a belief in intrinsic human sociability, unlike the Hobbesian view of human selfishness.

21 Ibid. 155.

22 Ibid. 146.

23 Ibid. 149.

physical and spiritual laws. Unlike Combe, however, Drummond saw all natural laws as forming a continuum, from inanimate objects through the lowliest amoeba, the vegetable and animal worlds, rising to the greatest possible heights of man’s spiritual endeavours.  

It is unsurprising, however, that jurists would focus on the legal aspects of natural law and the law of nations.

Twiss’s understanding of natural law was consistent with that of Justinian’s Institutes as ‘“the law which Natural Reason teaches to all mankind”’.  

Nevertheless he was in agreement with Chancellor Kent who in reviewing natural law stated that many of the legal principles of the law of nations were given legal precision and supported by practical application since the times of Grotius and Puffendorf. They were informed by the determinations of the Prize Courts of Europe and the United States rather than by theoretical writings of jurists. Again he cited Dr Richard Zouch, in his role as Judge of the High Court of the Admiralty and Regius Professor of Civil Law at Oxford, referring to Zouch’s ‘threefold division of the Law of Nations into Natural, Conventional and Customary, was adopted as early as the middle of the Seventeenth Century’.

In common with other law of nations’ jurists, Twiss subscribed to the belief that the open sea was excluded from any nation’s rights of possession. In this regard he followed Grotius’s explanation that there had always been common consent from the time of Roman Law ‘in restraint of the Law of Nature with regard to prior occupancy’


27 Twiss, Law of Nations. 156.

28 Ibid. 157.
preventing the sea’s possession by any nation.29 This was a particular case where the law of nations was recognised by its exclusion rather than its implementation. An ongoing denial of a role for natural law in the law of nations by its opponents was that natural law was merely a statement of morality which had little to do with formal jurisprudence.

Twiss clarified his position on the matter by distinguishing between International Morality and International Law. Twiss noted that Lord Stowell as one of the administrators of the Law of Nations through Admiralty courts stated that he was not to be swayed ‘by one Nation [which] has thought fit to depart from the common usage of the world’ in making judgments based on the established practices of mankind.30 The evidence Twiss cited was selected to support his conviction that whilst the Law of Nations was inseparable from natural law, the element of Positive or Instituted Law was refined by precedents developed over time. He was keen also to defend the Law of Nations from the accusation that it was merely a statement of morality. Twiss’s understanding of Law was based on the possibility of temporal enforcement:

Wherever a Rule of Conduct is thus capable of being enforced it ceases to be a mere Rule of Morality, binding on the conscience of men, and may in contradistinction be termed without risk of confusion a Rule of Law’.31

By restating the lack of necessity for a sovereign power to oversee the Law of Nations’ along with his definition based on its enforcement, Twiss had crafted a significant refutation of Austin’s reasons for rejecting the possibility of its existence. He had also drawn on a long historical precedent to support his contention.

29 Ibid. 157.
30 Ibid. 158.
31 Ibid. 176. In a footnote to this point he observed it was a well founded distinction that where the sanctions for a rule of conduct are physical, for an individual or nation, the term Law applies; where the sanctions ‘are only to be discovered in the human conscience, it is a rule of Morality, as distinguished from Law’.
Twiss had observed that Emer de Vattel (1714–67) suggested that Justinian’s idea was that, ‘according to the situations and circumstances in which men were placed, right reason has dictated to them certain maxims of equity, so founded on the nature of things, that they have been universally acknowledged and adopted’. He considered that this was no different from the law of nature which applied to all mankind.\(^{32}\) By coming together into a nation or state, a body politic, such a society became a ‘moral person ... susceptible of obligations and rights’.\(^{33}\) Vattel had written concerning the self-protection of a nation, ‘The nation ought to put itself in such a state as to be able to repel and humble an unjust enemy’.\(^{34}\) Herein lay its primary duty of self-preservation. In quoting Vattel’s opinion Twiss argued that the nation therefore had the right to maintain men at arms, fortify the nation and enter into allegiances. Importantly, Twiss believed that, provided such actions did not encroach on the corresponding rights of other nations, they were implicit in natural law.\(^{35}\)

One of the fundamental issues pertaining to natural law in the minds of theorists was the character of laws pertaining to property rights. This was of similar significance when applied to the law of nations. Developed from the concept of possession of self in natural law, and extended to the rights of nations to defend their own self-possession, property rights, as applicable to the individual, were seen to be similarly applicable to nations under both natural law and the law of nations. This position, like that of Lorimer,


\(^{33}\) *Ibid.* iii.

\(^{34}\) *Ibid.* 87.

earlier rejected what Waldron referred to as Bentham’s ‘extreme materialist view’.  

Twiss again drew on Vattel, who had stated:

All mankind have an equal right to things that have not yet fallen into the possession of anyone; and those things belong to the person who first takes possession of them.

Vattel applied this also to a nation which found a country uninhabited and without an owner, proclaiming that country’s lawful right to take possession. He added, however, several important qualifications. Firstly, title could be expected to be honoured, ‘provided it was soon after followed by a real possession’. Secondly the taking of a territory far bigger than the nation could populate or cultivate ‘such a pretension would be an absolute infringement of the natural rights of men’. These statements highlighted two most significant applications of natural law through the law of nations to colonisation: the law of first taker and the requirement of the coloniser to utilise its new territory.

In citing Vattel, Twiss expressed his belief in the ‘perfect accord’ evident between the law of nature and the law of nations on this matter. He stated that occupation of a territory by a nation was equivalent to the detention of an object by an individual. Like Vattel, he saw real possession of a territory as more than mere discovery, which could be regarded as a ‘transient act’; the nation must demonstrate ‘its intention to appropriate the territory to its own purposes’. This required notification of possession to other powers, and as he noted Vattel had observed, the law of nations would not ‘acknowledge the property and sovereignty of a Nation over any uninhabited countries, except those of

38 Ibid. 99.
which it has really [my emphasis] taken actual possession, in which it has formed settlements, or of which it makes actual use’. Twiss confirmed the Roman jurists’ view that the law of nature, and thus the law of nations, prevented the appropriation of things which by their nature could not be appropriated: running water in a river, and the oceans beyond a territorial boundary.

In his assessment of leagues between formerly combative nations and those which had never contracted any engagement to one another, he confirmed the existence of a Rule of Natural Right, citing Grotius, who maintained that ‘there is a kind of Natural Relationship between all mankind, and therefore that it is wrong for one man to harm another’. He included Puffendorf’s additional reference to a class of league, ‘those which restrain the duties of Natural Law, when they are too general and indefinite, to certain and particular articles’. Twiss’s quote from Grotius cast further doubt on the attribution of modern natural law, based on human survival, to Grotius, rather reinforcing his support for the principles of ancient natural law, human sociability. Its significance for Twiss, however, was its acknowledgment that, by underpinning leagues, natural law was again the foundation not only for treaties, but also for other forms of positive law.

Twiss stated his belief in the importance of the law of nations as underpinned by natural law when, following his duties as President of the 1876 Bremen Conference, he addressed the Association for the Reform and Codification of the Law of Nations at the

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41 Twiss, Law of Nations. For the discussion of his view see p.231ff.
42 Ibid. 384
43 Ibid. 384.
44 Ibid. 386. Twiss indicated that ‘under the simplest head of Leagues may be classed all Compacts between Nations for freedom of Commerce and for Hospitality towards Strangers of either Nationality, as being agreeable to the Law of Nature’. He stated further that Leagues ‘add something further to the Natural Law of Nations’.
Antwerp Conference, 1877. His concern was prompted by an earlier incident during the American Civil War, the capture on February 3rd 1863 of a British barque, *Springbok*, by the US Cruiser *Sonoma*, a Union ship of war, on a voyage from London to Nassau, a British possession in the Bahamas. Subsequent to its arrest and transfer to New York, the ship and cargo were declared a lawful prize of war, accused of carrying supplies to the Confederate states. Twiss’s concern was that while the *Springbok* itself was ultimately released on appeal to the US Supreme Court, the cargo was retained as prize based on the Doctrine of Continuous Voyage. The doctrine argued that it was lawful for a belligerent nation to seize a prize at sea where its ultimate destination was an enemy port, even though its immediate destination was a neutral or friendly port. Factors complicating the *Springbok*’s case were that it was transporting some contraband of war, and the United States courts initially accepted evidence that the ship’s papers were ‘simulated and false’. Twiss believed this doctrine contradicted the 1856 Declaration of Paris, was contrary to the law of nations, and to precedent set in English Prize Courts. He cited Lord Stowell’s interpretation of the law concerning contraband that ‘the articles must be taken *in delecto*, in the actual prosecution of the voyage to the enemy’s port’. He also quoted the Earl of Derby from Hansard of 18th May 1863, in the House of Lords, ‘“If a vessel were proceeding *bona fide* from this country to Nassau, whatever might be the nature of her cargo, no American cruiser has the right to interfere with her...even though it were meant

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that she should subsequently proceed from Nassau to the Confederate States and endeavour to break the blockade’. 46

Twiss’s concern about this ‘novel doctrine of “Continuous Voyages” ’ had a national interest as well as a juridical one. Most shipments of saltpetre from Calcutta were taken initially to the Port of London, the ‘great Entrepot of saltpetre’, and the Suez Canal was often the preferred route of travel. He feared that, during times of conflict, the Continuous Voyages Doctrine could justify the seizure of any British merchant ship on entering the Mediterranean by any European belligerent on the justification that its cargo’s ultimate destination was its enemy’s port. 47 Twiss ventured that ‘the Supreme Court of the United States in giving to the doctrine a prospective operation, ...has stepped onto a dangerous declivity, down which it will be difficult for Prize Courts to arrest their progress’. 48 He felt ‘there was no doubt that the doctrine of “prospective continuity” applied to the transport of merchandise on the high seas opens wide the floodgates of visitation and search’. 49

It appears most likely that the United States’ assumption concerning the Springbok was correct, and a presumptive strike made good technical sense in their war against the Confederates. There was little in the British objections to address the facts of the case, merely an expression of umbrage at the legal affront to British merchant shipping by ignoring the law of nations. As Twiss had noted, its significance was far greater than that. It underscored the fragility and consensual nature of the law of nations,

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46 Ibid. pp. 22-23.
47 Ibid. 28.
48 Ibid. 29.
49 Ibid. 30.
the legislative reach of national Prize Courts, and strengthened the argument of followers of Austin that the concept of international law was implicitly self-contradictory, there being no sovereign power of enforcement. It again illustrated the wide range of understandings and overlapping uses of the term ‘law’: from a separation of its scientific and judicial use to a blending of the two by Henry Drummond; natural and positive, moral and physical, and their blending by George Combe. Although there was reasonable agreement that all law depended on temporal enforcement, in the case of the law of nations the character or identity of the enforcer has to this day remained particularly unclear.

In 1884, as a member of the Institute of International Law, Twiss revisited the Springbok case to demonstrate again his continued concern for the rights of the ships of neutral nations transporting goods in times of conflict. Acknowledging that the 1856 Declaration did not declare non-compliance an offence against the Law of Nations, he admitted:

The Declaration is, in fact, nothing more than a solemn pledge on the part of the States, which have signed or adhered to it, that they will mutually observe its provisions in their relations towards one another.50

Part of Twiss’s concern was the fact that other countries appeared to be turning to American interpretations of International Law as precedents for their own. Having previously expressed his concern about the US Supreme Court’s interpretation where the Springbok was ultimately released, but its cargo was retained, he found it necessary to restate his criticism of the legal judgment, fearing that adherence to US precedents would

unfairly undermine the rights of neutrals who were parties to the Declaration during any conflict, and impede the processes of other prize courts particularly British ones. Twiss illustrated his concern by speculating on a possible conflict between France and China, which by following the US interpretation of the Continuous Voyages Doctrine, using presumptive seize and search, could potentially justify the French seizure of every British or Dutch ship passing along the Tunisian coast on the way to the Suez Canal when the ship was travelling to a neutral port such as Singapore or Hong Kong. Twiss concluded:

It is not too much to say that it has added a new terror to war as regards neutral commerce, and has also introduced a new ratio decidendi into Prize proceedings, to which other nations may with justice demur.

Twiss drew satisfaction from the 25th January 1884 declaration by Count van Lynden van Sandenburg, Dutch Minister of State, in the sitting of the Upper Chamber of the States General of the Netherlands condemning the behaviour of the United States concerning the Springbok. The Minister called upon the United States to renounce ‘a doctrine destructive of neutral trade’ arguing that there was a great principle at stake, and the nationality of the owners of traded goods was irrelevant. It was interesting that he spoke as the representative of the country which gave birth to Hugo Grotius, prompting Twiss to echo this request to the countrymen of Benjamin Franklin, to abandon the doctrine of blockade by interpretation which was contrary to the principles of natural equity. Again Twiss based his interpretation of international law on the governing principles of natural law.

\[51 \text{Ibid. pp. 23-26 Twiss considered in some detail the relationship between the Springbok judgment, contrary European Prize Courts’ decisions, and the potential difficulties for the trade of neutral nations.} \]
\[52 \text{Ibid. 26.} \]
\[53 \text{Ibid. pp. 29-30.} \]
\[54 \text{Ibid. 31.} \]
In a less usual application, Twiss previously in 1851 had cause to be mindful of the ‘Public Law of Europe’ and the Law of Nations in his examination and vehement criticism of the Apostolic Letters of Pope Pius IX which he saw as an encroachment on the laws of England as a sovereign nation. Other states over time had had ongoing difficulties with the duality of the pope’s role as both a secular ruler and the spiritual leader of the Catholic Church throughout the world. Indeed a number of popes, notably Julius II (1443–1513), had similar difficulties also reconciling their own dual roles. For Twiss, Pius’s religious decisions were a political challenge to the sovereignty of the government of England and an offense against the law of nations. Twiss stressed that his opposition would, as far as possible, avoid contentious religious divisions tracing back to the Reformation. His objections, he stated, were from the point of view of historical facts, ‘and not in subordination to any general theory’. Twiss pointed out that the object of his treatise was ‘to examine the late proceedings of Pope Pius IX in its bearing upon the laws of England, and the law of Europe’. In essence, Twiss found the brief from Pius to be ‘most objectionable’ because it was a direct violation of the Statute Law of the Land, seeking as it did to erect Sees for Bishops in Ordinary ‘within the dominions of an independent Sovereign, without the consent of the Crown’. Initially it involved the See of St David’s. Because it deviated from long standing practice, Twiss believed it violated one of the fundamentals of the law of nations. He regarded the 1829 Catholic Emancipation Act as hurried and incomplete, and argued for comprehensive amendment which ‘whilst it confirms the religious liberties the Roman Catholic subjects of her

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56 Ibid. iv.
Majesty, shall place the religious liberties of her Majesty’s Protestant subjects in security from alarm, and beyond the reach of further aggression’. 57

There were several elements of Pius’s brief which Twiss saw as an affront and a challenge to English sovereignty. The pope’s intent was to create one archi-episcopal see and twelve episcopal sees dividing the entirety of England and Wales into thirteen dioceses. For Twiss, even more threatening than this action alone, done without consultation with the Crown, was the further declaration in the brief that ‘the aforesaid archbishop and his twelve suffragans shall enjoy, as the archbishop and bishops of England, [Twiss’s italics] all the rights and functions which other Catholic archbishops and bishops of other nations enjoy, according to the sacred canons and the apostolic constitutions’. He stated that the brief then abrogated ‘all the constitutions, privileges and customs of the ancient English Church...and re-establishes in England the Common Law of the Church’. Twiss interpreted this as an attempt to restore ‘the whole body of Canon Law sanctioned by the Popes’. 58

Twiss’s further attack was an intriguing one. Because he saw inadequacies in the 1829 Catholic Emancipation Act, he all but admitted that British law was insufficient to address the problem when he called on the ‘public law of Europe’ for the solution. Twiss admitted ‘it might be perfectly true that the municipal law of England does not expressly forbid her Majesty’s Roman Catholic subjects to take the style and title of bishops of English sees erected by the Pope without the consent of the Crown of England’. He thus turned to the Law of Nations for assistance by stating ‘It may be against the public law of

57 Ibid. vi.
58 Ibid. 3.
Europe for the Pope to erect a bishop’s see within the realm of a Sovereign Prince, without having previously obtained the consent of the Prince’. Twiss supposed that such a proposition posed a rather different question, which if addressed, would achieved the same end ‘namely, whether the act of the Pope, although it may not touch the supremacy of the British crown in spiritual matters, does not constitute an invasion of its temporal authority within the realm of England’. Twiss clearly believed it did. His strategy was an interesting use of external law, drawing on the Law of Nations generally and the public law of Europe specifically to deal with an internal problem for which he believed municipal law proved inadequate.

Twiss’s attack on Pius IX’s brief brought him into conflict with a fellow jurist at Common, George Bowyer, as well as Cardinal Wiseman (1802–65). George Bowyer, who had converted to Catholicism in 1850, acted as a constitutional adviser to Cardinal Wiseman and a spokesman for the Church on legal issues. Michael Lobban was somewhat dismissive of the English jurists after 1850 who persisted with a ‘traditional form of natural law thinking’. Stating that ‘these works were often unsophisticated, and written by minor figures’, clearly non-canonical, he recognised that they were accepted favourably by the legal profession. He included George Bowyer amongst the ‘minor unsophisticated figures’. The reason for this judgment is unclear, but Bowyer did make a notable contribution to jurisprudential discourse.

In his treatise, The Cardinal Archbishop of Westminster and The New Hierarchy, Bowyer acted as an apologist for the cardinal and the Holy See, both defending Pius’s

59 Ibid. 6.
60 Ibid. 7.
61 Lobban, "Was There a Nineteenth-Century 'English School of Jurisprudence'?" 46.
plan and seeking to ‘answer to the arguments and invectives which in an uninterrupted torrent ... [have been] raising apprehensions in the mind of impartial and thoughtful men’. The tenor of Bowyer’s introduction was evidence of the fierce antagonism underlying the debate of which he and Twiss were a part. As G.I.T. Machin points out Cardinal Wiseman had himself contributed to the hostility by issuing ‘an unnecessarily grandiloquent pastoral, containing the assertion that, as archbishop of Westminster, ‘... we govern and shall continue to govern the counties of Middlesex, Hertford and Essex as ordinary thereof, and those of Surrey, Sussex, Kent, Berkshire, and Hampshire, with the islands annexed, as administrator with ordinary jurisdiction’. There was little wonder that the Wiseman’s pastoral further inflamed tensions. His letter issued immediately on returning from Rome, *Appeal to the Reason and Good Feeling of the English People* (1850) was described by Machin as ‘too equivocal to calm matters, and came too late to have much influence, except among those who were already disposed to accept the hierarchy’. While also claiming to avoid ‘contentious religious divisions’ Bowyer drew on the 1829 Catholic Emancipation Act to justify his case. Within the Act was an oath where the subject had to swear ‘‘*I do not believe that the Pope of Rome, or any other foreign prince, prelate, person, state, or potentate, hath or ought to have, any temporal or civil jurisdiction, power, superiority or pre-eminence, directly or indirectly within this Realm*’’. Bowyer believed that this distinguished between the temporal and spiritual

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63 Machin, *Politics and the Churches in Great Britain, 1832–1868*. 217. G.I.T. (George Ian Thom) Machin was Professor of British History, University of Dundee.
64 Ibid. 217. For Machin’s account of the conflict see pp 210-218.
jurisdiction of the See of Rome manifestly permitting *spiritual* jurisdiction over British subjects. Twiss’s reference to the interpretation of the ‘*municipal laws of England*’ suggests strongly that he, to his regret, interpreted them similarly. From that point, any argument Bowyer developed, based on the Emancipation Act, was irrelevant for Twiss. His sense of the Act’s inadequacy led him to look beyond it to the law of nations.

Nevertheless, Bowyer had used the Catholic Emancipation Act to develop his argument as to how ‘her Majesty’s loyal and devoted subjects, the English Roman Catholics, have received the great benefit of a canonical, and regular, and permanent Episcopacy, in lieu of a temporary and anomalous form of internal administration under prelates...’66 Bowyer argued that Royal supremacy relating to the Ecclesiastical prerogative of the Crown affected the ‘Established Church’ alone. Therefore, any action by other faiths that didn’t violate legal rights did not affect that supremacy. Because Roman Catholics were *allowed* [my emphasis] to acknowledge the spiritual authority of the Pope, they were outside the ‘spiritual jurisdiction or supremacy of the Crown’.67 A particular point of disagreement between Bowyer and Twiss was over Bowyer’s contention that the change was only within the internal governance of the Church ‘it in no respect violates the supreme, civil or temporal jurisdiction of the Crown’.68 A significant argument of Bowyer was that ‘a Catholic Bishop is not and cannot be Bishop of a territory, but Bishop of a flock’. He stressed that ‘the Church’ meant ‘*the flock in communion with him at that place*’ not the land or territory identified by the See.69

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67 Ibid. 7.
68 Ibid. 12.
69 Ibid. 32.
Dr Wiseman had aggravated the fear of political action that underlined Twiss’s condemnation. Wiseman had stated in a lecture what he saw as a disadvantage under a system of vicars:

For in a country divided into Vicariates, however numerous, each has a perfectly free and independent action, as much as if each were situated in a different country; there is no bond of organic union between them...no power to give their joint acts a general authority [my emphasis]. 70

The prospect of Catholic unification for political advantage alarmed Twiss as he stated, ‘Now it is precisely in respect of its organic bond of union that the new system, as compared with the old is fraught with political danger’. He argued ‘the new Hierarchy is an institution opposed to the genius of the constitution of the realm, which allows of no rival legislative body within the realm, whose decrees shall conflict with and prevail against those of the Queen and her Parliament’. 71 This was the nub of Twiss’s concern: the use of ecclesiastical power for temporal purposes lacking a spiritual dimension.

Citing the action of the Synod of Thurles in Ireland’s 72 interference in a legislative decision as evidence, he observed that thirteen dissenting Roman Catholic bishops of Ireland were ‘constrained, against their conscience, to oppose and thwart the execution of the law’. 73 Twiss considered that pressure from an external sovereign was brought to bear in countering a lawful municipal judgment. Twiss concluded that on the basis, not only of British municipal law, but with regard to the public law of Europe:

70 Twiss, Letters Apostolic of Pope Pius IX. 18.
71 Ibid. pp. 18-19.
72 A council of Roman Catholic prelates in 1850 at Thurles convened The Synod which was called by the newly appointed Archbishop of Armagh and Primate of All Ireland and Apostolic Delegate. It reversed previous agreement by bishops to support British government approved non-denominational “godless” colleges throughout Ireland and prohibited priests from involvement with them.
73 Twiss, Letters Apostolic of Pope Pius IX. 19.
If there be any one principle of law which has received the sanction of that high usage and practice which constitutes it a binding obligation on all the powers of Christendom, it is this, that the Pope cannot set up the See of a Bishop within the territory of an independent prince without his consent. Common sense suggests that none other than the sovereign power of the land can give a Bishop a Seat within the land.74

Twiss, although not a supporter of Catholicism, was thus prepared to accept the degree of religious freedom that its followers enjoyed in the prevailing circumstances; for Cardinal Wiseman, as an example, to be undertaking a missionary role on behalf of the Holy See, but not to establish for it administrative and management structures within Britain.

Twiss drew on the precedent established by a judgment of Lord Stowell where an enemy power in 1799 claimed to be authorised to establish jurisdiction and impose sentence within the dominions of a neutral power. Twiss saw a direct parallel between the sets of circumstances even though he was not regarding the Pope, at least overtly, as an enemy. Stowell drew on a policy found in natural law that ‘general principles’ must prevail unless on the basis of ‘ancient and universal practice of mankind’ they have been modified by usage. In such a case the institution must conform to ‘text law, and likewise to the constant usage upon the matter’. Stowell concluded that as ‘no sentence of this kind has ever been produced in the annals of mankind’ it was the duty of the Court to reject the sentence, and declare it inadmissible.75 For Twiss this was sufficient justification to argue that in the present case there was no ‘ancient and universal practice’ to overturn ‘general principles’ prohibiting Papal interference. The argument had little

74 Ibid. 67.
likelihood of resolution because the underlying religious prejudices were immutable. It was for this reason that while all parties were seeking a legislative resolution to their problem, such a solution would in reality be a technical one. The issues involved went much deeper, to what each side saw as fundamental or natural rights. Twiss, failing a municipal solution, looked to the law of nations because of its underlying principles. Bowyer, on more secure legal ground, used legislation to defend the natural rights he saw associated with religious freedom. In concluding his treatise he confirmed this when he stated that English Catholics ‘ask nothing of the Crown or the Legislature, beyond what is given as a matter of right to every denomination of religionists and to every sect’.  

Although natural rights were not overtly discussed, they remained an underlying feature of the debate as they continued to do throughout the nineteenth-century. Somewhat ironically, although Twiss and Bowyer were unable to agree on religious matters, and the issues derived from them, they were in complete agreement on the principles of natural law, rights, and their underpinning of the law of nations. George Bowyer was particularly strong in his affirmation of natural law.

Where Rousseau had seen natural law as applicable to man in a state of nature, and Maine had rejected it for the same reason, Bowyer defined it in similar terms to Mackintosh, Lorimer, Foster, and Heron. He declared ‘natural law is not the law which governs man in what is vulgarly called a state of nature, but that law which is agreeable to the nature of man, and the ends for which he was created’.  

In addressing the Society

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of the Middle Temple in 1850, Bowyer expanded on this description. In a clear rejection of Rousseau and Maine he stated that:

The law of nature is to be deduced from the natural state of man, which is not (as some writers have supposed) that of a savage in the woods, or a sort of wild animal in human form (a condition in which man never existed, except when accidentally degraded below his nature), but that state which the reasonableness of man and the dignity of his immortal soul point out as the state for which he was intended by his Creator.78

This was a most important element of its definition being consistent with their beliefs that an understanding of natural law was progressively discovered and comprehended by man with increasing intelligence and socialisation. It also contributed to the confusion over the nature of primitive man; the level of capability at which a being could be confidently designated human. Bowyer adopted a Kantian position, where Kant had argued that ‘the state of nature (status naturalis) is not a state of peace but war; though not of open war, at least, ever ready to break out’.79 Kant argued that in the primitive state the only tribunal available was the ‘field of battle’.80 This belief distinguished the state of nature from the application of natural law. This necessitated neighbours guaranteeing one another’s security as a prerequisite for perpetual peace.

Bowyer consistently related his natural law understanding to his Catholic religious beliefs as others did to their own Eurocentric Christian beliefs. Bowyer also divided natural law into two branches: Primary Natural Law and Secondary Natural Law. ‘The first is that which springs from the relation of man to man, without more, such as the rule that no man ought to kill or hurt another’. This was traditional Thomist thinking;

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78 Bowyer, Readings. 7.
79 Kant, Perpetual Peace. 10.
80 Ibid. 20.
totally opposed to the Hobbesian interpretation of natural law as human selfishness – all against all. Suggesting that the secondary form was less easy to explain, he indicated ‘it arises out of some institution of which it is a consequence’. Thus he accounted for the role of ‘secondary’ natural law in supporting institutions, positive law, and the law of nations, whose primary function was to implement and enforce primary natural law. Such institutions and legal structures were grounded in natural law because they were necessary for the welfare of society. Thus he cites as an example, ‘the Law of Dower’, an arbitrary law comprised of two parts: the immutable natural law which determines that a widow should have some part of her deceased husband’s estate, and the arbitrary or positive law which determines the extent of that provision. Bowyer most specifically indicated his belief that the law of nations was a branch of natural law ‘when it regards the relations of different sovereign communities with each other, it is called external public law, or international law’. With a similar perspective to other natural theorists who expounded the law of nations, Bowyer expressed his view on the rights of the occupancy of property, particularly in the context of imperial expansion. He expressed agreement with Grotius’s position in stating:

Occupy, or the taking possession of that which previously belonged to no one is, as Grotius says, the only natural and original mode of acquisition, that is to say, the only mode of acquiring by natural law [my emphasis], without deriving a title from any other person.

81 Bowyer, Readings. 7.
82 Ibid. 11.
83 Ibid. 9.
This was also consistent with Kant’s position that ‘No state shall by force interfere with either the constitution or government of another state’.  

Observing that where legal tribunals existed judicial means were available to adjudicate disputes, but ‘in the great and independent society which every nation composes, there is no superior resort but to the law of nature; no method to redress the infringements of that law but the actual exertion of private force’.  

Bowyer’s statement was important for several reasons. He was acknowledging the supremacy of natural law as the ultimate determiner of all national and international legal rights. He also accepted that while the reason for Austin’s discrediting of the law of nations for having no sovereign was obviously true, the law itself was still valid and capable of enforcement. Although he confirmed that ‘Natural law prescribes to us to seek the establishment of peace by all lawful means’, of further significance was his acceptance of a nation’s right, within natural law, to wage what it termed to be a just war as a means of redressing a perceived transgression of natural law and the law of nations.  

In fact he admitted that it was really the only means of enforcement of natural law. Similarly, within an oppressed community, revolution was not necessarily contrary to natural law. In the case of unconstitutional oppression within the state, which he admitted positive law couldn’t provide for, Bowyer agreed with Blackstone that nature and reason would prevail. ‘Ordinary law cannot afford that redress [of oppression] to which, by the divine law of nature, they are entitled’.  

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consensus that they were protected by the law of nature and of nations. He considered that Britain ‘as well as the rest of Europe, seems to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime’.\textsuperscript{89} His position again affirmed the law of nature and of nations as superior to that of positive law. He applied Grotian principles of natural law to the finding of lost possessions with ‘the general principles of natural law, which give those things that have no owner to whoever first takes possession of them’, their original owner being unknown.\textsuperscript{90} This principle of first taker had been the accepted means of justifying and legitimising European imperial expansion. Bowyer acknowledged, as did Grotius and Blackstone that common laws in some countries ceded discovered possessions to the Crown.\textsuperscript{91} Where this occurred they were annexed to the State by positive laws. Linking natural law and Christianity he stated, ‘No man can refuse to perform this duty without offending against natural law, and consequently against the obligations of a Christian; because the social state is a portion of secondary natural law’.\textsuperscript{92}

Although Travers Twiss and George Bowyer were both members of Doctors Commons and committed advocates of natural law theory, they conflicted over the role of the authority of the Pope in the appointment of Catholic bishops in Britain. It was interesting that, believing British law was inadequate, Twiss should choose to prosecute his case regarding papal authority within British sovereign territory, through international

\textsuperscript{89} Ibid. 220.  
\textsuperscript{90} Ibid. 270.  
\textsuperscript{91} Ibid. 271.  
\textsuperscript{92} Ibid. 284.
law. This conflict while remaining a juridical matter touched on aspects of the relationship of natural law to the spiritual life.
CHAPTER SEVEN: JAMES LORIMER AND THE LAW OF NATIONS.

In stressing the necessity for natural law’s recognition and in opposition to Jeremy Bentham, James Lorimer’s definition of natural law as ‘law as it ought to be’1 was an important counter argument. It underlined his conviction that positive law developed from natural law because the latter represented an overarching moral ideal or mode of expected human interaction. He recognised that in reality although the moral ideal may not have been achieved in enacted law, such failure in no way discredited or denied the reality of natural law – the ‘ought to be’ law. If this morally omnipresent definition of natural law is pursued then it suggests an intriguing question. To what extent had the Utilitarians, including Bentham and Austin, unwittingly based their denial of its existence on the very natural law principles that they rejected? The dependence of positive law on natural law was one basis of Lorimer’s argument concerning the importance of natural law’s role in the law of nations: its guiding role in the devising of new forms of positive international legislation in the absence of a sovereign. Because the law of nations required legislation that could take precedence over the positive laws of individual nations, Lorimer believed that this need could only be solved by an appeal to natural law.

Robert P George, in the introduction to his book In Defense of Natural Law (1999), identifies himself as a true Thomist, particularly with reference to his dialectical method.2 While discussing later twentieth-century interpretations of natural law George refers to some of the interpretations which have been derived from, post-Enlightenment

1 Lorimer, The Institutes of Law. 8n
2 Robert P. George is McCormick Professor of Jurisprudence at Princeton University, lecturing on constitutional interpretation, civil liberties, and philosophy of law. He is a leading proponent of reviving the natural law tradition and has written extensively on Natural Law theory (NNL).
and nineteenth-century theorists. This is consistent with my argument that post-Holocaust interest in human rights and natural law drew not merely on Enlightenment ideals, but also on a vibrant nineteenth-century pragmatic discourse on natural law and rights.

George’s understanding of natural law consists of several sets of principles:

First, and most fundamentally, a set of principles directing human choice and action toward intelligible purposes, i.e., basic human goods which, as intrinsic aspects of human well-being and fulfillment, constitute reasons for action whose intelligibility … does not depend on any more fundamental reasons (or on sub-rational motives such as the desire for emotional satisfactions). Second, [he accepts] a set of ‘intermediate’ moral principles which specify the most basic principle of morality by directing choice and action toward possibilities that may be chosen consistently with a will toward integral human fulfillment and away from possibilities the choosing of which is inconsistent with such a will.3

Here George restates the natural law principles of sociability. Despite his Catholic conservatism he omits reference to God in the same manner as the theorists discussed. This was similar to the nineteenth-century theorists who saw God as fundamental to creating a self-managing natural law system. George’s natural law thinking focuses on moral Good and Right without associating them with the Divinity. The nineteenth-century theorists I have examined: Foster; Lorimer; Caulfeild Heron; Phillimore; Twiss; Bowyer; Drummond; Combe and Seeley, while considering law independent of a Deity, like George, were nevertheless themselves theists. It was their thinking which emphasized, though far from completely, the focus of natural law specifically on the nature of Man. Benthamite utilitarian teleology, natural selection combined with Hobbesian modern natural law, were post-Enlightenment influences which contributed to the mutation, though not the extinction of natural law.

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The interpretation of Lorimer and the members of the Scottish historical school for example Adam Ferguson (1723–1816) and Francis Hutcheson (1694–1746), that natural law was not evidenced in a primitive ‘state of nature’ but its understanding grew with human intellectual development, was perfectly consistent with George’s ‘set of principles directing human choice and action towards intelligible purpose’. The blurring of the rigorousness of deontological and teleological approaches to the law by Bentham and Austin, the confining of morality and consequences to the temporal world by Combe, and the acceptance by later nineteenth century jurists of a melding of ancient and modern natural law and rights theories influenced the post-Holocaust preoccupation with ‘human’ rights.

Lorimer’s views on natural law generally, and international law particularly, were certainly not without their critics. Martii Koskenniemi in The Gentle Civilizer of Nations considers that international lawyers of the period ‘were anything but averse to giving legal recognition to cultural differences between Europe and the rest of the world’, and that Hobsbawm in his Age of Empire 1875–1914 (1987), was correct in arguing that the influences of Social Darwinism, colonial difficulties, and missionary horror stories often transformed humanitarianism into racism. Marti Koskenniemi believes that Lorimer subscribed to these Eurocentric racial views citing his prediction in La Doctrine de reconnaissance (1884), ‘that no other modern science would have as much effect on

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international law as ethnology, or the science of races as he called it'. He referred also to Lorimer’s comments about future British rule in India which would either continue, ‘or else something would happen “that had never happened before,” namely the birth of a proper Oriental political organization’.  

Koskenniemi refers to James Lorimer as ‘the Institut member who did the most to attempt a theoretical, a new international law’. Frederick Pollock writing Essays in Jurisprudence and Ethics in 1882, similarly to Holland, had praised Lorimer’s intent and effort but not his subject matter, natural law. Pollock considered that the text ‘would be valuable even if this were only fairly well done; but Professor Lorimer has done it as well as it can be done’. He referred to the ‘satisfaction of reading a vigorous and well-written exposition of a theory with which one entirely disagrees’. He stated that, ‘our English school holds that absolute law which is or should be the origin and pattern of all existing laws, - Naturrecht as the Germans call it, - either does not exist or does not concern lawyers more than anyone else’. Lorimer was in fact reversing Pollock’s rejection of Naturrecht because, like Combe’s and Drummond’s, it was Lorimer’s appeal to the ‘anyone else’ as well as lawyers that expanded the appeal of natural law issues to the general community; not merely to canonical figures but even beyond the exclusive ownership of lawyers to the general populace. While Pollock acknowledged his own following of the English analytical school of jurisprudence he did not appear to fully

6 Ibid. 335. 70.  
9 Ibid. 19.
accept the differences between the development of English and Scottish law; Lorimer was as much a product of his Scottish legal tradition as Pollock was of the English school.

In prefacing his major work on the Law of Nations, Lorimer expressed his desire ‘to place International Law on deeper and more stable foundations than comity or convention, and to vindicate for international jurisprudence the character of a science of nature which I have elsewhere claimed for jurisprudence as a whole’. ¹⁰  He established his linking of international law with natural law when he defined it as, ‘(A) the law of nature realised in the relations of separate nations’. ¹¹  He specifically stated his belief that the law of nations was a branch of positive law and thus related to natural law in the same manner as other forms of jurisprudence. This positioning of the law of nations confirmed his interpretation of it as being legally enforceable. It also confirmed his rejection, like Charles Foster’s, of Austin’s denial of the law of nations existence. Lorimer equated the implementation of the law of nations with that of all elements of natural law:

This law of what we may call ethical or jural gravitation, which, at bottom, is nothing more than “the golden rule,” the universal recognition of which humanity in all ages we have already pointed out, and the validity of which in this particular branch of positive law [my emphasis]...we shall accept as the ultimate definition of the law of nations – namely this: (C) The law of nations is the realisation of the freedom of separate nations by the reciprocal assertion of their real powers. ¹²

In terms of what he saw as both normal and abnormal relations of states, Lorimer stressed that natural law determined the reciprocal and co-extensive relationship of rights and

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¹¹ Ibid. 1.
¹² Ibid. 3.
duties and that international law would therefore embrace both. Lorimer defined normal relations as those seeking to define ‘the reciprocal rights and duties of States, living in peace and amity’ to attain their freedom as separate political entities. Abnormal relations, recognised conflict or belligerency between states. These positive laws addressed issues between belligerents, between belligerents and neutrals, and between neutrals. Lorimer was careful to divorce the analogous relationship of persons and states from any suggestion of congruency. A discussion of the similarities between persons and states could be extended to the issue of punishment. If so, by whom? Lorimer rejected this by arguing that while States, like persons, were capable of rights and liable to obligations this could never extend to criminal law. [Lorimer’s emphasis.] He believed that this misunderstanding came from a confusion of criminal jurisprudence with the civic, legal profile of a corporation. While a being with thoughts and feelings could be regarded as a natural person, a corporation or a state would be regarded as a legal person. He argued for the criminal jurisdiction to be relevant there had to be individual will, of a natural person, not the representational will of a corporation or state. The redress for a state for a perceived injustice not a crime, if negotiation failed, would be hostility, military or economic.

There was irony in the fact that John Stuart Mill based his utilitarian ideology on the same principle as Foster’s natural law, the ‘golden rule’. The irony was compounded by Lorimer also quoting the same principle as underpinning his understanding of natural

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13 For further discussion see Lorimer, Institutes of the Law of Nations Vol.1. pp. 5-6, 8.
law, and specifically the law of nations. While Lorimer argued for human sociability, his theories nevertheless acknowledged the issue of belligerence. Although a theorist of sociability Lorimer acknowledged the Hobbesian principle of self-preservation as an element of natural law, but held that self-preservation was never excluded from ‘ancient’ natural law. This reflects the Kantian principle of ‘unsociable sociability’ [ungesellige Geselligkeit] developed by Pufendorf who argued that our sociable nature comes from our incompleteness and consequent vulnerability to others, thus we need society. Lorimer noted, ‘Self-protection is a right which results... from the fact and consequent right of separate existence’. Based on the assumption of human sociability Lorimer advocated a measured response to belligerence in relations between nations: ‘Recognition, Intervention, and Neutrality’

While laws could be argued as obligations, duties and limitations, and rights would be seen as freedoms, the distinctions between the two were blurred, and the terms were often used interchangeably. While he saw natural law as the supreme authority, sourced from God, in command of all others, Lorimer considered that in international law, which was positive law, rights had supremacy over laws. Drawing on his earlier volume on the law of nations, he observed that:

From the natural law which declares rights and duties to be reciprocal and

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coextensive, it follows that every doctrine of international law may be logically stated either as a doctrine of rights or as a doctrine of duties; and that an exhaustive doctrine of either would embrace both.

Lorimer explained that the reason for using rights as a starting point in jurisprudence generally was because ‘rights are the primary and duties the secondary consequences of existence. Till we have a right to exist ourselves, no duty of recognising other existences can be incumbent on us’. 18 This was a significant transference of interpretation of natural law from individuals to nations, as he was concluding that the primary right of a nation was its independent existence, and consequently it was the initial obligation of international law to guard and enforce this independence. It was his references to ‘the solidarity of rational coexistence’ and belief that in an ideal state both individual’s and State’s interests would recognise not only its own rights but ‘the rights of every other created entity’. This reaffirmed his belief in the applicability of ‘ancient’ natural law theory.19

Lorimer rejected two alternative, but contradictory, schools of thought regarding international jurisprudence which he identified amongst European nations: the negative or national school; and the positive or cosmopolitan school. By taking issue with them, he provided further insight into his understanding of the relationship between natural and international law. The negative school’s argument was entirely consistent with that of Austin, whose position Lorimer consistently rejected. Koskenniemi observed that ‘the 1832 lectures of John Austin (1788–1859) famously disqualified international law as a law through an argument that conceived legal rules in terms of the commands of a

19 Ibid. pp. 8-9.
sovereign enjoying habitual obedience’.\textsuperscript{20} Being focused on the conception of national rights, and thus the absolute independence of States, Lorimer believed that Austin’s interpretation within the negative school totally extinguished international rights and duties, and with them, international law. Lorimer’s belief was that with the use of this logic positive law would end at national borders and the Hobbesian concept of international war would exist beyond it. He considered that the cosmopolitan school, proposing an opposing point of view was equally dangerous. While it argued the necessary interdependence of States, it ignored their independent rights as separate communities. This also negated the principles and function of international law. With these principles the cosmopolitan school envisioned the realisation of Dante’s dream of a universal empire, or Hobbes’ \textit{Leviathan}, albeit in a nobler form.\textsuperscript{21} Somewhat ironically Lorimer’s solution was a reconciliation of the thinking of the two schools where national freedom of action was accommodated through recognition of international interdependence.

By equating the loss of national independence within the cosmopolitan school to the effects of pantheism on natural law, Lorimer further developed his expressed interpretation of natural law.\textsuperscript{22} Where George Combe’s \textit{Constitution of Man} was attacked, albeit erroneously, by churchmen as preaching pantheism at the least, and atheism at worst through Combe’s limiting consequences of behaviour to the natural world, Lorimer’s understanding implied no such difficulties. He considered that pantheism, being an all embracing philosophy of the congruence of God and the universe, rejected

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\textsuperscript{20} Koskenniemi, \textit{The Gentle Civilizer of Nations : The Rise and Fall of International Law, 1870–1960}. 34.
\textsuperscript{21} Lorimer, \textit{The Institutes of the Law of Nations}, Vol. 1. 10.
\textsuperscript{22} Ibid. 11.
the possibility of independent freewill of individuals in the same manner as the cosmopolitan school rejected this freewill of states. The ‘ancient’ natural law theorists from Aquinas and the Salamanca school to the nineteenth-century proponents believed in the creation of a temporal world by the Deity and of individual freewill for humans. Lorimer here acknowledged his agreement with this belief.

In the same manner that Lorimer countered the arguments against the opponents of natural law theory in general, such as contract theorists and the historical school, he crafted his explanation of what he saw as the importance of natural law in the law of nations. He initially argued again: the source of natural law as God’s law, the historical origins of natural law; its implications for both Christian and heathen countries in their international dealings; and the subservience of positive law to natural law. Lorimer affirmed his belief that God and God’s laws were the ‘fountains of International Jurisprudence’.23 ‘The Primary Source, then, of International Jurisprudence is Divine Law’.24 He referenced a 1753 British statement which had responded to a Prussian document where Britain stated: ‘“The Law of Nations” is said to be “founded upon justice, equity, convenience and the reason of the thing, and confirmed by long usage”’.25 This statement positioned his interpretation of the historical belief in the much more ancient context of natural law.

Consistent with his explanation that natural law exists at all times, and all peoples understand it more fully with greater degrees of civilisation, Lorimer again argued that natural law applied however imperfectly, to ‘barbarians’ though it was better recognised

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by ‘all civilized heathen nations’. While he conceded that there was limited application of natural law principles in the international dealings of Ancient Rome due to their ‘practical contempt for the law, exhibited in their unbounded ambition and unjustifiable conquests’, he saw its support in ancient Greece from Aristotle, Thucydides Plutarch and Plato, particularly in their relations with other city states. He concluded this argument with his affirmation of the permanence of natural law by again rejecting the primacy of the historical school, contract theorists and positivists claiming:

Whenever communities come in contact with each other, before usage or custom has ripened into a quasi contract, and before positive compacts have sprung up between them, their intercourse is subject to a Law.

Although Lorimer argued that ‘the obligations of Natural and Revealed Law exist independently of the consent of men or nations’, he indicated that in place of a sovereign, the role of natural law was consolidated by nations following and enforcing the laws to which they agreed. He suggested two ways in which this consent would be revealed: ‘by being embodied in positive conventions or treaties’; and it being . In some respects, predominantly longevity and custom, the enforcement of natural law bore strong similarities to Maine’s and the historical school’s approach to the growth of British common law with its reliance on historical precedent. Although this was to some extent true of their implementation, their sources and authority were radically different. Where natural law theory could rely on an externally determined code of behaviour on which to

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26 Ibid. 15.
27 See Lorimer’s discussion of the ancient states in Lorimer The Institutes of the Law of Nations, Vol. 1. pp. 16-18, including in his view some more enlightened Romans in international affairs, such as Livy, Cicero, and Pompey.
29 Ibid. 38.
30 Ibid. 38.
base legal judgments, even if they had existed for many centuries, the positivist approach of the historical school relied on historical precedent, moulded only by past practice, There appears to be little discussion of the course of action to be taken in the historical approach when a situation arises for which there is a lack of precedent.

Lorimer cited the judgment of Lord Stowell, Judge of the High Court of the Admiralty (Prize Courts), where Stowell demonstrated the function and enforcement of the law of nations. In 1816 a British cruiser had detained the French ship, *Louis*, for being involved in the slave trade and resisting a search. Subsequently *Louis* was condemned and sentenced by the Vice-Admiralty Court in Sierra Leone. Lord Stowell reversed the court’s sentence in 1817 declaring, somewhat reluctantly because of the involvement of slavery, that no British Acts of Parliament could affect the rights of foreigners ‘unless they are founded upon principles, and impose regulations that are consistent with the Law of Nations’.

This judgment was consistent with Stowell’s similar judgments concerning *The Maria* and *The Santa Cruz* where he rejected British statutes in favour of the law of nations indicating ‘there is a use and practice of nations, to which we are now expected to conform’. Lorimer’s citing of Stowell was intended to reinforce and justify his argument, to provide precedents for his determining the role of natural law in the law of nations where it was revealed in treaties and long-held customs. Throughout his analysis Lorimer consistently placed his natural law theories in the international context of the law of nations.

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31 *Ibid. 39, 40.*
32 *Ibid. 41.*
The value of Lorimer’s work was still appreciated many decades later. The continuity of the influence of natural law theory, not merely into the nineteenth but further into the twentieth century, was demonstrated by the esteem in which Lorimer and his writings were held. The argument for a post-holocaust revival of natural rights is countered by the evidence of regard for Lorimer and his message before World War II had concluded. In the lead up to World War II in 1933 Alexander Pearce Higgins a distinguished international lawyer specializing in maritime history reviewed Lorimer’s writing on Natural and International Law. While considering Lorimer was not a ‘typical British international lawyer’ acknowledging his Scottish background he praised the contemporary relevance of Lorimer’s writing and his ‘contribution to the science of International law”. He noted the dependence of Lorimer’s international law theories on their basis in natural law.33 This was against the background of Hitler’s and Germany’s military expansion. On February 14th 1940, C. Wilfred Jenks delivered an address to The Grotius Society on the occasion of the fiftieth anniversary of the death of James Lorimer entitled ‘The Significance To-day of Lorimer's "Ultimate Problem of International Jurisprudence"’. C. Wilfred Jenks (1909–73)34 was a Director General of the International Labour Organization (ILO) (1970–73). During, and immediately after World War II he worked, as secretary, with the then directors drafting the Declaration of Philadelphia which became part of the ILO constitution. He was a member of the ILO delegation to the San Francisco conference in 1945 which established the United Nations. The timing

and the location of the address were both important. This mid-twentieth-century address was delivered in the early stages of World War II, in a period allegedly devoid of natural law and rights: pre-Holocaust and well preceding the ‘Declaration of Human Rights’.

Jenks in his introduction observed that despite the nation’s preoccupation with war, it was not merely ‘inappropriate to postpone [the commemoration] to happier times’, but added that there was so much in Lorimer’s writing ‘upon international law which affords a stimulus for our thinking about the tasks of reconstruction which lie ahead that the commemoration...becomes now that Europe is at war, a duty more imperative than it appeared to be when this meeting was arranged in a period of uneasy peace’.35 He applauded the fact that Lorimer believed that ‘international interdependence is the only basis on which there can be built up an adequate international legal system’.36

Jenks himself believed that the interdependence of states was of greater importance than their independence. He cited Lorimer’s assertion ‘this law of life of States I have traced back to the still wider law of the reciprocity of rights and duties – a law of relations which embraces the whole sphere of conscious existence’. Jenks noted Lorimer’s insistence upon the existence of a necessary law of nations consisting of the application of the law of nature to nations.37 He also acknowledged that Lorimer’s conception of interdependence and subsequent limitation of duties, although narrow within a twentieth-century context, had pointed application to the then current

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36 Ibid. pp. 36-37.

circumstances of war. Ultimately, Jenks’s conclusion was most interesting – that a visionary writer, such as Lorimer would not necessarily ‘receive in his own day the measure of recognition ‘which will now be widely accepted as his due’. [My emphasis] His relevance was being noticed when human rights were becoming a concern during World War II. He cited the patronising opinions of Sir Thomas Erskine Holland, whom Jenks described as speaking ‘with the complete self-confidence of a convinced positivist’ when he self-righteously expressed his admiration for and enjoyment of “the lucidity of style, the elevation of sentiment, and the ingenuity of illustration which characterize every page of Mr. Lorimer’s writing” but proceeds to dismiss his ‘ “scheme for the establishment of an “International Government” ’, (the quotation marks speak volumes) as “Professor Lorimer’s interesting speculations”. Holland’s positivist thinking appears to have led him to attribute to Lorimer the Kantian position of an international government.

Lorimer was better appreciated in his own time than Jenks suggested particularly on the international stage, through his being a founding member of the Institut de Droit International founded in Ghent, in 1873. Significantly John W. Cairns observed that Lorimer’s reputation was greater in continental Europe than in the United Kingdom. He was awarded an honorary doctorate by the University of Bologna, in 1888. Lorimer’s The Institutes of the Law of Nations, had sufficient international merit that it was translated into French by his fellow Institut member Ernest Nys, a Belgian professor, and published in

Brussels in 1885. The French version was in turn translated into Spanish by A. L. Lopez Coterilla and published in Madrid in 1888.\textsuperscript{41} Jenks’s observation further justifies my contention that natural law and rights had not disappeared during the nineteenth century but remained part of the juridical discourse, well into the twentieth. Even Holland’s opposition indicates an existence needing to be refuted. Jenks’s argument suggests a longer gestation period for the post-Holocaust codification of human rights. Interestingly, the chairman of the proceedings at which Jenks spoke, Lord Alness, recalled fondly his being a student of Professor Lorimer over half a century earlier,\textsuperscript{42} observing that he [Lorimer] ‘was a man moreover to whose message the world, in these dark and difficult days, would do to pay special heed’.\textsuperscript{43} It was most significant that this was not merely a Scottish lecturer speaking to a Scottish audience, but a world-renowned academic and jurist, speaking in London to an audience of international lawyers. Jenk’s has been described as ‘as one of the most prominent and prolific writers on international law of his time.\textsuperscript{44} Lorimer’s message about the laws of nature and of nations had maintained its significance well into the twentieth century.


\textsuperscript{42} Lord Alness (1868–1955), Robert Munro, was a retired lawyer, judge and Liberal politician, Secretary for Scotland in Lloyd George’s government (1916–1922), Lord Justice Clerk (1922–1933), and Lord in Waiting in Churchill’s wartime government (1940–1945).

\textsuperscript{43} Jenks, "Lorimer’s Ultimate Problem of International Jurisprudence." 65.

\textsuperscript{44} Lauterpacht, “Jenks, Clarence Wilfred (1909–1973)”, Oxford Dictionary of National Biography
CHAPTER EIGHT: HENRY DRUMMOND.

The mutation of the concepts of natural law and rights developing in nineteenth century Britain was evident in the differences between the interpretations of Henry Drummond and James Lorimer. Where Lorimer’s purpose was clearly juridical, Drummond’s was ecclesiastical and evangelical. He carefully crafted an explanation of what he saw as the unity between the laws of the temporal and spiritual worlds of Man. In a review of *Henry Drummond: A Perpetual Benediction* (2001), edited by Thomas E. Corts, while acknowledging that Drummond was best known for his devotional classic, *The greatest thing in the world* (1887), John McPake considers ‘his principal concern was to formulate a synthesis between Christian thought and science and to communicate it in an age profoundly marked by the influence of Charles Darwin’s evolutionary theory. McPake observes that ‘Drummond’s attempted synthesis did not ultimately commend itself’. In a similar review, Martin I Klauber effectively sums up Drummond’s mission stating, ‘He attempted to reconcile his interest in the fulfilment of the Great Commission with his belief in the progress of science,’ reflected in *Natural Law in the Spiritual World* published 1883. ‘Drummond argued that many of the natural laws of the spiritual world are simply a reflection of the natural order. This idea was highly controversial, as many

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2 The Great Commission was generally understood to be the Christian Evangelical response to Christ’s exhortation to his disciples, in Matthew 28: 16-20, to baptize all the nations of the world.
conservative Christians saw it as a betrayal of foundational doctrines’. The unnamed reviewer in *Science of Natural Law in the Spiritual World* (1892) was equally unimpressed. Having described Drummond’s work pejoratively as ‘somewhat curious’. Although he acknowledged that Drummond was attempting to seek some basis of agreement in the relations between the natural and spiritual worlds he claimed that:

The result appears in this book, in which he endeavours to show that the laws of biology, which are manifest in organic life, are no less manifest in religious, or, as he calls it, spiritual life. Analogies between organic life and the mental and moral life of man have often been pointed out before; but Mr. Drummond maintains there is something more than analogy in the case, that the very same laws operate in these widely different spheres. We cannot think, however, that he proves his thesis, the resemblances that he points out between the natural and the spiritual world being, in spite of his disclaimer, nothing but mere analogies, and often remote and fanciful analogies. … some of the resemblances that Mr. Drummond dilates upon have a certain interest, and serve well to illustrate moral and religious truth; but as the basis of scientific doctrine and as proving the reign of law in the spiritual world, they are of little value.

Drummond’s focus on the figurative nature of much Biblical teaching was equally controversial where he stated ‘Allegories and other figurative illustrations can never be produced as proofs...The custom, both ancient and modern, in the East to teach by allegories, pervades the whole of Scripture’.5

James Simpson (1873–1934) in his biography *Henry Drummond* recounts the occasion of Drummond walking with an unnamed friend near Edinburgh during his student days exclaiming, ‘May not one law run through the natural and spiritual?’6 This discussion and his conclusion foreshadowed the theme of his book *Natural Law in the*...
Spiritual World to be published a number of years later. Simpson considered that several of the influences on the formation of Drummond’s thinking were John Ruskin, Ralph Waldo Emerson and William Ellery Channing.\footnote{Ibid. pp. 31-32. John Ruskin (1819–1900) was an English painter, art critic, essayist on art and architecture, who explored sociological, political and philosophical ideas; Ralph Waldo Emerson (1803–82) was a philosopher, involved in the Transcendentalist Movement, poet and essayist; William Ellery Channing (1780–1842) was a leading American theologian and evangelist.} He states that Ruskin was the person who taught him to see Nature.\footnote{Ibid. 31.} In evangelical missions around 1875 Drummond delivered addresses but also participated in counselling in inquiry rooms. Simpson commented that at this time Drummond ‘was deeply impressed with the divinity of human nature: it was gloriously worthy of redemption’.\footnote{Ibid. 45.}

His impressions of human nature were influenced by his interpretation of sin. A contemporary of Drummond and his biographer, Cuthbert Lennox, recounted an occasion when Drummond was walking with a fellow student, Rev. Hugh M Scott DD, later to become Professor of Church History at the Chicago Theological Seminary, of whom he asked, ‘Scott, what do you think of sin?’\footnote{Cuthbert Lennox, The Practical Life Work of Henry Drummond (New York: James Pott and Co, 1901).} While Scott acknowledged that he basically repeated the Shorter Catechism definition, Lennox observed that Drummond, ‘astride an analogy’, approached the topic in the way he would develop in Natural Law in the Spiritual World: that ‘sin was largely negative, and referred to such terms as iniquity, the Greek word for sin which means to miss, to fail, evil as vanity, a lie, darkness, a way that perishes, destruction, etc’. Scott considered that Drummond, in his student days, held a view that would run through all his later work.\footnote{Ibid. 46.} Drummond had distanced himself from...
the traditional Calvinist ‘hell-fire’ preaching and thinking – an approach he would maintain throughout his later writing and preaching.

Drummond’s thinking was sharpened by the controversy in the Free Church of Scotland over the published views of Professor Robertson Smith (1846–94), a Scottish Old Testament scholar, professor of divinity, and minister of the Free Church of Scotland. Smith was an editor of *Encyclopaedia Britannica* and contributor to *Encyclopaedia Biblica*. In an article for an edition of *Encyclopaedia Britannica*, Smith had argued for a less literal reinterpretation of the early books of the Bible, and particularly the Creation story in the light of scientific knowledge. Simpson noted that, while not taking part in the debate, Drummond sympathised with Smith’s supporters’ views and saw the applicability of this thinking to his own developing views on the relation between the temporal and spiritual worlds. At this time Simpson aptly referred to Drummond’s ‘double life as science lecturer and missionary’. Initially, in 1880, the Church Assembly narrowly voted in Professor Smith’s favour, but following the publication of further articles, the Church’s commission, and ultimately The General Assembly, voted for the removal of Professor Robertson Smith from his chair.

Drummond felt deep sorrow and frustration when writing on May 21, 1881:

> We are all much dejected here by the suicidal policy of the majority in their recent determination to lynch Smith. It will be a very serious blow to the Church, and I fear nothing can avert it now.  

Drummond’s disquiet was due to his perception that the conservative churchmen were positioning religion and science as adversaries when Drummond himself saw them

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as complementary and essentially co-linear. In ‘A Talk with Professor Drummond’ by Raymond Blathwayt, around 1890, however, Drummond expressed greater ease when he was reported to have said,

The contest is dying out. The new view of the Bible has made further apologetics almost superfluous...No one now expects science from the Bible. The literary form of Genesis precludes the idea that it is science. You might as well contrast “Paradise Lost” with geology as the book of Genesis. …Mr Huxley might have been better employed than in laying that poor old ghost.14

George Adam Smith15 believed that Drummond ‘had seen great signs of evolution within Scripture itself’. On the other hand Drummond was convinced that Natural Science corroborated rather than refuted ‘the Scriptural assumption that behind the visible universe there is a creative mind’. It was on this point that he considered Darwin’s teaching defective.16 In a letter to Hugh Barbour he observed, ‘I think it is quite clear that Science has gone as far as she ever will on her side of the border. And she has gone a wonderful length – towards us, as I am convinced’.17 He argued that the observation of how far science had come away from God, the Creator, was rapidly becoming obsolete. While Drummond considered that Darwin’s natural selection theory was not in error, merely incomplete, he believed that Huxley’s agnosticism, his totally materialistic interpretation of creation and scientific development was. He referred to Huxley’s Lay Sermons where Huxley observed the development of an ovum through a microscope.

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15 Sir George Adam Smith (1856–1942) was an Old Testament scholar and geographer; he maintained an interest in reconciling advanced scientific scholarship with a reverential outlook when teaching at the Free Church of Scotland College at Aberdeen. His outlook was consistent with Drummond’s thinking.
16 Smith, Henry Drummond. 149. Drummond was responding to an inquiry by Hugh Barbour regarding “what science had done to corroborate the teachings of the Scripture upon the origin of life”? Letter written 31 December 1878.
17 Ibid. 150.
While Huxley described the physical development of the ‘semi-fluid globe’, Drummond particularly registered Huxley’s comparison of the creative process to that of ‘a skilled operator on a formless lump of clay’. Drummond observed that Huxley saw as it were:

… “a skilled modeller” shaping the plastic mass with a trowel... “as if a delicate finger traced out the line to be occupied by the spinal column, and moulded the contour of the body...one is almost involuntarily possessed by the notion that some more subtle aid to vision than an achromatic would show the hidden artist with his plan before him, striving with skilful manipulation to perfect his work.”

Drummond had no difficulty with Huxley’s observation which he felt that he could have made himself. In fact he believed that the materialists had progressed Science as far as they could, but he could take it further. ‘I do not see that they could go one step further than Huxley in the passage referred to; for the next step would be God’. Implicit in Huxley’s description, Drummond saw evidence of God as creator. Unlike some scientists on the one hand, and ecclesiasts on the other, he was perfectly able to accommodate scientific discoveries and religious teaching, seeing them all linked by natural law.

While including Drummond in their number, D. P. Crook observed that ‘“religious evolutionists” defended their faith by using, or claiming to use, scientific weaponry including that of the godless Darwin himself’. Crook, in his biographical analysis of the Social Darwinism of Benjamin Kidd saw some similarities between Kidd and Drummond while acknowledging that Drummond had greater faith than Kidd in

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18 Ibid. 150.
19 Ibid. pp. 150-151.
reason. Both were attempting to reconcile the studies of science and religion. Crook claims that ‘Kidd saw himself as a pioneer in the scientific study of religion’. This appellation could be shared equally with Drummond. It is really more appropriate for Drummond because of his application of scientific ‘laws’ to the spiritual world.

Like George Combe, part of the success of Drummond’s *Natural Law in the Spiritual World* was its identification with working-class men, thus reaching beyond academic and ecclesiastical audiences. George Adam Smith in his biography of Drummond eighteen months after Drummond’s death cites the popularity he gained both during his student years and on the publication of his first book. ‘We watched him, our fellow-student and not yet twenty-three, surprised by a sudden and fierce fame. Crowds of men and women in all the great cities of our land hung upon his lips, innumerable lives opened their secrets to him.’ It was ten years later with the publication of *Natural Law in the Spiritual World* that Smith reports Drummond’s fame extended, ‘the great of the land thronged him’. Both Combe and Drummond had published their books in cheap editions which encouraged wide readership within the community. Further, Drummond drew on his addresses to working men, particularly at Possil Park, in the Possil district of Glasgow. The addresses had been delivered at a time of great social and economic distress in the community following the 1878 collapse of the City of Glasgow Bank. The

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22 A more detailed discussion of the similarities and differences between Drummond and Kidd follows later.
social misery of unemployment was aggravated by a bitterly cold winter. These addresses formed the basis of the latter part of *Natural Law in the Spiritual World*.

Scott notes that ‘Drummond defended his work by asking that it be considered in the context of its original audience and purpose: ‘“It was spoken to working men, and for a simple practical purpose … it was written to reduce to some order the vagrant spiritual experiences and aspirations of those among whom I worked, and to offer to plain minds a working basis for their religious life.”’ Lennox, on the same basis, trivialised the value and importance of the text by observing, ‘Suffice it to say that the volume contains eleven papers, of differing interest, and with little co-relation – all, originally, addresses delivered by Drummond to his audiences of working men at Possilpark, in no studied sequence’. By contrast, after its appearance in July 1883, Lennox noted that ‘it got a splendid send-off in a long and appreciative review in *The Spectator* of 4th August’.

Prior to his journey to Africa in June 1883, a first edition of one thousand copies was published; after his return in 1884, thirty-four thousand more followed. Although these sales were eclipsed by Combe’s *The Constitution of Man considered in Relation to External Objects*, which sold approximately 350,000 copies between 1828 and 1900, they approached Darwin’s *Origin of the Species*, published in 1859, which sold only about 50,000 copies in Great Britain up to 1900. Anne Scott notes that Drummond’s text was still selling at a phenomenal rate with the issue of a sixpenny edition in 1902. Like Combe’s work, the cheap editions enabled Drummond to reach his intended audience.

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29 Scott, " ‘Visible Incarnations of the Unseen’ ". 435.
Despite the criticisms that his work did not meet criteria that Drummond had not intended to meet, by his drawing on sermons to working-men, Drummond did not ignore academic audiences; his election to the position of Professor of Natural Sciences in the Theological Faculty of Glasgow in the same year enabled him to continue his academic lecturing.\textsuperscript{30} Drummond’s journey to Africa, in a period of considerable political importance, gives evidence of a lack of political or juridical concern, similar to Combe, when he visited the continent at a time of widespread international interest. The year of his visit, 1883, was particularly interesting, occurring as it did during the 1880’s ‘scramble for Africa’, and two years before the Berlin Conference. In the same manner that Combe ignored political and juridical issues in his writing on phrenology and natural law, Drummond’s letters disregard these issues entirely, reporting his adventures, scientific observations and religious activities.\textsuperscript{31} Lennox noted that Drummond’s journey to Africa was ‘purely scientific’. ‘He had accepted a commission from the African Lakes Company to make a botanical and geological survey of the Nyassa-Tanganyika plateau’.\textsuperscript{32} His visit to Africa, however, did confirm in his mind the belief that natural law did not necessarily function at the primitive level. He had visited with a native chief, King Chipitula, whom he had befriended, exchanging gifts with him. In his travels he learned that several days following the visit, King Chipitula had been shot by a white trader. The trader was then speared by Chipitula’s men and his black porters ‘according to native etiquette, were butchered with their master’. Drummond concluded, ‘There is absolutely no law in Africa, and you can kill anybody and anybody can kill you, and no one will ask any

\textsuperscript{30} Simpson, Henry Drummond. 62.
\textsuperscript{31} For Drummond’s letters from Africa see Smith, Henry Drummond. Chap 8, pp. 190-228.
\textsuperscript{32} Lennox, The Practical Life Work of Henry Drummond. 78.
questions.\textsuperscript{33} This view, like Lorimer’s, avoided Maine’s criticism of natural law in that it did not envisage a ‘noble savage’ nor the purity of the functioning of natural in the primitive state. This did not mean they regarded natural law as not existing in the primitive state. For Drummond and Lorimer it had always existed but its understanding and interpretation were linked to the progressive advancement of civilisation.

The breadth of his lecturing extended to Australia, Melbourne, Adelaide and Sydney, and to his presentation in Boston of \textit{The Lowell Lectures}. In Australia, Drummond determined to avoid churches or ‘anything that might distract from his mission to students, young men, and boys’.\textsuperscript{34} In fact this proved to be the case. In Adelaide, Melbourne, and Sydney, Drummond spoke at meetings, often two per day, and frequently privately organised. He found himself too busy to accept an invitation to Government House and angered the religious press when he only allowed students at his meetings and admitted no reporters. ‘The newspaper interviewer,’ said one editor, ‘who can generally draw blood from a stone, can get nothing for a notice out of Professor Drummond’ .\textsuperscript{35}

In 1893, Drummond delivered the Lowell Institute Lectures in Boston which became his volume \textit{The Ascent of Man}. They created particular interest, ‘For everyone who received a ticket of admission to them, there were ten turned away’ .\textsuperscript{36} Drummond had planned a number of years of scholarly revision of the text of his lectures until he learned that a Philadelphian publisher planned to issue a volume entitled \textit{The Evolution of

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\textsuperscript{33} Henry Drummond, \textit{Tropical Africa} (New York: John B Alden, 1890). 20
\textsuperscript{34} Smith, \textit{Henry Drummond}. 386.
\textsuperscript{35} \textit{Ibid}. 394.
\textsuperscript{36} \textit{Ibid}. 451.
Man, being the Lowell Lectures delivered at Boston Massachusetts, April, 1893 by Professor Henry Drummond. Smith reports that the text was taken from reports in a publication The British Weekly and they were heavily abridged. In a subsequent court case Drummond was granted an order restraining the publisher and awarded costs. As Smith noted ‘It is said to have been “The first case in which a favourable judgment was given to an alien in such a matter” ’. As a result Drummond hastened his revision of his lectures, sending them to press in 1894; they were first published in 1895.

With the publication of his work Natural Law in the Spiritual World in 1883 and The Ascent of Man in 1895, Drummond developed his concept of natural law: its bonding of the physical and spiritual worlds, or dimensions, of Man; its ready accommodation of Darwin’s theories of natural selection; with an extension of those theories into the higher order altruistic characteristics of Man. Throughout, unsurprisingly, he took issue with and rejected Thomas Huxley’s materialistic interpretation of human development. Natural Law in the Spiritual World provided a detailed groundwork, expounding his belief in the congruence of physical and spiritual laws. His later work, The Ascent of Man, positioned humanity within this continuum. Lennox in his biography observed that this text, never commanded the public interest of Natural Law. This he attributed partly to pricing, to its more scientific nature, but mainly to the fact that in the preceding ten years, the religious public ‘had arrived at the more mature judgment that Drummond had failed to make out his case…and it was therefore less likely to look to a fresh scientific work from his pen in the hope of his coming any nearer the solution of the problem’. Drummond’s most

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37 Ibid. 460.
38 Lennox, The Practical Life Work of Henry Drummond. 166.
significant belief was that evidence of physical natural selection, when related to Man’s higher order development, as part of a divine plan, also accounted for spiritual, altruistic behaviour – progressing from ‘the Struggle for Life’ to ‘The Struggle for the Life of Others’. In this Drummond rejected the Hobbesian, modern natural law theory of universal selfishness, positioning himself in a hybrid natural law position which reflected its origins in the ancient natural law tradition.

In his biography of Henry Drummond, James Simpson shed light on the context of Drummond’s writings and highlighted an explanation for Drummond’s interpretation and use of natural law. He observed that the ‘last twenty five years’ [the last quarter of the nineteenth century] had been referred to as the ‘Age of Science’.39 This had followed a period of animosity, where theologians and scientists had been in a state of continual antagonism due to their misunderstandings of the respective natures of science and theology.

Although he considered Drummond’s writing accommodated Darwin and natural selection, Simpson observed that philosophers such as Huxley and Tyndall ‘were rapidly colouring the intellectual atmosphere of the nation; science, physical and natural, was to explain everything.’40 It was most appropriate therefore that Drummond should have made use of elements of Darwin’s thinking to establish his link between the Natural World and the Spiritual World. Unlike Lorimer who ignored physical natural laws, an incorporation of them into Drummond’s beliefs was vital in explaining an unbroken

development of natural law from the lowest level of physical life and activity to the highest cerebral and moral behaviour of humans.

In prefacing his 1884 text *Natural Law in the Spiritual World*, Henry Drummond addressed the problems that occurred in reconciling religion and science. He observed ‘No class of works is received with more suspicion; I had almost said derision, than that which deals with Science and Religion’.

Commenting that science was ‘tired’ with, and religion ‘offended’ by these attempts at reconciliation, Drummond observed that ‘in most cases where Science is either pitted against Religion or fused with it, there is some fatal misconception to begin with as to the scope and province of either’. It was in this determination of ‘province’ where Drummond felt that much of the discussion was misguided. While he saw both areas of study as perfectly consistent, he felt that his own argument would be similarly misunderstood, unless it was recognized that his subject matter ‘being Law – a property peculiar neither to Science nor to Religion – at once places it on a somewhat different footing’.

Anne Scott notes that ‘James R. Moore has read Drummond’s arguments for the naturalness of the spiritual world as an attempt to transform the Darwinian theory…to secure the doctrines of traditional Christianity on an evolutionary basis’. The reading of Drummond’s religious writing generally suggests that he felt little need ‘to secure doctrines of Christianity’ to any other philosophical or intellectual framework. It is more likely that he believed that he was illuminating aspects of science and natural selection within the context of Christianity.

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41 Drummond, *Natural Law in the Spiritual World*. v.
42 Ibid. v.
43 Ibid. v.
44 Scott, " 'Visible Incarnations of the Unseen' ". 453.
His focus on law was, in fact, a focus on natural law. Intriguingly while Drummond’s interpretation of natural law appeared, at least superficially, to be diametrically opposed to that of James Lorimer, there were marked similarities in intent. While Lorimer regarding the physical laws of Nature as unrelated to his concerns ignored them, focusing on the spiritual, Drummond embraced them. He used them in fact to argue their role in the management and development of spiritual man, the spiritual world. The basis of his argument was encapsulated in his question, ‘Is there not reason to believe that many of the Laws of the Spiritual World, hitherto regarded as occupying an entirely separate province, are simply the laws of the Natural world?’ He was questioning, whether the laws of the natural world could be identified in the spiritual world.

Drummond explained that the issue occurred to him during the time when he was a weekday lecturer in Natural Sciences and a Sunday preacher of religion and morals. Having felt initially the obligation to maintain a separation between the two, believing that they ‘lay at opposite poles of thought’, he came to see an overlap between the two such that ‘the subject-matter Religion had taken on the method of expression of Science, and I discovered myself enunciating Spiritual Law in the exact terms of Biology and Physics’. He questioned whether he could link lines of thought running through his understanding of the spiritual world with those that ran through the visible universe, ‘which we call the Natural Laws’. Thus he proposed to address the question ‘is the Supernatural, natural or unnatural?’

45 Drummond, *Natural Law in the Spiritual World*. vi.
Lorimer’s approach, although based on strong religious conviction, had a juridical focus. Reflecting the influence of the ancient tradition, Lorimer argued his belief in: human sociability; the existence of natural law; its application to human behaviour; its role as the basis of natural rights and positive law; and in international law. Drummond, however, had a specifically religious focus; he demonstrated little interest in the purely philosophical or juridical positioning of natural law, nor in its extension to natural rights. It was the spiritual life of man and better methods of its explication that concerned him. In this, his later discussion of spiritual man removed him from Hobbesian natural law thinking making his position more consistent with the traditional Thomist position. Ironically, like Lorimer, his specific and narrow interpretation of natural law also put him outside the usual criticisms of natural law supporters addressed in the earlier discussion of Lorimer, even if for entirely different reasons. Like the Scottish historical school before him, Lorimer had acknowledged the unreality of the concepts of the “imagined state of nature” and contract theory, but had argued the existence of natural law prior to divine revelation and even prior to human association.\(^48\) Drummond overlooked these issues accepting natural law on fundamentally religious grounds.

Drummond distinguished between the uses of natural phenomena and natural law. For him, natural phenomena served mainly an illustrative function related to religion. ‘Natural Law, on the other hand, could it be traced in the Spiritual World, would have an important scientific value – it would offer religion a new credential’.\(^49\) Believing that it was a period when mankind’s religious opinions were in a state of flux, he felt that


\(^{49}\) Drummond, *Natural Law in the Spiritual World*. ix.
people were seeking the introduction of law within the spiritual world. He argued that it was the one science that lagged behind the rest; he felt that ‘it was the one region still unpossessed by Law’.\(^{50}\) Drummond was arguing for a continuation of law – from the natural law of the material world by a linear extension into the spiritual world. – ‘the basis in a common principle – the Continuity of Law’.\(^{51}\) Drummond believed he was following principles well and successfully established in other areas of society. ‘What is the Physical Politic of Mr. Walter Bagehot [(1826–77)] but the extension of Natural Law to the Political World? What is the Biological Sociology of Mr. Herbert Spencer but the application of Natural Law to the Social World?\(^{52}\) By the extension of this analogous argument he held ‘if the introduction of Natural Law into the Social sphere is no violent contradiction but a genuine and permanent contribution, shall its further extension to the Spiritual sphere be counted an extravagance?’\(^{53}\) James Moore states ‘The principle on which Drummond looked for natural law in the spiritual world was the 'Law of Continuity' — the law that laws themselves apply everywhere throughout the universe, without gaps, leaps, or other interruptions.’\(^{54}\) Moore considers that Drummond developed the principles of Balfour Stewart and P. G. Tait, Drummond's old professor of natural philosophy, who were the anonymous authors of *The Unseen Universe* (1875) and *Paradoxical Philosophy* (1878), ‘as a basis for believing in human immortality and the reality of an unseen world of spirit’. Moore correctly identified the difference in

\(^{50}\) *Ibid.* x.


\(^{52}\) *Ibid.* xiii.


Drummond’s argument: that the same laws governed both the natural and spiritual worlds.55

The introduction to *Natural Law in the Spiritual World* opened with a somewhat contentious statement. ‘Natural Law is a new word. It is the last and the most magnificent discovery of science.’56 In the broad interpretation of the concept, Drummond was plainly wrong. Natural Law was Aristotelian and Thomist and had also been adapted by seventeenth-century philosophers. The statement is puzzling. As he had cited the Stoics and Pythagoreans, it is somewhat surprising that he made no reference to Aristotle’s teachings. Having also cited Walter Bagehot and Herbert in the context of their use of natural law, it is even stranger. The most likely possibility is that Drummond believed his use of the word, as a scientific concept leading into the spiritual world, was new – as a ‘scientific’ discovery. With his limitation of the concept to the material, scientific determinations of the physical world, his definition was accurate for his purposes. What the definition did was to confirm Drummond’s lack of concern for the philosophical and juridical implications of natural law as well as his preoccupation with the physical and scientific, with its extension into the spiritual, theological dimensions of mankind. Yet in the context of his motivation, to interpret the spiritual, Drummond’s interpretation of natural law was perfectly understandable. It accounted also for his lack of discussion both of natural rights and positive law. As Smith points out, Drummond’s focus on physical, scientific issues led to both support and rejection by varied groups. He noted that the largest group of supporting letters Drummond received was from ‘such promoters of the

55 Moore, "Evangelicals and Evolution." 397.
56 Drummond, *Natural Law in the Spiritual World*. 3.
application to the future life of the doctrine of “the survival of the fittest”. Then the foes of “Bibliolatry” as they call it, congratulate him on having removed religion from a Scriptural basis’.  

While many quoted Drummond to their purpose, these two ‘supporting’ positions highlight important issues in Drummond’s text. References to support for the ‘survival of the fittest’ correctly show Drummond’s acceptance of Darwinian thinking regarding natural selection, and his limited acknowledgement of the Hobbesian belief in ‘all against all’. This again demonstrated the nineteenth-century theorist’s ability to accommodate both ancient and modern natural law positions in different stages of human development. These ‘supporters’, however, failed to appreciate fully Drummond’s extension of ‘Struggle for Life’ to the ‘Struggle for the Life of Others’, where, like Lorimer, he accepted relative degrees of civilisation as determiners of degrees of implementation of natural law.

Praise for removing a Scriptural basis for religion had some credibility also. Like natural law theorists from Aquinas onwards, Drummond discussed a world that operated without the direct intervention of a Deity. Nevertheless a totally confirmed theist himself, any failure to reference the Bible merely reflected the precision of his focus on the relationship between science and religion, rather than any belief in Biblical irrelevance. Like his supporters, opponents of Natural Law held diverse opinions. He was also attacked for considering the Bible irrelevant. Smith noted that some evangelists claimed that Drummond ‘did not recognise the authority of the Bible as the witness of God’s most gracious dealings with the race’ and by linking religion with science, ‘He founds religion

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57 Smith, *Henry Drummond*. 236.
58 See Chapter on Lorimer for similar views on degrees of civilisation. 109ff
upon science, and to do so is to be an infidel’.\textsuperscript{59} Drummond considered that thinkers as far back as the Stoics and Pythagoreans while attempting to make sense of the universe had seen only a collection of isolated and independent facts without any sense of law or system. It was when Nature revealed gravitation to Newton that there was the revelation that ‘Law was fact’.\textsuperscript{60} Although Drummond acknowledged that there were a number of definitions of natural law he was satisfied with taking it ‘in its most simple and obvious significance’.\textsuperscript{61} He continued, ‘The fundamental conception of Law is an ascertained working sequence or constant order among the Phenomena of Nature.’ His impression was of ‘Law as Order’. ‘The Laws of Nature are simply statements of the orderly condition of things in Nature, what is found in Nature by a sufficient number of competent observers’\textsuperscript{62} He felt unsure as to whether laws had absolute existence and merely expressed the state of things that Man expected to find around him. ‘The natural laws originate nothing, sustain nothing…they are modes of operation’.\textsuperscript{63} Citing the law of Gravitation Drummond commented that Man discovered its law, ‘but that tells us nothing of its origin, of its nature, or of its cause’.\textsuperscript{64} Drummond likened Natural Laws to lines that run through the universe reducing it to intelligent order. He questioned, however, why these should stop at the limits of the physical world. Because he saw Nature as a symbol of all that was beautiful and ordered in the world, he felt it unlikely that the same order didn’t extend into the spiritual world. He considered that it was commonplace anyway for

\textsuperscript{59} Smith, \textit{Henry Drummond}. 239. For an overview of both the supportive and negative reactions to \textit{Natural Law} see Smith pp. 233-43. Smith acknowledged deliberately omitting the names of both Drummond’s supporters and critics.

\textsuperscript{60} Drummond, \textit{Natural Law in the Spiritual World}. 4.

\textsuperscript{61} \textit{Ibid}. 5.

\textsuperscript{62} \textit{Ibid}. 5.

\textsuperscript{63} \textit{Ibid}. 5.

\textsuperscript{64} \textit{Ibid}. 6.
thinkers to believe ‘the invisible things of God from the creation of the world are clearly seen, being understood by the things that are made’’. He was careful to indicate that he was talking about ‘Laws’ not ‘Phenomena’. Believing that the discovery of Law was simply the discovery of Science, the analogies of Natural Law could be extended to the Spiritual World. This would bring the whole issue of the Spiritual World under the domain of Science. Drummond admitted that the validity of analogy was disputed but referred to John Stuart Mill’s observation that ‘when the analogy can be proved, the argument founded upon it cannot be resisted’. Mill, the Utilitarian thinker, believed that ‘to do as you would be done by, and to love your neighbour as yourself, constitute the ideal perfection of utilitarian morality’. In this regard he was ironically closer ideologically to the classical natural law theorists than were the Hobbesian modern theorists.

The irony, previously noted, of Mill’s basing his utilitarian ideology on the same principles as Foster’s and Lorimer’s natural law was further compounded by Drummond’s drawing on Mill’s principles to advance his own argument. Having considered that the use of analogy would be an effective argument, Drummond took his belief well beyond this issue by ultimately proclaiming, ‘The position we have been led to take up is not that the Spiritual Laws are analogous to the Natural Laws, but they are the same Laws. It is not a question of analogy but of Identity’. [Drummond’s italics]
Expanding on his statement he continued, ‘The Natural Laws…do not stop with the visible and then give place to a new set of Laws bearing a strong similitude to them. The Laws of the invisible are the same Laws, projections of the natural not supernatural.’ He continued, ‘Analogous Phenomena are not the fruit of parallel Laws, but of the same Laws – Laws which at one end, as it were, may be dealing with Matter, at the other end with Spirit.’

This was clearly a most significant position to take as it explained his focus on the significance of physical natural laws. Drummond’s citing of the law of Gravity well illustrated this identifying of natural laws. It becomes evident too that by linking these laws with the spiritual sphere, Drummond did not pretend that he was legislating for the Almighty. This was reflected in his deferential tone and acknowledgement of Divine supremacy when he observed ‘The only legitimate questions one dare put to Nature are those which concern universal human good and the Divine interpretation of things… We have Truth in Nature as it came from God’. As the issues he was addressing were moral and spiritual, and their origins, it becomes evident that the substance of his preoccupations was very similar to that of other traditional natural law exponents such as Lorimer, even though the points of reference differed. Drummond saw all forms of natural law affecting Man as forming a continuum which began at the most basic protozoan level of physical or scientific activity and extended to the highest order of metaphysical, philosophical, and moral thought.

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70 Ibid. 11.
71 Ibid. xi.
Drummond argued strongly against what he saw as a fallacy of scientific thinking: that ‘Science has taken theology at its own estimate’, believing that ‘The Spiritual World is not only a different World, but a different kind of world … under a different governmental scheme’. He felt that even those who had carefully studied the relationship between the Natural and the Spiritual had committed themselves deliberately to ‘a final separation in matters of Law’. Drummond was surprised by and criticised Horace Bushnell (1802–76), American theologian and clergyman, for his having described the Spiritual world as ‘“another system of nature incommunicably separate from ours”’ about which Bushnell claimed ‘“God has, in fact, erected another and higher system, that of spiritual being and government for which nature exists; a system not under the law of cause and effect, but ruled and marshalled under other kinds of laws”’. Although his quoting of Bushnell was not intended to modify Drummond’s views and appeared to support his argument, the impact of its being quoted was lessened when it was placed in its original context. It appeared to be referring to the natural and supernatural worlds as discreet, Bushnell’s reference as quoted by Drummond actually began, ‘Suppose, for example, (which we may, for illustration’s sake, even though it cannot be [my emphasis]’.

Drummond cited Joseph Butler (1692–1752), whose views, he believed, were consistent with his own. Butler was an eighteenth-century philosopher and Anglican bishop. While believing that morality and religion were essential components of nature,

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72 Ibid. 12.
73 Ibid. 13.
74 Ibid. 13.
he attacked Hobbes’ concept of self-love arguing that benevolence towards others was as integral a part of human nature as was self-love. Drummond argued that in his work *The Analogy of Religion to the constitution and course of Nature* (1736), Butler didn’t seek to indicate analogies between religion and the course of Nature, rather that ‘he showed that “the natural and moral constitution and government of the world are so connected as to make up together but one scheme” ’.76 Drummond’s view is confirmed by David E. White, editor of *The works of Bishop Butler* (2006), who states that ‘Butler ultimately attempts to naturalize morality and religion, though not in an overly reductive way, by showing that they are essential components of nature and common life’. He further substantiates Drummond’s views when he observes ‘Butler’s argument for morality, found primarily in his sermons, is an attempt to show that morality is a matter of following human nature’.77

The particular purpose of Drummond’s writing was to counter what he acknowledged as the general perception that the spiritual world existed outside natural law. His method of refuting this was his invoking principles of Continuity, and their applicability to the relationship between the natural and spiritual worlds. He believed they established an *a priori* proof of his position. Drummond based his thesis on the assumption ‘that if Nature be a harmony, Man in all his relations – physical, mental, moral, and spiritual – falls to be included within its circle. It is altogether unlikely that man spiritual should be violently separated in all the conditions of growth, development,

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and life, from man physical’. 78 He found it difficult to believe that ‘one set of principles should guide the natural life’ and at the point at which he saw them as most vital ‘suddenly give place to another set of principles altogether new and unrelated’. 79 To his thinking, Nature would not have introduced such a catastrophic situation. He concluded: ‘Man cannot in the nature of things, in the nature of thought, in the nature of language, be separated into two such incoherent halves’. 80 He quickly acknowledged that the study of the science of Man was in a different department from that of ‘natural’ man. Nevertheless, he stressed, the uniformity and unity of this harmony was not restricted to that department or any other department of study. ‘It is the universe that is the harmony, the universe of which these are but parts…While, therefore there are many harmonies, there is but one harmony’. 81 He insisted that regardless of how Nature might lend itself to subdivision into various departments, and that laws might be ascribed to those departments, such a breakup of the phenomena of the universe is artificial. As these ‘sciences’ or departments are human creations designed to further our understanding of the universe, they are ‘reductions of Nature to the scale of our own intelligence’. 82 Drummond considered there was a danger segmenting Nature into these divisions for any other purpose, and that we should maintain the practice of constantly thinking of Nature as a whole. Acknowledging that Evolution was found in so many different sciences Drummond felt ‘the likelihood is that it is a universal principle’. 83 While there were no presumptions against evolution being excluded from the spiritual, ‘On the other hand

78 Ibid. 35.
79 Ibid. pp. 35-36
80 Ibid. 36.
81 Ibid. 36.
82 Ibid. 36.
83 Ibid. 37.
there are very convincing reasons why the Natural Laws should be continuous through
the Spiritual Sphere’.  

The most significant of Drummond’s observations underpinning his conviction
that the continuum of natural law included the spiritual world related to the foundation of
natural laws. He noted that a recent scientific generalization was that ‘even Laws have
their Law’. He felt that as knowledge progressed the groupings of areas of knowledge
were like isolated lines of beauty running through Nature, but leaving the system of
Nature incomplete. ‘The principle which sought Law among phenomena had to go
further and seek a Law among the Laws’.  

He concluded, ‘That inmost circle is
governed by one great Law, the Law of Continuity. It is the Law for Laws’. This
became the foundation on which Drummond based his understanding of the universe,
nature, science, the spiritual world and the continuum of natural laws running throughout
them. He felt that the most effective way to appreciate a continuous universe was to
imagine a discontinuous one, what he saw as ‘an incoherent and irrelevant universe.’ He
saw, therefore, ‘the necessity of some principle or Law according to which Laws shall be,
and be “continuous” throughout the system’. It seemed logical to Drummond that as
Man was a rational being he should be able to trust that as a result of Nature he would
‘never be put to confusion’.’ He saw this principle as confirmation of a Divine
Being’s organization of the universe, and that ‘the Principle of Continuity may be said to
be the definite expression in words of our trust that He will not put us to permanent

84 Ibid. 37.
85 Ibid. 37.
86 Ibid. 38.
87 Ibid. 38.
88 Ibid. 40.
89 Ibid. 40.
intellectual confusion’.\(^90\) He determined that ‘Continuity is the expression of ‘the Divine Veracity in Nature’’.\(^91\)

Drummond attempted to counter the anticipated argument that there would be oddities in imagining that some of the physical laws were also to be found in the spiritual world. He introduced the explanation/justification of his views by citing the law of gravity. He acknowledged that there was no reason that is apart from continuity, to imagine that the law of gravity extended beyond our world. Nevertheless he argued that anywhere in the universe that matter was found to exist, the laws of gravity applied. While admitting that it was an obvious objection that ‘many of the natural laws had no connection whatever with the Spiritual World’, he used gravitation to develop a justification for his view. ‘First, there is no proof that it does not hold there. If the spirit be in any sense material it certainly must hold’.\(^92\) Thirdly, he argued, that even if the spirit is not a material thing, he considered that this was not justification for arguing that the law of gravity ceased. ‘It is not gravitation that ceases – it is matter’.\(^93\) In developing this concept he cited a principle of ‘growth’ or ‘vitality’ that he stated applied to the organic world, as evident in a flower, a principle which superseded the law of gravity. That the principle of ‘growth’ did not apply to the inorganic world led him to pose the question, ‘Is it not evident that each kingdom of Nature has its own set of Laws?’\(^94\) This was an important question to address in developing his conclusion, as he accepted that inorganic laws didn’t extend into the organic world, nor did the reverse apply. His

\(^{90}\) Ibid. 40.
\(^{91}\) Ibid. 40.
\(^{92}\) Ibid. 42.
\(^{93}\) Ibid. 43.
\(^{94}\) Ibid. 43.
explanation for this exclusivity justified his conviction that the Law of Continuity, however, still applied. Though the Organic World introduced a new set of laws, ‘the reason why the lower set do not seem to act in the higher sphere is not that they are annihilated, but that they are overruled’.\textsuperscript{95} Similarly he argued that the laws of the Organic world do not operate downwards ‘because there is nothing for them there to act upon. It is not Law that fails, but opportunity. The biological Laws are continuous for life’.\textsuperscript{96} He considered that Laws of Life would therefore be found anywhere there was life, as would the law of Gravity be found anywhere that matter existed. Thus Drummond argued for a continuity of Law from the inorganic to the organic and extending into the spiritual world, while accepting its varied applicability, from one to the other. It was also a step towards explaining his acceptance of Darwin’s theory of natural selection, while denouncing Huxley’s ‘agnostic’ interpretation of the universe. Drummond was concerned that errors of argument occurred through misunderstanding of the nature and role of Natural Laws because the idea of substance was constantly linked to them. He argued that the laws were always there, but only operating when there was something for them to influence. ‘Now Laws do not operate on anything…it cannot be too abundantly emphasized, that Laws are only modes of operation, not themselves operators.’\textsuperscript{97}

One of the major laws that Drummond saw as existing within the Law of Continuity was the Law of Biogenesis which he considered ‘the fundamental Law of life for both the natural and spiritual worlds’.\textsuperscript{98} He then rejected the possible argument that

\textsuperscript{95} Ibid. 43.
\textsuperscript{96} Ibid. 43.
\textsuperscript{97} Ibid. 44.
\textsuperscript{98} Ibid. 45.
because biogenesis dealt with ‘natural’ life it could not be extended into the spiritual world, thus causing a breakdown in the Law of Continuity. As Drummond believed that ‘the proposition is continuous for the whole world and, doubtless, likewise for the sun and moon and stars’, he determined that ‘the same universality may be predicated likewise for the Law of life’. A critical point from the development of his statement that ‘At the beginning of the natural life we find the Law that natural life can only come from pre-existing natural life’, was his conclusion that, ‘at the beginning of the spiritual life we find that the spiritual life can only come from pre-existing spiritual life. But there are not two Laws; there is one – Biogenesis’. Once again Drummond clarified his conviction that the laws of the physical world extended into the spiritual world linearly, being one and the same.

Having related the laws of the material to the spiritual worlds under the Law of Continuity, Drummond sought to link these laws to their source – a divine being. He argued that the ‘Sovereign Will’ had to be acknowledged as having a right of freedom just as it had been granted to humans. The creator’s paternalistic relationship with Man, he argued, was governed by no special laws – ‘no Law except the highest of all, that Law of which all other Laws are parts…the Law of Love’. Drummond believed that all other laws radiated from this central law. Expressing surprise that the identification of the Laws of the Spiritual World with the Laws of Nature had escaped recognition for so long, he claimed ‘the greatest among the theological laws are the Laws of Nature in

99 Ibid. 45.
100 Ibid. 46.
101 Ibid. 50.
disguise’. Wanting to clarify a potential misunderstanding of his argument, Drummond observed it could be construed that he implied ‘the spiritual laws were framed originally on the plan of the Natural’. Rejecting this he insisted ‘the exact opposite has been the case. The first in the field was the spiritual world’. The dignity of the laws of Nature ‘is not as Natural Laws, but as Spiritual Laws, Laws which, as already said, at one end are dealing with Matter, and at the other with Spirit’. In arguing the greater relevant importance of the Spiritual, he derided Thomas Huxley’s agnosticism observing that ‘even Mr Huxley, though in a different sense, assures us, with Descartes, “that we know more of mind than we do of body; that the immaterial world is a firmer reality than the material” ’.

Drummond’s underlying intent in developing his account of the relationship between the material and spiritual worlds was, in a Christian context, to create a basis from which to explicate his interpretation of the relationship of Man to both worlds and, within them, the function of Natural law. Concerned that Christianity had always faced a difficulty in meeting the challenge of Natural Religions, he believed that the recognition of Biogenesis as a scientific fact addressed the problem.

Far from being troubled by Darwin’s theory of natural selection, Drummond embraced it as it disposed of the theory of Spontaneous Spiritual Generation. As he believed that the laws of the Spiritual World were projected into the Physical World, evidence denouncing spontaneous creation in the Physical World reflected the absence of

102 Ibid. 52.
103 Ibid. 53.
104 Ibid. 55.
105 Ibid. 56.
similar spontaneous creation in the Spiritual World. ‘The lines of the Spiritual existed first, and it was natural to expect that when the “Intelligence resident in the ‘Unseen’ ” proceeded to frame the material universe He should go upon the lines already laid down’. 106 Drummond argued ‘He would, in short, simply project the higher Laws downward, so that the Natural World would become an incarnation, a visible representation, a working model of the spiritual. [my emphasis]’ 107 In establishing the correspondence of the two worlds, with the greater relative importance of the spiritual, Drummond argued philosophy taught that matter is a non-entity. ‘The reality is alone the Spiritual. “It is very well for physicists to speak of ‘matter’, but for men generally to call this ‘a material world’ is an absurdity’. 108 Contrasting the impressions of a corrupted physical world claimed by some religious thinkers, he believed that, when the last souls had left the earth to God, the earth would be ‘dissolved with fervent heat – not because it was base, but because its work is done’. 109 At the same time he condemned the churchmen who ‘in a thousand modern pulpits every seventh day are preaching the doctrine of Spontaneous Generation’ which he described as ‘this same error’ and to which many cultured writers devoted ‘earnest preaching of this impossible gospel’. 110 Again, with Huxley in his sights he quoted ‘We are in the presence of the one incommunicable gulf – the gulf of all gulfs– that gulf which Mr. Huxley’s protoplasm is as powerless to efface as any other material expedient that has ever been suggested since

106 Ibid. 56.
107 Ibid. 56.
108 Ibid. 57.
109 Ibid. 57.
110 Ibid. 67.
the eyes of man first looked into it – the mighty gulf between death and life’.\textsuperscript{111} There is little difficulty, thus, in appreciating why Drummond found Darwin’s theories of natural selection compatible with his own beliefs – by extending laws from the Spiritual World to the Physical, he could claim, in reverse, that Biogenesis and a lack of spontaneous creation in the Physical World demonstrated its absence in the Spiritual World.

Drummond’s continued clarification of his relationship between the natural and spiritual aspects of Man and the laws governing them progressively constructed the foundation of his belief that would ultimately reject the Hobbesian modern natural law theories predicated on universal human selfishness. Drummond’s beliefs reflected the influence of the ancient tradition – extolling human sociability and altruism. He did this by extending and developing the spiritual /religious dimensions of humanity. He argued ‘The natural man belongs essentially to this present order of things. He is endowed simply with a high quality of the natural animal Life’. Drummond claimed it is ‘so poor a quality that it is not Life at all’. His Christian religious deduction summed up his position. ‘He that hath not the Son \textit{hath not Life}; but he that hath the Son hath Life – a new and distinct and supernatural endowment’.\textsuperscript{112} At this point Drummond’s argument moved from natural law into discussion of theological and ecclesiastical issues having provided a basis for his later analysis of the spiritual nature of Man. His intent in using natural law to comprehend the nature of spiritual Man, Biogenesis and the role of Christianity was summed up where he observed ‘That we may see how a confused

\textsuperscript{111} Ibid. 69f n.
\textsuperscript{112} Ibid. 82.
doctrine can really bear the luminous definition of Science and force itself upon us with all the weight of Natural law’. 113

One natural law that Drummond warned against was what he referred to as ‘The Principle of Reversion to Type’, a condition that Drummond foresaw for natural Man if he didn’t take care of his soul. 114 He used the analogy of domesticated birds which if released would ultimately revert to type. ‘Or if we neglect almost any of the domestic animals, they will rapidly revert to wild and worthless forms again’. Arguing that the same would happen to any of us he asked, ‘Why should Man be an exception to any of the laws of Nature?’ 115 Drummond carefully analysed what he saw as the different facets of a human. ‘If a man neglect himself for a few years he will change into a worse man and a lower man’. He began with the lowest aspect of human nature. ‘If it is his body that he neglects, he will deteriorate into a wild and bestial savage’. He then moved to cerebral qualities. ‘If it is his mind, it will degenerate into imbecility and madness’. He considered moral qualities. ‘If he neglect his conscience, it will run off into lawlessness and vice’. Finally Drummond considered Man’s spiritual dimension. ‘If it is his soul, it must inevitably atrophy; drop off in ruin and decay’. In pursuing his important issue of the danger of neglecting the soul he observed, ‘We have here, then, a thoroughly natural basis for the question before us’. 116 Drummond’s statement had considerable significance in his observations on natural law for several reasons. It indicated his belief that the lowest level of mankind was bestial, basically as a result of Sin, while indicating that

113 Ibid. 90.
115 Ibid. 99.
116 Ibid. 99.
Man was capable of higher order conduct. It showed his unbroken link from the lower to the higher qualities of Man: from the physical body, to the mental faculties, the moral, and ultimately the spiritual dimension. Drummond was also unequivocal concerning the influence of natural law in all aspects of Man. Not only did Drummond’s theory about ‘reversion to type’ indicate a reinterpretation of the ancient natural law tradition, it reflected assumptions similar to those of Lorimer concerning the capacity for bestiality in civilised humans as evidenced in the French Revolution.117

Consistent with his acceptance of the principles of evolution, Drummond extended on the process, arguing what he believed was ‘simply what an enlightened evolutionist would have expected’.118 What he saw as the true extent of Evolution was the ‘Christian teaching that Christ’s mission on earth was to give men Life… And that He meant literal Life, literal spiritual and Eternal Life’.119 Drummond stressed forcefully that this was to be taken literally not metaphorically; an interpretation consistent with natural law affecting both the physical and spiritual worlds. With his publishing of Natural Law in the Spiritual World in 1884 Henry Drummond established the foundation for his beliefs concerning the character of natural law and its position within the entire spectrum of the universe, temporal and spiritual. It was The Lowell Lectures on the Ascent of Man in 1897 which developed more fully his perception of Man, his nature, and his position in the Universe. Moore believes in fact that ‘the last chapter of the Ascent of Man displayed more clearly than elsewhere the unity of Drummond's evolutionary vision.’120 In this,

117 For Lorimer’s discussion of later regressions to barbarism see Lorimer, The Institutes of Law. pp. 68-70.
118 Drummond, Natural Law in the Spiritual World. 234.
119 Ibid. 235.
Drummond demonstrated the influence of the Thomist school, while broadly rejecting the Hobbesian modern interpretation of natural law beyond the lower orders of nature and primitive humans. His position, like that of James Lorimer, meant that a number of nineteenth century criticisms of natural law theory were inapplicable to his beliefs. Neither Drummond nor Lorimer subscribed to the ideas of contract theorists, nor to theories of Man in a state of nature. Rather, both saw primitive man as bestial, with the true point of study being Developed Man, particularly redeemed Christian Man.

Drummond expressed this effectively when he observed, ‘no one need be surprised if the semi-savage with whom we leave off is found wanting in so many of the higher potentialities of a human being’. There is little doubt that his African experience of native killings and the murder of King Chipitula strongly influenced this conclusion. The ‘higher potentialities’ he referred to were the sciences of Psychology, Ethics, and Theology. Drummond could have well been speaking for all traditional natural law theorists.

Drummond could not have made his rejection of the Hobbesian modern natural law thinking more clear than when he denounced what he saw as a single theory of evolution that limited itself to the physical while overlooking the spiritual. Huxley, in particular had been previously targeted for taking a totally materialistic view of evolution’. Drummond stated that ‘Any Biology, any Sociology, any Evolution, which is based on a single factor, is as untrue as the old Geology’. Drummond made his most important statement explaining his concept of evolution and the natural laws controlling

it when he outlined his two-part theory of the principles underlying evolution. ‘The first, the Struggle for Life, is, throughout, the Self-regarding function; the second, the Other-regarding function.’ The Struggle of Life clearly encompassed the Hobbesian concept of natural law. The first is, ‘in lower Nature, obeying the law of self-preservation, devotes its energies to feed itself’. The second is ‘the Other regarding function…obeying the law of species-preservation, to feed its young’. The first he suggested developed active virtues of strength and courage, The second, the Other, which took natural law beyond Hobbes, he claimed, ‘lays the basis for the passive virtues, sympathy, and love.’ A further objection to belief in natural law centred on the question of its existence or validity prior to divine revelation. Lorimer also dismissed this issue stating that ‘it existed equally before it was divinely revealed’.

It was Drummond’s belief in the qualities of natural law being divided into two elements, the ‘Struggle for Life’ and the ‘Struggle for the Life of Others’ that set his understanding of natural law apart from others. He acknowledged there was clearly no ethical function in what he termed the ‘earlier reaches of Nature’, but he believed ‘the moment we reach a certain height in development, ethical implications begin to arise’. It was of great concern to Drummond, reflecting his antipathy towards modern natural law theory, that the perception of natural law and of evolution had produced a very one-sided interpretation – totally physical, devoid of a spiritual or ethical component. He suggested ‘The final result is a picture of Nature wholly painted in shadow – a picture so

124 Ibid. 24.
125 Ibid. 24.
126 Ibid. 24.
dark as to be a challenge to its Maker … an abiding offence to the moral nature of
Man’. ¹²⁹ For Drummond, the exclusive focus on physical change in nature produced an
unbalanced philosophy of natural law. With Hobbesian philosophy of ‘each against all’
as the basis, Drummond observed: ‘the world has been held up to us as one great
battlefield heaped with the slain, an Inferno of infinite suffering, a slaughter-house
resounding with the cries of ceaseless agony’. He referred to ‘this version of the tragedy,
authenticated by the highest names on the roll of science’. ¹³⁰ Thomas Huxley was once
again in his mind.

In considering the issue of the Struggle for Existence, Drummond noted while
some observers felt that the ‘supposed “torments” and “miseries” of animals have little
real existence, but are the reflections of the imagined sensations of cultivated men and
women… the amount of actual suffering caused by the Struggle for Existence among
animals is altogether insignificant’. He caustically berated Huxley however. ‘Mr Huxley,
on the other hand, will make no compromise. The Struggle for Life to him is a portentous
fact, unmitigated and unexplained… “The moral indifference of nature” and “the
unfathomable injustice of the nature of things” everywhere stare him in the face’. ¹³¹ The
argument that followed was intended to point out what Drummond saw as the
inadequacies in Huxley’s agnostic theories and Drummond’s own consciousness of both
physical and spiritual continuity. Drummond condemned Huxley for what he saw as a
disjunction in thinking.

¹²⁹ Ibid. 25.
¹³⁰ Ibid. 25.
¹³¹ Ibid. 26.
Drummond acknowledged that for thousands of years before the first recognised society, humans were lowly savages, in conflict with other animals and each other for survival, where ‘the Hobbesian war of each against all was the normal state of existence’.132 At this stage in evolution, he readily accepted that this conflict state existed. When faced with the problem of explaining the transformation from that condition of Man to the civilised situation, Drummond asked scornfully of Thomas Huxley, ‘How then does Mr. Huxley act … in the face of this tremendous problem? He gives it up. There is no solution’.133 The disagreement that Drummond felt with Huxley was based on his perception that Huxley saw primitive Man and civilised or ‘ethical’ Man as different entities without any satisfactory explanation for the transformation. ‘He [Huxley] turns his back upon Nature – sub-human Nature, that is – and leaves teleology to settle the score as best it can’.134 By criticising Huxley for merely claiming that the history of civilisation ‘is the record of the attempts of the human race to escape from this position’ and arguing that Huxley failed to explain the change, Drummond contemptuously claimed Huxley ‘washes his hands of it in the name of Ethical Man’.135 Drummond noted that Huxley felt ‘Cosmic Nature … is no school of virtue, but the head-quarters of the enemy of ethical nature’.136 This position left Drummond wondering where Huxley thought ethical nature came from. His previous comment indicated he didn’t believe Huxley considered it at all. Drummond saw Huxley as equating ‘cosmic nature’ with the

132 Ibid. 27.
133 Ibid. 27.
134 Ibid. 28.
135 Ibid. 28.
136 Ibid. 29.
‘Struggle for Life’, and his ‘Ethical Process’ as resembling the ‘Struggle for the Life of Others’.

Drummond felt that Huxley had mischievously hit on the right solution for totally wrong reasons. By splitting the world order into two halves, Huxley had caused the Struggle for Life to end with the Ethical Process, and there to be no Ethics prior to this. For Drummond this was ‘a curious disregard of the principle of Continuity’. Drummond defined his position with his statement, ‘The Struggle for the Life of Others, as we have seen, starts its upward course from the same protoplasm as the Struggle for Life; and the Struggle for Life runs on into the “ethical” sphere as much as the Struggle for the Life of Others’. Drummond regarded the breach between the earlier and latter stages as scientifically indefensible. Drummond stated emphatically, ‘The Struggle for the Life of Others is sunk as deep in the “cosmic process” as the Struggle for Life; the Struggle for Life has a share in the “ethical process” as much as the Struggle for the Life of Others’. Drummond felt that even Huxley’s critics, including Leslie Stephen (1832–1904) and Herbert Spencer missed the most significant point. Drummond argued, ‘The seat of the disorder is the same in both attackers and attacked – the one-sided view of Nature. Universally Nature, as far as the plant, animal, and savage levels, is taken to be synonymous with the Struggle for Life’. Drummond considered that even Huxley had misgivings about his own argument when he quoted his saying in note 19 to Evolution and Ethics that ‘strictly speaking, social life and the ethical process, in virtue of which

\[\text{Ibid. 29.}\]
\[\text{Ibid. pp. 29-30}\]
\[\text{Ibid. 30.}\]
\[\text{Ibid. 31.}\]
it advances towards perfection, are part and parcel of the general process of Evolution”

141 For Drummond, Huxley was contradicting his own position. By contrast, Drummond claimed, ‘even if a rudiment of a moral order be found in the beginnings of this process it relates itself and that process to a final end and a final unity’. 142

Drummond cited a critic of Huxley, Professor Seth (1856–1931)143, who had addressed the issue in Blackwood’s Magazine, Dec., 1893, with what Drummond regarded as a pertinent point. ‘ “I ask the evolutionist,” who has no other basis than the Struggle for existence, how he accounts for the intrusion of these moral ideas and standards which presume to interfere with the cosmic process and sit in judgment upon its results” ’. 144 Drummond believed that the question could not be answered as long as morality was treated as a by-product of the cosmic system. He speculated that it might be the cosmic system, and immorality the by-product. What he intended to show throughout his argument was ‘that the moral order is a continuous line from the beginning’. 145

Referencing the ongoing disputation between religion and science, he admonished the scientists who, in the name of scientific discovery, in the pursuit of facts, had rejected Christianity and ‘proclaimed their Agnosticism to philosophy’. 146 For scientists ‘the only refuge was Agnosticism – there were no facts. Till the facts arrive, therefore philosophy

141 Ibid. 31.
142 Ibid. 33.
143 Professor Andrew Seth, later known as Professor Andrew Seth Pringle-Pattison, held the Chair of Logic and Metaphysics, at Edinburgh University from 1891–1919. Drummond references his article “Man’s Place in the Cosmos” in Blackwood’s Edinburgh Magazine Dec.1893. online resource <http://aleph0.clarku.edu/huxley/comm/misc/seth93.html> viewed 28th March 2013.
144 Ibid. 33.
145 Ibid. 34.
146 Ibid. 34
was powerless to relieve her ally’.\textsuperscript{147} Drummond believed that confusion was caused because previously evolutionists had only had the Struggle for Life to consider, but adding the Struggle for the Life of Others, ‘the addition of an Other-regarding basis makes an infinite difference’.\textsuperscript{148} Drummond continued, ‘we perceive that it is neither by the one alone, nor by the other alone, that the process is to be interpreted, but by a higher unity which resolves and embraces all’.\textsuperscript{149} He determined ‘Seldom has there been an instance on so large a scale of a biological error corrupting a whole philosophy’.\textsuperscript{150} While he acknowledged that the Struggle for Life was an efficient instrument of progress he felt it was only half the instrument. Reinforcing his earlier belief statement he said, ‘The Struggle for the Life of Others, as we have seen, is no interpolation at the end of the process, but radical, engrained in the world-order as profoundly as the Struggle for Life’.\textsuperscript{151} Drummond explained the significance of the Struggle for the Life of Others as complementary to Darwin’s explanation of the Struggle for Life. This was again as a defining component of natural law. Drummond considered that it was reading Malthus on Overpopulation ‘that suggested to Mr. Darwin the value of the Struggle for Life’.\textsuperscript{152} His own reading of more recent biological research confirmed for Drummond the validity of this theory though he didn’t see it as a complete explanation. Even for plants and animals it wasn’t. ‘The Struggle for the Life of Others on the plant and animal plane, in the mere work of multiplying lives, is a final condition of progress’.\textsuperscript{153} It had a vital role to play

\begin{footnotes}
\footnote{147}{Ibid. 35.}
\footnote{148}{Ibid. 37.}
\footnote{149}{Ibid. 37.}
\footnote{150}{Ibid. 36.}
\footnote{151}{Ibid. 36.}
\footnote{152}{Ibid. 38.}
\footnote{153}{Ibid. 39.}
\end{footnotes}
even there, albeit a limited one. He felt that without it there would be no multiplying of lives and thus no Evolution. Clearly Drummond had no conflict with Darwin in the biological development of evolution, in fact, he supported Darwin while attacking his followers. In questioning why scientists had failed to take the Struggle for the Lives of Others into account, he observed, ‘Foremost, of course, there stands the overpowering influence of Mr. Darwin. *In spite of the fact that he warned his followers against it*, this largely prejudiced the issue’.\(^{154}\) [My emphasis]

Ultimately, Drummond’s central and most powerful argument invoked the fundamental tenet of traditional Natural Law, and that was Altruism. He again rejected Hobbesian modern natural law theory absolutely. ‘Finally, and all the reasons already given are frivolous beside it, had there been no Altruism – Altruism in the definite sense of unselfishness, sympathy, and self-sacrifice for Others the whole higher world of life had perished as soon as it was created … Altruism had to enter the world.’\(^{155}\)

Moore asks and answers the question, ‘How did Drummond arrive at this astonishing vision? He did it by tracing natural law in the spiritual world, not of the individual, but of the human race’.\(^{156}\) Moore’s observation highlights the particular significance of Drummond’s theory. Reference to the human race, as distinct from the individual, allowed perfect accommodation with Darwin’s natural selection; Drummond was himself suggesting an evolutionary process within humans. As Moore observes about the Struggle for Life, and the Struggle for the Lives of Others, ‘the first, a struggle for nutrition, is competitive, individualistic, and selfish. The second, a struggle to

\(^{154}\) *Ibid.* 41.


\(^{156}\) Moore, ”Evangelicals and Evolution.” 405.
reproduce, is cooperative, corporate, and altruistic’. Moore further questioned why this process of evolution in the human spirit had not been identified. Drummond had considered that the Struggle for the Life of Others had been neglected. Moore correctly observes that it was ‘because of the overpowering influence of Darwin’s greatest error, his emphasis on the Struggle for Life as the “final clue” to organic development’. Further, ‘the world “mistook Darwinism for Evolution”…and assumed “that the foundations of Darwinism were the foundations of all Nature” ’. It is evident that Darwin’s followers failed to heed his advice.

Interestingly while none of the natural law theorists being discussed here took the analysis of the spiritual world to the extent that Drummond did, their writings revealed an implicit understanding of those of his principles that referred to the temporal world. All recognised the development of humans from barbarism to civilized behaviour. At the barbaric level, the selfish survival, Hobbesian principles applied, but humans were argued to grow beyond these with gradually developed intellect. An implied altruism was seen as one clear differentiation of civilized man from the savage. While Drummond, like Lorimer and Phillimore, was prepared to see a linear development between savage and civilized man, he would have found unexpected agreement from the utilitarian Mill. Pitts points out ‘Mill believed that all diversity in social practices and institutions could be ranged along a scale of progress, and that the challenge for political thinkers… was to draw backward societies toward the state of the most advanced society’. While there was agreement on linear progression, only Lorimer specifically equated uncivilized

157 Ibid. 405.
158 Ibid. 406.
159 Pitts, A Turn to Empire : The Rise of Imperial Liberalism in Britain and France. 140.
behaviour of ‘civilized’ states, such as in the French Revolution, with regression to that of barbarians.

With his explanation of his understanding of natural law, extending linearly from protoplasm to the spiritual, Drummond’s concept of following Laws of Nature took on a significantly broader meaning deliberately, as he believed, augmenting the explanations of the scientists. His further discussion must be interpreted within that context. Drummond’s principal motivation in developing his theories about Nature and its laws and the incorporation of Evolution, was his belief that ‘we may have in Nature a key to the future progress of Mankind’.160 Demonstrating both a worldly and spiritual component he claimed, ‘Here for the individual, is … a vocation chosen of Nature which it will profit him to consider, for thereby he may not only save the whole world, but find his own soul’.161 In support of his opinion he quoted Edward Caird (1835–1908), Professor of Moral Philosophy, University of Glasgow, in The Evolution of Religion, Vol. 1, pp. 26, 29.

“The study of the historical development of man, … especially in respect of his higher life, is not only a matter of external or merely speculative curiosity; it is closely connected with the development of that life in ourselves…It is only through a deepened consciousness of the world that the human spirit can solve its own problem… and his consciousness of what he is in himself as a spiritual being is dependent on a comprehension of the position of his individual life in the great secular process by which the intellectual and moral life of humanity has grown and is growing.”162

Professor Caird’s observations were significant for Drummond because they reinforced Drummond’s own beliefs in the linking of the natural and spiritual worlds. They also

160 Drummond, The Lowell Lectures on the Ascent of Man. 53.
161 Ibid. 53.
162 Ibid. pp. 53-54.
appeared to support Drummond’s acceptance of the evolutionary process, as well as its application to the spiritual dimension of Man, where they referred to the moral life of humanity as “growing”.

In a rare use of Herbert Spencer’s opinion to support his own point of view he observed ‘If, as Herbert Spencer reminds us, “it is one of those open secrets which seem the more secret because they are so open, that all phenomena displayed by a nation are phenomena of Life, and are dependent on the laws of Life,” we cannot devote ourselves to study those laws too earnestly or too soon’.163 His usual attitude to Spencer was less positive, although not rejecting him as he did Huxley. Referring to the ‘Synthetic Philosophy of Herbert Spencer’ and the discovery by sociologists, and Spencer, of the ‘Social Organism’, he claimed they had raised great expectations that they had failed to fulfil. ‘Mr Spencer’s work has been mainly to give this century, and in part all time, its first great map of the field.164 Drummond felt that partly as a result of Spencer’s failure to identify the Kings and Queens in life’s game, others had come up with ‘projects as hostile to his whole philosophy as to social order. Theories of progress have arisen without any knowledge of its laws’.165 Drummond’s criticism was again of a failure to factor in The Struggle for the Lives of Others to science and sociology and to recognise evolution in the Spiritual World. Although not including any specifics, he also referred to the ordered

164 Drummond, The Lowell Lectures on the Ascent of Man. 56.
165 Ibid. 56.
course of things having ‘been done violence to by experiments’ grounded in this corrupt philosophy.\textsuperscript{166}

It was ironic that Drummond should quote two self admitted agnostics, Sir Leslie Stephen and Thomas Huxley, in support of his criticism of the inadequacy of scientific and of sociological discovery:

Mr Leslie Stephen pronounces the existing science “a heap of vague empirical observation, too flimsy to be useful”; and Mr Huxley, exasperated with the condition in which it leaves the human family, protests that “if there is no hope of a large improvement” he should “hail the advent of some kindly comet which would sweep the whole affair away.”\textsuperscript{167}

While Drummond’s criticism of the inadequacies of science in general and sociology in particular were consistent with those of Leslie and Huxley, and his solution of a ‘return to Nature’ was similar to theirs, his understanding of Nature was definitely not. Consistent with his views on Darwinism and Evolution theory, he also saw the induction of Sociology as ‘one-sided’. Rather than his finding error, it was the incompleteness of these studies that he criticised and saw as inadequate, leading sociology into ‘a wilderness of empiricism’.\textsuperscript{168} The return to Nature that Drummond sought was Nature as described in \textit{Natural Law in the Spiritual World}, a Nature where the natural and spiritual worlds were merely linear extensions of each other, and one couldn’t be considered independently of the other.

Drummond offered his formula for the redemption of Sociology, providing for its instalment, not just as another science, ‘but as the crowning Science of all the sciences,

\textsuperscript{166} Ibid. 56.
\textsuperscript{167} Ibid. 57.
\textsuperscript{168} Ibid. 57.
the Science, indeed, for which it will one day be seen every other science exists’.\textsuperscript{169}

Initially he argued that sociological method had to be the method of all natural sciences. But it was his interpretation of this study that was intriguing because it was to circumvent the function of Man. He demanded it look ‘not where the conditions are already abnormal beyond recall, or where Man, by irregular action, has already obscured everything but the conditions of failure’. There were two regions which he believed sociology should study, both virtually excluding Man, who, ‘by irregular action, has already obscured everything but the conditions of failure’. The first area was ‘in lower Nature which makes no mistakes’. The second area was ‘in those fairer reaches of a higher world where the quality and the stability of the progress are guarantees that the eternal order of Nature has had her uncorrupted way’.\textsuperscript{170} For Drummond, the function of Sociology was to study the nature, role and implementation of natural law – the Struggle for Life, and the Struggle for the Life of Others. The sociologist ‘must betake himself in earnest to see what these mean in Nature, what gathers around them as they ascend [from the material to the spiritual], how each acts separately, how they work together, and whither they seem to lead’.\textsuperscript{171}

Drummond took issue with Benjamin Kidd (1858–1916) a sociologist. D.P. Crook identified Kidd as ‘a spiky, self-taught individualist, an independent spirit convinced of his own originality, who dreamed of pioneering an holistic science of

\textsuperscript{169} Ibid. 57. 
\textsuperscript{170} Ibid. 58. 
\textsuperscript{171} Ibid. 61.
While occupying a number of civil service positions, Kidd became a noted social scientist through his book *Social Evolution* (1894) where he developed his theory. Unlike Drummond he regarded religion as the central point which was the element that held societies together. A Darwinist, he obliquely acknowledged natural law through his positioning of religion, though it was a Hobbesian modern natural law, concentrating on the struggle for life. Drummond considered that Kidd saw the problems of Evolution and Sociology clearly but postulated solutions on entirely the wrong basis. Drummond judged that by considering ‘all the sciences that ever were, and the one science [Sociology] which resolves them all … the confusions and contradictions of Evolution are reconciled’.

In taking issue with Benjamin Kidd, Drummond referred to what he acknowledged as the accuracy of Kidd’s observations on the problems facing Sociology and the sciences. He cited Kidd’s observations in *Social Evolution*, page 28, where Kidd argued for a coming together, ‘for the social sciences to strengthen themselves by sending their roots deep into the soil underneath from which they spring’, and for the biologist to ‘carry the methods of his science boldly into human society … where he encounters life at last under its highest and most complex aspect’. While agreeing entirely with Kidd about the nature of the problem, he argued that the basis of Kidd’s philosophy was unsound. Not only did he believe that Kidd followed Darwin but that he considerably exceeded Darwin in proclaiming the ‘enduring value of the Struggle.

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173 *Social Evolution* became an almost overnight sensation and was subsequently published in ten languages and several editions. None of his later writings achieved the same popularity and credibility.


for Life’. Drummond felt that this was only part of the issue. His criticism of Kidd was
directed at the latter’s exclusive focus on the Struggle for Life. ‘He sees its immense
significance even in the highest ranges of the social sphere’. Drummond attributed
Hobbesian thinking to Kidd where Drummond argued that in promoting the ‘imperious
call to individual assertion’ of the Struggle for Life, Kidd was ‘encouraging every man by
the highest sanctions ceaselessly to seek his own’. Because he believed Kidd saw nothing
else in Nature, and determining that Kidd overlooked the Struggle for the Life of Others
he cautioned that ‘to obey this voice means ruin to Society, wrong and anarchy against
the higher Man’.176 As he did with Darwin, Hobbes, and Stephens, Drummond dismissed
Kidd’s concept of natural laws as incomplete and one-sided, lacking a spiritual
evolutionary focus.

The solution that Drummond proposed was Thomist in form, with its assumption
of human sociability. ‘As a social being … he must subordinate himself to the larger
interest, present and future, of those around him’.177 Unless man acknowledged the
precept of Nature, and ‘ “Look not every man on his own things, but also on the things of
Others”, there is no rational sanction for morality’.178 The necessity for this subordination
was the problem he saw in company with Kidd ‘ “that the interests of the social organism
and those of the individuals comprising it at any time are actually antagonistic; they can
never be reconciled; they are inherently and essentially irreconcilable” ’.179 Ironically

176 Drummond, The Lowell Lectures on the Ascent of Man. 62.
177 Ibid. 62.
179 Ibid. 63.
Drummond was again quoting Kidd’s *Social Evolution*, but once more it was to reference the problem, not the solution.

Drummond’s justification for his objections to Kidd’s thinking further reinforced his explanation that, ‘Only by bringing theology into harmony with Nature and into line with the rest of our knowledge can the noble interests given it to conserve retain their vitality in a scientific age’. He saw two fundamental elements to maintaining the Law of Continuity in Nature: ‘the first essential of a working religion is that it shall be congruous with Man; the second that it shall be congruous with Nature’.180

In the manner that he had argued for the extension of natural laws into the spiritual world Drummond now endeavoured to demonstrate an indivisible link between the laws of the natural scientific world and laws promulgated by religion. With this he was returning to the theme expressed in his preface to *Natural Law in the Spiritual World* where he referred to attempts to reconcile Science and Religion, ‘two things which never should have been contrasted’. The problem he had seen was that ‘in most cases where Science is either pitted against Religion or fused with it, there is some fatal misconception to begin with as to the scope and province of either’.181 His criticism at this point was directed less towards the scientists who rejected the relevance of religion to their studies, but to evangelists who were equally dismissive of the value of science and the involvement of the material world in eschatological issues.

A further significant explication of his views of the relationship between the laws of the natural and spiritual worlds centred on his discussion of altruism. Without

181 Drummond, *Natural Law in the Spiritual World*. v.
reference to specific ecclesiasts he objected generally to the circumstances where
‘Religion is offended by the patronage of an ally which it professes not to need’.\textsuperscript{182} As
had been evident, Drummond rejected this sense of exclusivity entirely. Ironically, once
again he referred to his areas of agreement with Benjamin Kidd in support of his views.
‘We believe with Mr Kidd that “the process of social development which has been taking
place, and which is still in progress, in our Western civilization, is not the product of the
intellect.” ’ Like Kidd he believed that ‘ “the motive force behind it [social development]
has had its seat and origin in the fund of altruistic feeling [his italics] with which our
civilization has become equipped” ’.\textsuperscript{183}

Again he departed from Kidd’s views in explaining its source. Drummond saw
altruism as an organic natural growth, not something imposed from above by theological
teaching alone. This was compatible with Thomist thinking which, while fiercely
acknowledging God as Creator, devised a philosophy which could function
independently of God. Importantly Drummond was arguing that altruism was an integral
part, and a direct result, of the human evolutionary process in the material world. He
claimed that ‘this fund of altruistic feeling has been slowly funded in the race by Nature,
or through Nature, and as the direct and inevitable result of that Struggle for the Life of
Others, which has been from all time a condition of existence’.\textsuperscript{184} Although he felt that an
analysis of Religion’s contribution to altruism was beyond the scope of his discussion, he
considered that it would be unsurprising for students of religion to fail to recognise the
extent of the natural basis on which religion operated. ‘Nothing is gained by protesting

\textsuperscript{182} Ibid. v.
\textsuperscript{183} Drummond, \textit{The Lowell Lectures on the Ascent of Man}. 71.
\textsuperscript{184} Ibid. pp. 71-72.
that “this altruistic development, and the deepening and softening of character which has accompanied it, are the direct and peculiar product of the religious system”’. He stated that nothing could be gained by ‘setting one half of Nature against the other, or the rational against the ultra-rational’. 185 In stressing the importance of the unity of Nature from the physical to the spiritual Drummond warned ‘to break up Nature is to break up Reason, and with it God and Man’. 186

Consistent with Kant’s philosophy Drummond saw the link between developing reason and the appreciation of natural law. 187 He shared Kant’s belief that the state of nature was one of savagery. 188 Drummond interestingly, linked natural selection, man’s evolutionary growth, and subsequent “survival of the fittest” with altruism and moral growth. He felt it was not only the means for making life move forward, but ultimately the means of perfecting it. He compared the prize-fighter and the cripple and considered that in a moral world, with care of others, the cripple would be better adapted to live, where the pugilist would be thrown on his own devices to survive. Drummond argued, ‘the survival of the Fittest, of course, does not mean the survival of the strongest, It means the Survival of the Adapted’. 189 This process involved the passing from the animal and savage states, and, continuing the Struggle for Life in two more developed forms: War and Industry. He saw War as that ‘ancient Struggle for Life carried over from the animal kingdom’. Industry was ‘the same struggle, but in another disguise’. 190

185 Ibid. 72.
186 Ibid. 73.
187 In the introduction to her translation Mary Gregor comments on Kant’s observation on obedience to the moral law and rationality in Kant, The Metaphysics of Morals. 2.
188 See also Kant’s discussion in Kant, Perpetual Peace. pp. 18-23.
189 Drummond, The Lowell Lectures on the Ascent of Man. 267.
190 Ibid. 269.
An issue critical to Drummond’s exposition of the role of Natural Law in both the material and the spiritual worlds through the Struggle for Life and the Struggle for the Life of Others was introduced with his reference to what he saw as ‘the most important fact of all – the change that passes over the principle as time goes on’.\textsuperscript{191} For him the development of Industry was evidence of this. While the Struggle for Life would continue, Industry was one example of the ameliorating development that advances in civilization would encourage. The advantage, through adaptation, of the cripple over the pugilist was another. Because he believed the Struggle for Life was an essential part of life’s dynamic, he considered that it would always exist, but with advances in civilisation and science ‘in the virulence of its animal qualities it must surely pass away’.\textsuperscript{192}

In an unambiguous rejection of Hobbesian-based modern natural law theory Drummond dismissed those who ignored or overlooked the qualitative change that he saw as part of the evolutionary process, those who ‘would govern Society by the merely animal Struggle; those who claim for this sanction of Nature and lay down the principle of selfishness as the eternally working law.’ Drummond proclaimed, espousing the law of sociability, ‘The eternal law…is unselfishness’.\textsuperscript{193} Consistent with his earlier observations he argued that it was the force of Nature itself which would progressively minimise the importance of the Struggle for Life; by means of the Struggle for the Life of Others. Again he indicated that it was as old as the Struggle for Life, ‘as deeply sunk in Nature… destined from the first to replace the Struggle for Life… to establish these

\textsuperscript{191} Ibid. 270. \\
\textsuperscript{192} Ibid. 270. \\
\textsuperscript{193} Ibid. 271.
foundations was all that the Animal Struggle was ever designed to do’. This triumph of the Struggle for the Life of Others was for Drummond the reason for his linear extension of natural law from the protozoan level to the spiritual; from selfishness to altruism. It was a clear distinction from, not only the modern natural law theorists, but also from the traditionalists, such as Lorimer, who divorced physical from spiritual laws.

It was the function of the Struggle for the Life of Others that was the ultimate purpose of natural law in both man’s physical and spiritual worlds and in his ‘ascent’. In what Drummond regarded as the most important chapter in the evolution of Man, he observed that ‘Man is not a body, nor a mind. The temple still awaits its final tenant – the higher human Soul’. Drummond set out to argue in fact that the eventual outcome of Man’s natural development was Christianity. He reinforced and expanded his argument as to how the Struggle for the Life of Others was embedded in natural law, based on an extension of Darwin’s theories of evolution. Drummond emphasised that ‘Sociability is as much a law of Nature as mutual struggle’. He proposed that Nature be asked the question ‘Who are the fittest: those who are continually at war with each other, or those who support one another?’ His proffered answer to the question was that ‘we at once see that those animals which acquire habits of mutual aid are undoubtedly the fittest’. This reinforced his earlier analogy of the prize fighter and the cripple by indicating that a major force for adaptation was sociability. Arguing that sociability provided greater opportunities for survival, development of intelligence and bodily organisation he

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determined that ‘mutual aid is as much a law of animal life as mutual struggle’. 196 Far from depending upon selfishness for survival, he stated ‘the system of things, from top to bottom, is an uninterrupted series of reciprocities’. 197 Again Drummond was confirming his belief that altruistic behaviour was as much a product of physical natural laws as any scientific activity would be. He saw an ‘evolutionary tendency of the universe becoming conscious’ in the aspirations of the human mind and heart. Ironically he was in praise of Darwin’s contribution because his evolutionary theories demonstrated that the world exhibited continual upward progress. Drummond proclaimed ‘this is the last and most splendid contribution of science to the faith of the world’. 198

The principles of evolution provided an underpinning for his justifying the importance of Christianity. As Men evolved he noted they began to see ‘an undeviating ethical purpose in this material world…making for perfectness’. 199 He readily acknowledged that moral qualities – perfection, love, have always been required of Man, but that these had been required on other grounds, notably religious, but not before on the natural plain, which was what he was claiming. Asking if it were possible that Nature would become ‘the ethical teacher of the world?’ and the basis for ‘a final faith and a final creed’, he continued rhetorically to question whether an understanding of Nature could lead to ‘a religion congruous with the whole past of Man, at one with nature, and with a working creed which Science could accept?’ 200 Drummond then proclaimed triumphantly, ‘The answer is a simple one: We have it already’. For him the answer was,

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196 Ibid. 306.  
197 Ibid. 307.  
198 Ibid. 436.  
199 Ibid. 437.  
of course, Christianity. Asking why up to that point there had been nothing said to reconcile Christianity with evolution he claimed, ‘Because the two are one’.201

Drummond systematically argued his reasons through answers to a series of rhetorical questions.

What is evolution? A method of creation. What is its object? To make more perfect living beings. What is Christianity? A method of creation. What is its object? To make more perfect living beings. Through what does evolution work? Through Love. Through what does Christianity work? Through Love. Evolution and Christianity have the same Author, the same end, the same spirit.202

Drummond believed that Christianity ‘put the finishing touches to the Ascent of Man’. He claimed, ‘No man can run up the natural lines of Evolution without coming to Christianity at the top’. Without limiting it to any particular denomination, he concluded, ‘Christianity – it is not said any particular form of Christianity – but Christianity, is the Further Evolution’.203

The answers he gave to his rhetorical questions accounted for his linking of Christianity to Nature itself. After stating that the dignity which Man alone enjoyed had evolved through the development or evolution of Ideals, he equated Christianity with Nature and its extension. ‘There is nothing in Christianity which is not in germ in Nature. It is not an excrescence on Nature but its efflorescence… It is the main stream of history and of science’.204 From this he drew a notable conclusion determining that ‘Christianity did not begin at the Christian era, it is as old as Nature’.205 In the same way that he argued the struggle for the life of others coexisted with the struggle for life, he developed the

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201 Ibid. 438.
202 Ibid. 438.
203 Ibid. 439.
204 Ibid. 441.
205 Ibid. 441.
proposition that Christianity, albeit in an undeveloped or dormant form, also coexisted. Where he argued that qualities such as Altruism became evident only at the point in evolution at which they could function, he saw Christianity similarly as a latent force throughout evolution until the time when human spiritual development was sufficient for its emergence. For Drummond this was the apex of worldly evolutionary process. Evolution would continue however. ‘The Further Evolution must go on, the Higher Kingdom Come’. 206

For Henry Drummond, therefore, this spiritual development was the ultimate purpose of natural law. It was a law which, in concert with evolution, drove the progress of the world, of nature and mankind towards the achievement of an eschatological objective. It is evident from examining the development of Drummond’s argument that it was essential for him to acknowledge the concept of natural law to apply it to both scientific and spiritual features of the universe together, as, for him, they were one and the same. It was an approach by which he gave religion a more material basis, not through pantheism, but as an evolutionary extension of the material world. This position, underscored the fragmentation of the concept amongst nineteenth century users, as Drummond’s interpretation differed from that of other natural law exponents, such as Lorimer, who saw a complete separation of both spheres, and the laws governing them. In arguing the universality and unity of natural laws he developed his argument by relating the laws to each other.

206 Ibid. 444.
CHAPTER NINE: GEORGE COMBE.

'To be sure, the history of science is no more the true centre of British history in the nineteenth century than is the history of Parliament. But it is no less so’. Susan Cannon proceeds to complain that the historians of parliament, politics as well as ‘social’ historians have failed to ‘produce full and convincing history’. Her call is for historians who are pressured by ‘the totality of the past’. Although the same criticism for selectivity can be levelled equally at intellectual historians, her concern has merit when George Combe’s role in the melding of science and natural law is examined. The most significant reason for historians’ lack of appreciation of Combe’s significance is that the vehicle for advancing his views on natural law, phrenology, was a failure.

In the developing juridical relationship between natural and positive laws and their progressive accommodation of each other, George Combe (1788–1858) took no part. His preoccupation was the nature of man: physically and scientifically through phrenology; spiritually and morally through man’s accommodation to the natural laws. He provided important evidence of the continued influence of natural law theory throughout nineteenth-century Britain in both the scientific, academic, and particularly the general community. Roger Cooter, an historian who recognises Combe’s significance, describes phrenology as ‘the nineteenth century’s most popular and popularized “science” and one of its most fecund in the period preceding Darwin’. He believes that no one was more important than George Combe in instigating ‘phrenology’s

transformation from an arcane theory of brain and character to that of a socially respectable scientific vehicle of “progressive” ideas on social life and organization’.³

George Combe’s conviction was that this social life was governed by the law of nature.

George Combe (1788–1858) became the most widely recognised nineteenth-century British phrenologist. Combe’s upbringing: a large Scottish family; a rigorous and harsh education and, notably an austere Calvinist background. Cooter also argued that phrenology filled a gap left by rejecting Calvinism although it is unclear that Combe was ever devout enough to experience a later gap. Combe had been a Writer to the Signet for three years when John Gordon’s review of J.G. Spurzheim (1776–1832) appeared in 1815.⁴ There were no other phrenologists in Britain apart from Spurzheim and Thomas Forster (1789–1860) in 1816–17.⁵ At the suggestion of Rev. Dr. David Welsh (1793–1845)⁶, the Combes and some legal colleagues of George founded the Edinburgh Phrenological Society (EPS) in February 1820. It was the first phrenological body ever created.

On July 23rd 1852, seven years before the publication of Charles Darwin’s *On Origin of Species* (1859), when the principles of Phrenology held considerable sway,

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⁴ A Writer to the Signet, in Scotland, was a senior solicitor who conducted cases in the Court of Sessions. They prepared writs that were issued under the royal signet.
⁵ Thomas Forster coined the name ‘phrenology’ in 1815.
⁶ Rev Dr. David Welsh was a member of the Edinburgh Phrenological Society from 1822 and withdrew from the society about 1832.
Horace Mann,\textsuperscript{7} described as the ‘Father of American Education’ in a “Letter to a Young Lawyer” (1852) wrote, ‘The principles of Phrenology lie at the bottom of all sound mental philosophy, and of all the sciences depending upon the science of the Mind; and of all sound theology, too’. Singling out George Combe for specific praise he stated, ‘Combe’s “Constitution of Man” is the greatest book that has been written for centuries’. His principle reason for this praise was his belief that it ‘vindicates the way of God to man’ better than any polemical treatise I have ever read’.\textsuperscript{8} In 1858 the \textit{Illustrated London News} could maintain, ‘No book published within the memory of man, in English or any other language, has effected so great a revolution in the previously received opinions of society...The influence of that unpretending treatise has extended to hundreds of thousands of minds which know not whence they derived the new light that has broken in upon them’.\textsuperscript{9}

Yet it was as early as 1878, only twenty-six years later when Combe’s biographer, Charles Gibbon, could write in his introduction to \textit{The Life of George Combe}:

\begin{quote}
The name of George Combe is now rarely heard in scientific or philosophical circles — seldom even in those of the advocates and practisers of that system of advanced education for the adoption of which he struggled hard and endured much abuse.\textsuperscript{10}
\end{quote}

\textsuperscript{7} Horace Mann (1796–1859) was an American abolitionist, a social reformer, Congressman and educator. He was considered a significant contributor to the development of American public education. Interestingly, like George Combe, he had a Calvinist upbringing.


Iain McCalman in *Darwin’s Armada* notes that Alfred Russel Wallace\(^{11}\) (1823–1913), the British Naturalist, was influenced by Tom Paine’s (1737–1809)\(^{12}\) ‘pungent deistic polemic’, *The Age of Reason* (1794–1807), and George Combe’s, *The Constitution of Man*. McCalman considers that Paine’s text ‘helped make him [Wallace] a lifelong sceptic of orthodox religion’ while Combe ‘presented phrenological ideas in a way that appealed to a self-improving young socialist’. He further notes Combe stressed that, while the survey of a person’s ‘topography of cranial bumps’ indicated that a person had inherited tendencies, education could cultivate good ones and inhibit bad ones. He believes that a combination of Combe’s phrenology and [Robert] Owen’s\(^{13}\) (1771–1858) social utopianism cemented Wallace’s own socialist preoccupations. Combe’s phrenology was offering a rational alternative for the role of a Deity, as McCalman observes, ‘a do-it-yourself science for the common man’.\(^{14}\)

In 1898, in his book *The Wonderful Century*, Wallace reflected on the advances and the failures in science and technology during the previous hundred years. Amongst the worst failures of the nineteenth century he considered the neglect of the study of phrenology. He regarded its rejection as ‘an example of the almost incredible narrowness and prejudice which prevailed among men of science at the very time they were making such splendid advances in other fields of thought and discovery’.\(^{15}\) The future adoption of phrenology he thought inevitable, stating ‘in the coming century phrenology will assuredly attain general acceptance’. He believed it would prove its practicality in

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\(^{11}\) Alfred Russel Wallace was regarded as an eminent English naturalist, biologist, evolutionist and social critic.

\(^{12}\) Thomas Paine was an English/American political essayist and pamphleteer. He was an influential figure in the American independence movement.

\(^{13}\) Robert Owen was a British utopian socialist and regarded as founder of the Co-operative movement. Owen’s believed that character is formed by the effects of the environment upon the individual and that education was central to the development of rational and humane behaviour.

\(^{14}\) Iain McCalman, *Darwin’s Armada* (Camberwell, Vic.: Viking, 2009). 225.

education, personal self-discipline, and in reforming the treatment of the criminal and the insane.\textsuperscript{16} Wallace’s later opinion, sustained from his youth, was particularly interesting given that it was expressed at the end of the nineteenth century; several decades after the influence of phrenology had waned. Wallace’s optimism was misplaced. Although writing in an American context, John D Davis, in 1971 made an observation that was equally applicable to British thinking. ‘Phrenology today, far from being accepted as a science, is considered a harmless quackery practised upon the gullible at county fairs’. Of greater significance in this discussion was his observation that ‘what is more striking, it [phrenology] has faded from our memories as well as our beliefs: it is slipping away not merely from the present, [my emphasis] but from the past itself’.\textsuperscript{17} Cooter laments that phrenology’s position in the development of scientific inquiry is largely overlooked because it now appears in many respects ‘as a Dickensian caricature of science’.\textsuperscript{18} This historical neglect of phrenology is a significant factor in explaining both the lack of recognition of its contribution through George Combe to natural law, and of the continued place of natural law generally in nineteenth century Britain.

The analysis of the links between nineteenth-century science and politics by Boyd Hilton is typical of the approaches by historians to Combe, phrenology, and their contribution to the developments in natural law. The most significant feature of Hilton’s analysis is its total neglect of phrenology. He mentions it in reference to a hypothesis by the historian Simon Schaffer on whether the ‘laws of human nature could be “established

\textsuperscript{16} Ibid. 193.
\textsuperscript{17} John Davies, \textit{Phrenology: Fad and Science; a 19th-Century American Crusade} ([Hamden, Conn.]: Archon Books, 1971). pp. ix-x.
as the basis of a science of progress” ...showing how political radicals like J.S. Mill and J.P. Nichol [(1804–59)] fused their version of nebular theory with political economy, phrenology, and Comtism in their efforts to buttress movements for political reform’.19

His only other acknowledgment of phrenology is a similar reference to the monist thinking of the Tory politician Richard Vyvyan (1800–1879) in the 1830’s attempting to formulate a theory showing nature as one great progressive developmental system incorporating many of the scientific and pseudo-scientific theories of nature.20

The discrediting of phrenology and the subsequent growth of belief in evolutionary theory, originating with Charles Darwin, were significant factors that contributed to the waning of George Combe’s influence on later nineteenth century thinking. There is little in his phrenological ideas that has been considered of particular usefulness to historians. Those ideas that would be of value, had been effectively addressed by others. Dismissing Combe’s contribution through phrenology as quackery is an anachronistic judgment which overlooks the pioneering aspects of Combe’s scientific research. It also ignores the wide acceptance of his beliefs within Britain and the United States. At the time, it was seen, in the absence of other explanations, as a plausible hypothesis to explain the functions of the brain on a scientific basis. The importance of this context in which phrenology was developed has been overlooked by historians and the scientific community. It no more deserved ridicule than other discredited scientific


theories such as the indivisibility of the atom. In fact, ironically, the popular acceptance of phrenology contributed to its wholehearted rejection when found to be incorrect; particularly as a result of its appropriation by charlatans at county fairs. The resulting neglect of Combe’s work was a result of intellectual embarrassment. It is important to note that, by directly linking his study of phrenology to the nature of man and human behaviour, Combe made phrenology, not only physiologically and psychologically significant, but of cultural importance in Britain and also in America with his visits there. Cooter saw 1835 as the date after which phrenology, largely due to the popularisation of Combe’s the Constitution of Man, ‘was seized upon as a vehicle for liberal social reform.’

Stephen Tomlinson believed that much of the popularity of phrenology resulted from the research and teachings of Johan Gasper Spurzheim who transformed it from a physiological theory of the brain structure’s influence on character and abilities into a progressive moral philosophy reflecting middle class values of order and balance. Although it is somewhat difficult to imagine an alternative from a European cultural perspective Cooter makes the interesting point that phrenology gained credibility from a ‘doctrine about the head’ where it was to be celebrated above all other body parts as the seat of intellect. In other circumstances palmistry, for example, could conceivably been the source of physical study of human intellect. Combe’s popularising of phrenology was seen as being ‘in opposition to the environmental and socialist doctrines of...

22 Ibid. 110.
Owenism’. George Combe phrenologist and natural philosopher, having eventually accepted the theories of J.G. Spurzheim, linking brain construction and abilities, became phrenology’s most significant and well recognised exponent in Britain. It is ironic to observe that the cause of Combe’s fame, or infamy, phrenology was ultimately the cause of his historical demise. As Charles Gibbon observed in his biography, ‘Phrenology was in his [Combe’s] eyes the key to all knowledge...he viewed life entirely through its medium... He regarded it as a mixture of science and philosophy — science in its relation to the structure, and philosophy in its relation to the functions of the brain’. Cooter observes correctly that Combe hardly relied on the anatomical aspects of phrenology at all. For him phrenology was above all a ‘stupendous discovery in relation to the moral world’. For this the anatomy and physiology of the brain had little significance. ‘The role of phrenology as a ‘key’ to other knowledge was frequently misunderstood by his contemporary critics, partly due to Combe’s own obduracy, and was similarly overlooked by later observers. A careful examination of The Constitution of Man shows that it was not a book on phrenology, but that for Combe, phrenology was providing one entry point to a philosophy of the nature of Man, and his relationship with Nature and the Deity. Interestingly, like the jurists already discussed: Foster, Caulfeild Heron, and Lorimer, Combe was educated as a lawyer. Unlike them, however, his approach to natural law was not juridical but scientific and medical, incorporating the philosophical implications of these studies for mankind. Because of his considerable

23 Tomlinson, Head Masters : Phrenology, Secular Education, and Nineteenth-Century Social Thought. xii.
influence, confirmation of the mutation which natural law underwent in nineteenth
century Britain would be incomplete without reference to Combe’s theories.

Evidence of Combe’s extensive influence was the fact that his most notable work,
_The Constitution of Man considered in Relation to External Objects_, sold approximately
350,000 copies between 1828 and 1900, whereas Darwin’s _Origin of the Species_
published in 1859 sold only about 50,000 copies in Great Britain up to 1900. Charles
Colbert pointed out that the ‘self-evaluation and personal improvement’ characteristics of
the book struck a chord with Americans also, because two hundred thousand copies were
purchased in the three decades prior to the Civil War. 26 Although Darwin’s influence was
considerably longer lasting, it would be an error to misjudge the influence that Combe
had on nineteenth century British thinking. The influence Combe had on people’s
conception of themselves in relation to nature and natural laws should not be
underestimated. An examination of his somewhat pantheistic teachings makes the
negative reaction of contemporary ecclesiastics unsurprising.

In his conception of natural laws George Combe didn’t believe he was being
original. Apart from acknowledging his debt to G. Spurzheim, M.D. in his teaching,
notably to _A Sketch of the Natural Laws of Man_ (1832), he believed ‘the parts have nearly
all been admitted and employed again and again, by writers on morals, from the time of
Socrates down to the present day’. 27 To the extent that he acknowledged the role of
physical laws in relation to moral behaviour, his thinking was consistent with that of
Henry Drummond. Combe, however, failed to extend that link into the spiritual world as

27 Combe, _The Constitution of Man Considered in Relation to External Objects_. vii.
Drummond did. By linking physical natural laws and morality like Drummond, he also had a radically different interpretation of natural law from James Lorimer, who treated them as totally independent.

Combe was in the Kantian tradition in seeing nature’s influence on the functioning of man’s laws. In developing a plan for perpetual peace, Kant had referred to:

> what nature has done with regard to it; how she favours the moral views of man, and guarantees the execution of the laws reason prescribes to him; so that whatever man should do freely, according to the civil, public and cosmopolitical right, if he neglects it, he shall be forced to do it, by a constraint of nature, without prejudice to his liberty.

Where Kant saw the support of and limitations upon human behaviour that nature provided, Combe took the concept considerably further, arguing that disobedience of nature’s laws incurred mandatory ‘punishment’ in the material world.

While Combe believed that the ideas underlying his work were unoriginal, he considered ‘The only novelty in this work respects the relations which acknowledged truths hold to each other’. Coming as he did from a socially disadvantaged background with a strict Calvinist upbringing, it was natural as Tomlinson suggested, that ‘Combe was receptive to a philosophy that questioned irrational and authoritarian structures without undermining the rule of faith, reason and morality’.

Ironically, in recounting the horror he felt as a child when subjected to preaching about the terrors of the Gospel, hellfire, and the corruption of the human heart Combe stated, ‘At home we never talked on religion. It was too awful and painful a subject for us’.

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29 Later discussion focuses on Combe’s discomfort with the word ‘punishment’, and what can only be regarded as his singular definition of it.
With the publication of *Essays on Phrenology* in 1819 Combe gained national recognition. It was in 1825, as a successful writer and lecturer on phrenology that he was forming his thesis for *The Constitution of Man*, when he wrote to a Rev. Dr Welsh on several occasions regarding his position on religion and God. His principles were based on the theory that:

God intended the moral sentiments and intellect to rule the actions of man, and constructed the human mind and physical nature with a determinate relation to these faculties, so that conduct in conformity to their dictates should be followed by happiness, and conduct in opposition to them should produce misery.32

This theory was most significant because its thinking was strongly echoed and developed in *The Constitution of Man*. The offence taken by clerics was based on Combe’s belief in the primacy of intellect and moral determination over the strictures of conventional religion. The belief statement also foreshadowed Combe’s conviction that natural laws would determine the soundness of behaviour and of punishment in the physical world without the need to reference the spiritual. Despite his efforts to reject them, the religious components of Combe’s ‘theology’ were still drawn from his own upbringing. As Colbert observed, *The Constitution of Man* ‘offered readers a rather distant, legalistic divinity, not unlike the one who ruled over Calvin’s world’.33 There was no evidence of prayer being able to influence the Divine plan or the need for penitential activity. The deity, having established the order of the universe and its natural laws, withdrew from its daily functioning. While criticism of Combe’s disputing the role of churches led to extreme accusations including heresy and atheism, his letter to Rev Dr Welsh, 11th February 1826 expressed a strong belief in the Deity, a belief that was echoed throughout his writings.

32 Ibid. 183.
He wrote, ‘I have got hold of the principle of the Divine administration and most holy, perfect and admirable it appears. Now I can say for the first time in my life that I love God with my heart and soul and mind’. It was not church teachings that brought about this belief and conviction, but because he saw God’s ‘administration’ as consistent with his own phrenological categories of: ‘Benevolence, Veneration, Hope, Ideality, Conscientiousness, Comparison, and Causality.\(^\text{34}\) It is little wonder that one censure of him by churchmen was for arrogance. Yet the criticism particularly by evangelicals highlighted more than just their problem with phrenology and Combe’s possible religious heresy. As van Whye noted it revealed ‘a crisis of authority which lay at the heart of the first so-called “science and religion controversies” of the nineteenth centuries’.\(^\text{35}\)

It could well be argued that while Combe believed in the ‘primacy of intellect’ he believed even more in the primacy of his own. Van Whye notes that Combe, having formed an opinion, had little time for the opinions of others. Francis Jeffrey (1773–1850)\(^\text{36}\) when explaining Combe’s devotion to phrenology observed that once Combe conceived a ‘partiality’ for phrenology he was ‘then induced, with the natural ambition of a man of talent, to make it a point of honour to justify his partiality’. A nephew of Combe, Sir James Cox, later recalled that Combe had a "strong desire for posthumous fame".\(^\text{37}\) It is however, reasonable to conclude that Combe’s alleged obstinacy and arrogance were merely his determination to propound his beliefs, against trenchant


\(^{36}\) Francis Jeffrey was a lawyer, editor of the influential Edinburgh Review, Dean of the Faculty of Advocates, Lord Advocate, an MP, a judge and University of Glasgow Rector. See Francis Jeffrey, ‘[review of George Combe’s] ’A System of Phrenology’, Edinburgh Review No 44, Sept 1826. pp. 253-318.

opposition, his deeply held conviction in his interpretation of the role of natural laws in the functioning of the universe and the blueprint of the Deity.

Combe was satisfied that the physical laws of nature were accepted generally as regulating the entire material universe. Similarly medical practitioners admitted the existence of organic laws. Thirdly ‘the sciences of government, legislation, education, indeed our whole train of conduct through life, proceed upon the admission of laws in morals. For Combe these studies had clearly preoccupied philosophers in every age, but had not been considered in a systematic integrated way. Particularly, the heart of Combe’s thinking was that no one had acknowledged ‘the relations between those laws and the constitution of Man’. This was the notion on which Combe’s singular approach to natural law was based. It was the idea which embraced not only phrenology, which Combe readily admitted, but other elements of the physical constitution of Man. To relate these to manifestations of physical behaviour and wellbeing was not new, but his linking them to the observance of moral and spiritual behaviour was. To Combe, therefore physical, organic and moral laws were inseparably linked to the physical constitution of Man. His ‘great object’ in developing and expounding his theories was ‘to exhibit the constitution of Man, and its relations to several of the most important natural laws, with a view to the improvement of education, and the regulation of individual and national conduct’.

As Gibbon observed, one of Combe’s philanthropic aims was to promote the advancement of education. Combe’s explanation of his educational beliefs was

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38 Combe, The Constitution of Man Considered in Relation to External Objects. viii.
39 Ibid. viii.
interesting because it displayed his ongoing link between phrenology and the laws of nature. This could be seen in his concerns about the adequacy of the tuition of children: both their school curriculum and religious instruction. Advocating the benefits of their being taught phrenology he stated ‘you can prepare them admirably to encounter the wickedness of the world without contaminating them by initiation’. 40 But the teaching of phrenology was not an end in itself. Importantly Combe made it an adjunct to the teaching of the laws of nature. ‘In the next place I would explain to the children the laws of nature...Let them see from infancy the real situation in which they stand as created beings; and point out to what extent they are the arbiters of their own fate’. 41 Combe was thus contemptuous of traditional education and its irrelevance in failing to present his beliefs. His anti-evangelical stance on religion generally, and Calvinism in particular as described earlier, was evident in his views on religious instruction for children. ‘Finally the use of religion I would make is this: having explained nature’s laws I would lead them up to God; in obeying His laws [of nature] you obey Him’. 42 Noticeably absent was any acceptance of the Hell-Fire preaching which so terrified him as a child.

A misunderstanding of Combe’s position on the relative importance of phrenology in relation to the laws of nature has been a significant factor in his being frequently ignored historically, even within a few decades of his death. He described the function of phrenology when he stated that although the purpose of study was a practical one an essential component of his process was a theory of the Mind. He felt this was essential as it was the only means in his view to enable a comparison ‘between the natural

constitution of man and external objects’. He explained the reason that he drew on phrenology for substantiation of his theories. ‘Phrenology appears to me to be the clearest, most complete, and best supported system of mental philosophy which has hitherto [my emphasis] been taught’. A largely overlooked part of his explanation was the word ‘hitherto’. Combe acknowledged that his belief in phrenology was based on its ‘scientific’ value at that time. While believing, as he did, that phrenology was the means of understanding mental qualities, Combe distinguished between the human knowledge of these and the inflexible operation of natural law which ‘never bended to accommodate itself to that state of ignorance’.

Nevertheless he stressed that his development of a theory of the Mind did not depend on Phrenology. ‘The latter as a theory of Mind, is itself valuable only in so far as it is a just exposition of what previously existed in human nature’. In fact, The Constitution of Man, far from being a defence of phrenology or a vehicle for promoting Combe’s scientific or medical theories, was an analysis of man’s relationship to and position within the laws of nature. The basis of his analysis was that ‘We are physical, organic, and moral beings, acting under general laws’. He stressed that this was valid, regardless of whether principles of phrenology were accepted or not. His work was to analyse ‘the known qualities of Man’. This simple and self-evident statement was important because Combe used it to link all aspects of human creation, including spiritual and moral ones under a structure of externally imposed laws of nature. In refuting generally the opinions of those who would see all mental philosophies as useless, he

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43 Combe, The Constitution of Man Considered in Relation to External Objects. 187.
44 Ibid. ix.
argued that ‘the objects of moral and political philosophy are the qualities and actions of the mind itself’. Because they had no existence independent of the mind, he believed it was impossible to know them without a philosophy of the mind.

It was particularly ironic that Combe observed in prefacing _The Constitution of Man_, ‘I have endeavoured to avoid religious controversy’, because the expression of his natural religious beliefs created _considerable_ controversy. John van Whye observes that Combe’s book was hugely controversial from the 1820s through the 1850s. ‘Evangelicals founded societies to oppose it, wrote books and articles against it, and sometimes even burned it! Thus the fuss popularly believed to have resulted from Darwin's _Origin of Species_ merely pales in comparison to that of Combe's _Constitution_.’ Cooter concurs with van Whye’s assessment commenting that ‘the amount of intellectual and emotional heat generated by Combe’s book far surpassed that raised by the publication in 1859 of Darwin’s _Origin of the Species_.’ Boyd Hilton also observes that ‘except in the most biblically literalist circles, _Origin of Species_ was absorbed fairly painlessly’. He contrasts it with the 1844 reception of the anonymous _Vestiges of the Natural History of Creation_ which proposed a form of evolutionary theory, ‘a theory of development

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45 Ibid. x.
47 Cooter, _The Cultural Meaning of Popular Science : Phrenology and the Organization of Consent in Nineteenth-Century Britain_.
[which] really had provoked “convulsions of the national mind”’.

As continues to be the position with many historians, Hilton overlooks the contribution of Combe.

Combe created controversy, and the fierce opposition of evangelicals, on the issues of moral corruption and divine punishment. John Davies notes that Combe was eagerly cross-examined regarding his position on the doctrine of total corruption. His position on the place for Christian retribution for criminal behaviour was challenged as to whether he believed that ‘habitual criminals’ were to be regarded merely as ‘unfortunates’ and ‘moral patients’. Combe had replied that the first question was only for those who believed in total corruption and ‘as to the second, men must bring their interpretation of Scripture “into harmony with natural truth”.’ It is not at all difficult to understand that Combe’s positioning of the Scriptures with his natural law based religious theories antagonised the believers of orthodox Christianity. For them, there was little point in Combe’s providing more and varied evidence of a beneficent Deity. What was lacking was an emphasis on Man’s need for salvation. There was nothing in Combe’s writings that provided this. It was the irreconcilable point of difference between evangelicals and Combe’s natural approach to Christianity. It was not surprising as Gibbon observes ‘Many good people long regarded George Combe as a rank atheist, — a companion fit only for Tom Paine, — and his teaching as most perilous to morality’.

To explain his intent in Constitution, Combe quoted from Dugald Stewart’s

49 Ibid. 180.
50 Davies, Phrenology: Fad and Science; a 19th-Century American Crusade. 154.
Outlines of Moral Philosophy (1793)\textsuperscript{52} in his Preface. "The object of Moral Philosophy," says Mr Stewart, "is to ascertain the general rules of a wise and virtuous conduct in life, in so far as these rules may be discovered by the unassisted light of nature; that is, by an examination of the principles of the human constitution, and of the circumstances in which man is placed." Combe’s reliance on ‘unassisted’ nature would have been seen by evangelists as threatening, overlooking as it did all religious and biblical association. Combe particularly quoted Stewart as he claimed that his treatise was to develop the plan found in the ‘instructive works on moral Science …with the aid of the new lights afforded by Phrenology’.\textsuperscript{53} He considered that he was continuing on and expanding the work of Dugald Stewart in the study of moral philosophy, and also that of Dr Hutcheson, Dr Adam Smith, Dr Reid, and Dr Thomas Brown.\textsuperscript{54}

As Stephen Tomlinson observes:

Turning orthodox theology on its head, Combe effectively secularised the key Calvinist concepts of original sin, the elect, and the damned in a temporal account of physiological states: those born with good brains experienced the joys of living salvation; those with deranged brains, the torment of a living hell.\textsuperscript{55}

The Calvinist origins of his thinking could be clearly seen, particularly with his stress on the control and dominion of God over all things. Combe basically neutralised the worst horrors of his Calvinist upbringing. Doctrines of predestination were accommodated, with brain structure, along with God’s determination, to differentiate the elect and the

\textsuperscript{52} Dugald Stewart, (1753–1828) Scottish Enlightenment philosopher, teacher of moral philosophy at the University of Edinburgh.

\textsuperscript{53} Combe, \textit{The Constitution of Man Considered in Relation to External Objects}. xi.

\textsuperscript{54} Francis Hutcheson (1694–1746) a philosopher who became one of the founding fathers of the Scottish Enlightenment. Adam Smith (1723–90) was a Scottish moral philosopher and a political economist. Thomas Reid (1774–76) a philosopher who accepted the Chair of Moral Philosophy in Glasgow as successor to Adam Smith. Thomas Brown (1778–1820) was a Scottish philosopher and metaphysician.

\textsuperscript{55} Tomlinson, \textit{Head Masters : Phrenology, Secular Education, and Nineteenth-Century Social Thought}. 113.
damned within a temporal context. Cooter strongly expressed the same viewpoint arguing that:

The *Constitution of Man* was less an *alternative* to the Calvinism that Combe rebelled against than a secular *revival* of it, sacralizing the social norms and values most appropriate to the industrially modified and modifying economic order...the book ushered in a new authority in secular natural law to which the new bourgeois individual man could relate directly and “rationally”. 56

While seeing natural law and nature as the explanation of the Deity’s role in the universe, Combe was strongly influenced, even inhibited, by the parameters of his Calvinist religious experience.

Differentiating himself from ecclesiasts and natural law proponents like Drummond, who extended natural law from the physical into the spiritual world, Combe made clear that his scope was purely within the material world stating ‘when I speak of man's highest interest, for example, I uniformly refer to man as he exists in this world’. 57 His focus on the natural world was reinforced by reference to his belief that while the organic world, was developed under the care of the Deity it was done ‘not by special interferences, but in manner of natural law’. 58 With an argument that would be compatible with Darwin’s natural selection, Combe considered that most important authorities acknowledged that by the time of Man’s arrival on earth, the patterns of survival, death and reproduction were already established. He emphasised that the pattern didn’t change with Man’s arrival, but that Man adapted to it. This would have displeased creationists, further accounting for religious opposition to his beliefs. Combe observed

that, to the extent he resembled inferior creatures Man was capable of enjoying a similar style of life. ‘But to the animal nature of man have been added, by a bountiful Creator, moral sentiments and reflecting faculties’. These abilities, Combe regarded as not only Man’s highest gifts but the source of his most intense pleasure. These would lead him to the highest objects of his existence: ‘obedience to God, and love towards his fellow-men’.59 Again, minimising the function of religion Combe continued, ‘These powers of applying nature, and of accommodating his conduct to her course, are the direct results of his rational faculties; and in proportion to their cultivation is his sway extended’.60 While Combe’s position was not intended to be a rejection of conventional religion he was minimising its role in the development of natural law and moral behaviour. His conception of the intrinsic value of an uninterpreted nature was effectively summed up in his observation, ‘Nature is never contemplated with a clear perception of its adaptation to promote the enjoyment of the human race, or with a well founded confidence in the wisdom and benevolence of its Author’.61

Combe was scathing in his criticism of philosophy’s capacity to provide any meaningful analysis or explanation of the nature of Man. ‘The philosophy of man was cultivated as a speculative and not as an inductive science… Consequently, even the most enlightened nations have never possessed any true philosophy of mind, but have been bewildered amidst innumerable contradictory theories’. He referred to the ‘deplorable condition of the philosophy of human nature’. He considered that philosophy contained

59 Ibid. 6.
60 Ibid. 7.
61 Ibid. 8.
too many diverse and contradictory theories. He further criticised conventional religion claiming that ‘religion also has failed to enter into harmonious alliance with the order of nature’. Arguing that as a result of Science, educated people no longer believed in the Deity’s influencing human affairs through supernatural intervention, he stated ‘Men now act more on the belief that this world's administration is conducted on the principle of an established order of nature’. If the distinguishing feature of Lorimer’s natural law theory was its juridical origins in God’s law, and Drummond’s was the continuum of natural law from the physical into the supernatural world, Combe’s was the operation of both God’s physical and moral laws within the context of the natural world. Natural law, as determined by God was both manifested and regulated by conditions within Nature. As with others, Combe acknowledged that Man’s understanding of natural law expanded with his intellectual growth and with advances in civilisation. He differed from Lorimer and Drummond by believing that it could be determined purely through reference to the physical world – particularly with the use of science and phrenology. In support of his views he quoted Rev. Adam Sedgwick (1785–1873) whose views he believed represented the ‘modern man of science’:

If there be a superintending Providence, and if His will be manifested by general laws, operating both on the physical and moral world, then must a violation, of these laws be a violation of his will, and be pregnant with inevitable misery. Nothing can, in the end, be expedient for man, except it be subordinate to those laws the Author of Nature has thought fit to impress on his moral and physical creation.

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62 Ibid. 12.
63 Ibid. 13.
64 Rev. Adam Sedgwick in 1818 he became Woodwardian Professor of Geology at Cambridge.
He quoted another clergyman, The Rev. Thomas Guthrie (1803–73), who ‘in his late admirable pamphlet, "A Plea for Ragged Schools," (1849) observed that, ‘They commit a grave mistake, who forget that injury as inevitably results from Lying in the face of a moral or mental, as of a physical law.’ Combe’s deliberate quoting of clergymen in support of his argument, was to substantiate his view that whilst some clergy were willing to acknowledge the role of natural laws, and science, in the ordering of life and regulating world affairs, the natural order was insufficiently taught by masters of theology who preferred to rely on special acts of supernatural power. Dismissing this idea he argued that if the world was not governed by regular and comprehensible natural laws, ‘then is this world a theatre of anarchy, and consequently of atheism,— it is a world without the practical manifestation of a God. If, on the other hand, as science shews, such laws exist, they must be of divine institution, and worthy of all reverence’. On the basis of his criticism of the churches for not teaching and practising a more practical form of theology, Combe asked contemptuously, ‘In the standards of what church, from the pulpits of what sect, and in the schools of what denomination of Christians, are these laws taught to either the young or old as of divine authority, and as practical guides for conduct in this world's affairs?’ He believed that if natural laws were not ‘not studied, honoured, and obeyed, as God's laws’, then religion was both impractical and out of harmony with the ‘true order of Providence’. He likened a denial of a divinely appointed natural order, such as he described, to atheism, while an acceptance of it ‘accompanied

66 Ibid. 13. Thomas Guthrie was an authoritative Anglican theological writer, or divine whose writings on scripture, theology and morality were of significant influence within the Anglican community.
67 Ibid. 14.
by the nearly universal neglect of teaching and obeying its requirements, is true, practical, baneful infidelity, disrespectful to God, and injurious to the best interests of man’.

His views, predating Darwinism, were evidence of the developing theological conflict over the respective roles and explanations of science and religion. It was unsurprising, on either the grounds of theological interpretation, or the clergy’s proprietary sense of ownership of religious dogma, that Combe’s analysis, juxtaposing the conflicting views of science and religion, provoked antagonism from the churches. Interestingly while predating Darwin’s theories, Combe’s were quite compatible with them. As van Whye correctly observes, ‘Combe’s introduction of a progressive Nature into currency is one of the least appreciated aspects of his book’. He believes that an appreciation of Combe’s ‘doctrine of natural laws’ is necessary for a proper understanding of later writers, from Samuel Smiles to Richard Cobden. Where Boyd Hilton can argue that ‘except in the most biblically literalist circles, Origin of the Species was absorbed fairly painlessly’ this acceptance was due in no small measure to Combe’s widely read and debated Constitution of Man. Pearce and Stewart comment that Man had been progressively developing an understanding of the natural world, a process which involved classification and explanation. They consider that while raising fierce controversies with ‘those who held to Archbishop Ussher’s chronology of the earth’,

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Darwin’s ideas ‘slowly eroded the opposition with the inevitability of an incoming tide’. George Combe’s contribution to this development has gone largely unappreciated. His search for a scientific explanation for human behaviour, however erroneous, the widespread publication and distribution of his work, in both Britain and America, and the fierce, and equally widespread accompanying debate, established a collective mindset which was more able to accommodate Darwin’s theories.

Linked to this thinking, but perhaps even less noticed was Combe’s conviction regarding the evolutionary nature of religion. In a letter to Dr Channing in 1830 he declared ‘I have the impression that morals and religion are at present in the same state as that in which the physical sciences existed prior to the practice of the Baconian philosophy’. While comparing contemporary religion’s relationship to the science of man’s nature to the relationship of alchemy to chemistry he regarded available works on human nature as containing ‘much of truth, but very little evolution of the principles of it, in the explicit knowledge of which its consistent application appears to me to depend’.

Specific evidence of his evolutionary, or even revolutionary, views of religion was demonstrated in the same letter, in his outline of man’s duty to God. He contrasted conventional Christianity, particularly Calvinist teachings, to his own concept of a natural religion. He claimed that ‘the prevailing opinion is that man is sent into this world to promote the glory of God for God’s gratification...zeal for God’s glory is extolled as the

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72 Dr William Ellery Channing (1780–1842) was a notable American Unitarian preacher and liberal theologian who was opposed to Calvinism because it promoted a God who was to be feared and dreaded.

grand principle of action, and in which the matter of salvation from God’s wrath is represented as a business of awful magnitude and importance’. Despite the contemporary belief of clerics that Combe was an atheist, it is very difficult to infer such a conclusion from a closer examination of his own writing. Although to a great extent this description of the churches’ approach to Christianity was applicable to all Christian faiths, the evidence from Combe’s writing and his upbringing was plainly a representation of Calvinism. In his most vehement attack on contemporary Christian practice he stated his belief that not only was religion utterly misunderstood, ‘it is just a great system of astrology’ misdirecting the talents and efforts ‘of a vast and intelligent portion of the community’. Nevertheless, for him religion was not only a part of Man’s nature but his ‘highest delight’. As Charles Gibbon notes, it is important to stress that Combe’s convictions obtained for him the epithet of ‘infidel’, and the broad principles he espoused at the time ‘when he was moving in a circle in which the least deviation from evangelistic doctrines was regarded as “implicit atheism” ’. Where Boyd Hilton could attribute part of the easier acceptance of Darwin’s theories to a period of ‘a more comfortable theology’, he correctly assessed Combe’s era, the first half of the century, as one of ‘disputes over baptismal regeneration, the real presence, eternal torment, the atonement or pre-election [which] seemed to be matters of spiritual life and death’. 

In developing and defining his interpretation of natural law as the basis of true religion, Combe outlined what was his unique contribution to its development. He

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74 Ibid. 219.  
75 Ibid. 219.  
76 Ibid. pp. 222-3.  
endeavoured to substantiate what he believed was a doctrine, as yet unappreciated, which would provide ‘the key to the true theory of the divine government of the world, namely, the independent existence and operation of the natural laws of creation’. Combe argued that the natural laws could be divided into three classes – Physical, Organic, and Moral. His distinguishing ‘peculiarity’ was his conviction that ‘these operate independently of each other; that each requires obedience to itself; that each, in its own specific way, rewards obedience and punishes disobedience; and that human beings are happy in proportion to the extent to which they place themselves in accordance with all the divine institutions’. This division which identified the independent operation of the areas of natural law differentiated Combe’s concept from a more conventional interpretation introducing as it did the material dimension, incorporating physical and organic laws. Combe illustrated his point with an example a group of pious missionaries travelling to convert heathens, embarking in an unsound ship. The fact that they had more than adequately fulfilled the moral law would be of no protection from drowning in a storm through disobeying the physical law. Again he was arguing that there would be no supernatural intervention to protect them on the basis of their morality. ‘Even virtuous aims do not save us from the consequences of breaking the natural laws’.

Combe explained his use of the words ‘Laws of Nature’. ‘A law of nature is not an entity distinct from nature’. He observed that atoms or elements of matter behave inevitably in regular ways in particular circumstances. It was the human’s observing the action that characterised it as being according to law. ‘But the term "law," thus used,

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79 Ibid. 22.
80 Ibid. 20.
expresses nothing more than the mind's perception of the regularity. The word does not designate the efficient cause of the action; yet many persons attach a meaning to the term, as if it implied causation’. He felt it necessary also to define his use of the word ‘punishment’ when referring to punishment for the transgression of natural laws. Stating that while the dictionary definition of punishment was ‘"infliction imposed in vengeance of a crime…"’

By punishment, I mean the natural evil which follows the breach of each physical, organic, and moral law. I regard the natural consequence of the infraction, not only as inevitable, but as pre-ordained by the Divine Mind, for a purpose: That purpose appears to me to be to deter intelligent beings from infringing the laws instituted by God for their welfare, and to preserve order in the world.

Combe felt that the term ‘consequence’ insufficiently defined his meaning but ‘punishment’ added a vengeful dimension which he didn’t wish to include. Nevertheless, unable to find another term to be more precise, he settled on ‘punishment’ as the closest to match his needs. Clearly, ecclesiasts would have seen this statement as antagonistic to traditional Christianity. Combe was rejecting the conventional religious concept of moral punishment, which assumed a form of divine action determined by religious teaching, following human transgressions. Without in any way minimising the function of the Deity, Combe was marginalising the role of ecclesiasts. He was arguing that the direct causal relationship between action and result, evident in the physical world, was equally valid in the implementation of moral laws. Condemning the churches’ lack of understanding of physical laws he observed, ‘The popular interpretations of Christianity have thrown the public mind so widely out of the track of God's natural providence, that

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81 Ibid. 20.
82 Ibid. 24.
83 Ibid. 25.
His object or purpose in this pre-ordainment is rarely thought of. Combe stated his great purpose in *The Constitution of Man* was to correct the major error in the public mind concerning the natural and inevitable consequences of moral actions. Because the public was accustomed to regard human punishment as arbitrary he felt they did not perceive ‘divine pre-ordainment and purpose in the natural consequences of such moral actions’. On the contrary Combe argued, ‘there is a natural preordained consequence, which man can neither alter nor evade, attached to the infringement of every natural law’. He was unapologetically including moral law in this. Thus every infringement of the natural moral law was subject to a pre-ordained ‘punishment’ [using Combe’s definition].

In a further assertion which was not likely to endear him to theologians, while acknowledging the role and omnipotence of the Creator, Combe placed religion in a position subservient to natural law when he declared ‘one principle, largely insisted on … shall be admitted to be sound, viz., that religion operates on the human mind, in subordination, and not in contradiction, to its natural constitution’. While still acknowledging religion’s relevance, in promoting the position of natural law Combe maintained the dependency of religion on it by insisting, ‘it will be indispensable that all the natural conditions required by the human constitution as preliminaries to moral and religious conduct be complied with, before any purely religious teaching can produce its full effects’.

If this were not to be seen by clerics as provocative enough, Combe challenged the criticisms religious supporters made of philosophers. Combe asked whether the

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84 Ibid. 24.
85 Ibid. 25.
86 Ibid. 26.
failures of religion, acknowledged by them, to ‘render men as virtuous and happy as they desired, may not, to some extent, have arisen from their non-fulfilment of the natural conditions instituted by the Creator as preliminaries to success’. Where clerics claimed that philosophy had waged wars on religion Combe questioned whether the treatment was not in fact deserved, because they had treated the teachings of philosophy with neglect in religious instruction. He claimed, ‘True philosophy is a revelation of the Divine Will manifested in creation; it harmonizes with all truth, and cannot with impunity be neglected’. 87 For Combe, therefore, the centrality of conventional religion and its assumptions of exclusivity in dictating morality were suspect, ignoring, as he believed it did, both the teachings of philosophy, and the primacy of obedience to all of God’s natural laws – both physical and spiritual. Typical expressions of his belief which marginalised religion and led to his being labelled a heretic by some ecclesiasts were found in his letter to a Rev. Dr Welsh. ‘The doctrines of Revelation either are or are not in harmony with the mental constitution of man and the laws of the physical world’. He saw an inherent contradiction between living lives in a different manner if there were no immortality from that which one would if there were. He was most controversial when he stated, ‘The belief in immortality, combined with the notion that this world is all ajar, has a bad effect on ignorant minds’. 88 Combe’s concept of religion was more consistent with naturalism than church centred religion. This was similar to the criticisms levelled at John Seeley regarding Ecce Homo.

Combe carefully argued his case for the primacy of natural laws, equating as he

87 Ibid. 26.
did, the consistency of “punishment” for failure to follow God’s physical laws with punishment for disobeying moral laws. Throughout his analysis of laws, Combe’s notion of punishment had a less punitive, retributive character, referencing a more causal relationship with predetermined and inevitable consequences. There was little controversy in his statement, ‘The Creator has bestowed on physical nature, on man and on animals, definite constitutions, which act according to fixed laws. A law of nature denotes a fixed mode of action’. 89 It merely demonstrated the growing enthusiasm for scientific analysis. The consequence of touching something hot, for example, was Combe’s idea of the inevitable ‘punishment’ that was provided to regulate ordered behaviour in the physical world. As he explained, ‘whenever the relation, and the consequences of disregarding it, are perceived, the mind is prompted to avoid infringement, in order to avert the torture attached by the Creator to the decomposition of the human body by heat’. 90 This was important for Combe in building his relating of the behaviour of both physical and moral laws. The critical factor was that the consequence of the action was planned by the Deity to prevent humans from taking actions which would inevitably lead to their destruction.

Combe was concerned that his terminology be correctly understood. He was particularly careful to distinguish what he saw as genuine natural law from manmade rules of human conduct. ‘We must distinguish between regulated action inherent in the constitution of creatures and things (to which alone the term natural law can be properly applied), and the rules which the human intellect may deduce, from contemplating the

89 Combe, The Constitution of Man Considered in Relation to External Objects. 29.
90 Ibid. 32.
phenomena of nature, for its own guidance’.

The latter would be referred to by Lorimer and others as positive law. The critical differences were that natural laws were invariable, whereas ‘the rules of human conduct [are] inferred from observing nature, and are perfect or imperfect according to the opportunities and degrees of intelligence employed in the acts of observation and reflection’. Seeing that all natural objects had specific constitutions, and therefore had predetermined methods of action in particular circumstances, he determined that there had to be as many natural laws as there were distinct relationships between actions and beings. These natural laws were invariable therefore ‘man suffers from not accommodating his conduct to them, even although his passion be the result exclusively of ignorance’. 

Combe, in both noting different types of natural laws, and ranking their superiority – physical, organic, intelligent, and moral, was consistent with Lorimer and Drummond. While Lorimer found discussion of the physical and organic laws largely irrelevant to his juridical approach to the intelligent and moral laws, and Drummond saw the linear extension of physical, organic, intelligent, and moral laws into the spiritual world, Combe’s intent was to show the linking of these laws within the material world and the inevitable and predetermined consequences of, or ‘punishment’ for, failure to follow them. Although Combe did not argue that religion was totally irrelevant to this process, he minimised its significance, and berated ecclesiasts for failing to incorporate the role of natural laws in their teachings. He believed the natural world was designed by

91 Ibid. 33.
92 Ibid. 33.
93 Ibid. 35.
94 Lorimer, The Institutes of Law. 3.
95 Drummond, Natural Law in the Spiritual World. vi.
the Deity as a self managing and self regulating entity, even in the area of moral
behaviour, without the need for further direct supernatural intervention.

Combe indicated his analysis of natural laws would centre on the intelligent world
with principle focus on humans. He differentiated the ‘Intelligent and Animal’, from the
‘Intelligent and Moral’: ‘The dog, horse, and elephant, for instance, belong to the former
class, because they possess some degree of intelligence, and certain animal propensities,
but no moral feelings; man belongs to the second, because he possesses all the three’. 96

He determined that four major assumptions underlay a discussion of natural laws:

‘1st, Their independence of each other; 2dly, That obedience to each of them is
attended with its own good-and disobedience with its own evil consequences;
3dly, That they are universal, unbending, and invariable in their operation; 4thly,
That those that are external to man are in harmony with his constitution’. 97

He had already stated that the moral behaviour of the occupants of a ship were irrelevant
to the physical laws associated with its seaworthiness, and its capacity to avoid
foundering. Similarly he continued that morality did not influence the physical effects of
failure to observe organic laws, such as would occur with accidental poisoning.

An important argument was his claim that ‘Obedience to each law is attended
with its own agreeable, and disobedience with its own disagreeable consequences’.
Mariners, therefore, would sail safely by the observance of the appropriate physical laws.
More importantly, however, on the moral plain ‘People who obey the moral law, enjoy
the intense internal delights that spring from active moral faculties; they render
themselves, moreover, objects of affection and esteem to moral and intelligent beings,

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96 Combe, The Constitution of Man Considered in Relation to External Objects. 36. This position was
radically different, as previously noted, from that of Drummond who determined the application of
natural laws to all levels of creation.

97 Ibid. 37.
who, in consequence, reciprocate with them many other gratifications’. 98 Having
challenged the ecclesiasts over their belief in divine intrusive supernatural punishment, it
was necessary for Combe to produce a credible, natural alternative. His proposition was
entirely grounded in the physical world.

Those who disobey that law are tormented by insatiable desires, which, from the
nature of things, cannot be gratified; they suffer by the perpetual craving of
whatever portion of moral sentiment they possess for higher enjoyments, which
are never attained; and they are objects of dislike and malevolence to other beings
of similar dispositions with themselves, who inflict on them the evils dictated by
their own provoked propensities. 99

Combe saw the ‘punishment’ for transgression of the moral law as being largely through
deprivation, and the anguish accompanying an inability to effectively indulge desires.

For an evangelical cleric who preached hell fires, these would not amount to a
traditional perception of punishment at all. From Combe’s perspective these were the
Deity’s predetermined consequences for contravention of a natural moral law. His
justification for the ‘intrinsic punishment’ attached to the violation of moral natural laws
was as materialistic and untheological as that for contravening physical natural laws.
Based on his views concerning the latter he argued that ‘it ought to follow that the natural
laws, when obeyed, conduce to the happiness of the moral and intelligent beings who are
called on to observe them; and that the evil consequences, resulting from infringement of
them, will be calculated to enforce stricter obedience, for the advantage of these creatures
themselves’. 100 Combe believed that the discomforts from the contravention of natural
moral law were both inevitable and sufficient to return a person to the pleasures of

98 Ibid. 38.
99 Ibid. 38.
100 Ibid. 40.
obedience. The consequences thus were educative rather than retributive in the traditional sense. Indeed there seemed to be none of the retaliatory elements that formed part of the normal ecclesiastical concept of moral transgression and divine retribution.

Supporting the views of the eighteenth century theologian William Paley concerning benevolent design, he indirectly used these to support his thesis regarding the merely instructive role of moral ‘punishment’. He noted that Paley said ‘Nothing remains but the supposition, that God, when he created the human species, wished them happiness, and made for them the provisions which he has made, with that view and for that purpose’. Observing that contrivance was proved by design, Paley continued the ‘world abounds with contrivances; and all the contrivances which we are acquainted with, are directed to beneficial purposes’. Arguing that the provisions made by the Deity in providing for the human species were both beneficial and for its happiness, it was reasonable to conclude that consequences of even moral law transgressions were protective and caring.

It is important to stress that Combe was not opposed to traditional religion although he reduced its relative worldly importance merely to an aspect of the practical training that could influence feelings of individuals to obey natural laws. He believed that religion, being very conducive to motivating this obedience was most important to the welfare of both the individual and society generally.

Active religious feelings dispose a man to venerate and submit him to those moral and physical laws instituted by the Creator, on which his own happiness and that of society depend. They prompt him also to adoration and gratitude, emotions

highly influential in the right ordering of human conduct. Cooter correctly claims that Combe was in step with other early-nineteenth-century natural theologians in that he identified God with the laws of nature. He considers however that:

almost wholly, he [Combe] failed to appreciate, first, that the orthodox natural theologians did not just identify God with the laws of nature, but teleologically directed those laws to God; second, that the natural theologians were careful not to deny Providential interventions in nature, nor to doubt the relevance of Scripture.

It is unlikely that Combe failed to appreciate either of these, given the nature of his beliefs. Combe’s agreement with Paley that ‘active religious feelings’ enable humans to submit to ‘those moral and physical laws instituted by the Creator’ was clear evidence of Combe’s teleologically directing those laws to God and a rejection of pantheism. Combe was careful throughout his writing, while marginalising religion, to establish the role of the Deity in establishing the natural laws that Combe propounded. It was not that Combe failed to appreciate ‘that the natural theologians were careful not to deny Providential interventions’. He fully understood the concept, and undoubtedly its political value, but utterly rejected it. As noted below, he scorned miracles. As Cooter himself observed Combe’s phrenology represented ‘the victory of reason and rationality over the superstition-based repressions of the past’. Prayers for Divine intervention and miracles were a contradiction of his fundamental belief in a divinely ordered universe and an

102 Combe, The Constitution of Man Considered in Relation to External Objects. 42.
104 Ibid. 128.
105 Combe, The Constitution of Man Considered in Relation to External Objects. 42.
admission that God’s creation was flawed; therefore needing his interference and correction. Far from ‘failing to appreciate’ ‘Providential interventions’, Combe rejected them as an affront to God’s planning.

By reducing religion’s value merely to its functional usefulness for modifying behaviour, he further alienated clerics, minimising the value of prayer, penance and formal religious practices. Practical evidence of his attitude to the minimal value of prayer and rejection of Providential interference could be found during his travels in the United States. Colbert noted how, while in dangerous seas, Combe determined to stay on deck rather than join passengers below giving prayers for their safe passage. He asked ‘whether rational beings should expect that God should work miracles in order to save them from the consequences of their own ignorance and neglect of his laws’.  

Substitution of prayer for ignorance or disobedience of God’s natural laws lacked any logic from Combe’s perspective. In contrast to clergy who regarded the primacy of knowledge of the Bible and religious teaching as sufficient, Combe instead applied this to natural laws. ‘Although mere knowledge is not all-sufficient, it is a primary and indispensable requisite to regular observance and that it is as impossible effectually and systematically to obey the natural laws without knowing them’. Combe had previously noted that the teaching of these was conspicuously lacking. Confining religion to a supporting role in the material world he observed that ‘Some persons are of opinion that Christianity alone suffices for our guidance in all practical virtues, without knowledge of, or obedience to, the laws of nature; but from this notion I respectfully dissent’. Combe was troubled by the idea that, despite Christian religious teaching, there had been no

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systematic concept of the ‘moral government of the world’, addressing and incorporating natural laws, presented to mankind. This was the teaching that he saw as lacking, because of his belief that the Deity had directly incorporated moral as well as physical strictures in the creation of natural laws. Observing that the number of sermons preached against vice and misery did not result in a proportional diminution of them, Combe claimed that the importance of natural laws was such that ‘before religion can yield its full practical fruits in this world, it must be wedded to a philosophy founded on those laws’.108

Although Combe was quite expansive on the role of natural laws in dealing with both physical and organic circumstances, utilising his understanding of phrenology to explain these relationships, it was his interpretation of the connections between natural and moral laws that were of most significance to this investigation. Having already acknowledged that the spheres of natural laws operated independently of one another, there was little controversy in his linking the neglect of natural and organic laws to natural and organic consequences. Consistent with his argument that a study of natural laws was necessary for the well being of humanity, physically, organically and morally, he maintained that ‘when the mind is opened to the perception of its own constitution, and of the natural laws, the advantage of moral and intellectual cultivation, as a means of exercising and invigorating the brain and mental faculties, and also of directing the conduct in obedience to these laws, becomes apparent’.109 It is evident once more, that ecclesiasts would have found Combe’s contention unsatisfactory as it again suggested a merely temporal justification for morality – the smooth functioning of the material world.

108 Combe, The Constitution of Man Considered in Relation to External Objects. 42.
109 Ibid. pp. 150-151.
Combe gave anecdotal evidence to illustrate his reasons for insisting that natural laws should be taught when considering the consequences he believed derived from transgression of organic natural laws. Based on his belief in phrenology, he cited as an example a person who had received from nature ‘a large and tolerably active brain’ but possessing sufficient wealth, neither worked, nor took interest ‘in moral anti-intellectual pursuits for their own sake’. He believed this person would be a victim of natural laws through neglect of nervous and muscular exercise. ‘In want of objects on which the energy of their minds may be expended, the due stimulating influence of their brains on their bodies will be withheld.’ Despite the later discrediting of phrenology, Combe’s conviction that such physical inactivity would lead to bodily deterioration, malfunction and disease proved surprisingly accurate scientifically. Ignorance, therefore, of organic natural laws could be expected to result in ‘infringement of institutions calculated in themselves to promote happiness and afford delight when known and obeyed.’

Although still accepting that some bodily suffering was due to imperfections of nature, he believed that a considerable element was due to ‘our own ignorance and neglect of Divine institutions.’ In the case of moral behaviour Combe expressed the view that moral obedience to organic law produced the greatest degree of pleasure and satisfaction. As the mental organs were higher in the scale, ‘the more pure and intense is the pleasure: hence, a vivacious and regularly supported excitement of the moral sentiments and intellect is, by the organic law, highly favourable to health and corporeal vigour’. In the manner of a modern medic he was linking physical ill health and organic breakdown to

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110 Based on his phrenological research, Combe related intelligence and ability to brain size.
failure to observe good health practices and physical exertion, but clearly identifying this conduct as a failure to observe the Deity’s natural laws.\textsuperscript{113} As Cooter observed, Combe’s natural laws of morality determined ‘that the maximization of happiness depended upon the cultivation of the intellect and moral sentiments and upon the repression of animal desires’.\textsuperscript{114} This morality was a conflation of physical and moral natural law and Calvinism without the supernatural, underpinned by the ‘scientific principles’ of phrenology.

Combe refined his earlier position on the independence of each of the forms of natural law.\textsuperscript{115} Although he reaffirmed his view that the forms of natural law acted separately from each other directly, and to the moral condition of people specifically, he considered that the natural laws, physical and organic, were connected indirectly, acting in harmony with the moral law. Thus a person infringing the moral law would have often disobeyed other forms of natural law, thus doubly punishing the offender.\textsuperscript{116}

Clearly some of the physical natural laws, such as the effects of touching something hot were self teaching, and were not at issue. Nevertheless, explaining his belief in the necessity for clerics to include teaching of obedience to natural laws in sermons to their congregations, Combe cited several anecdotal examples, including some from religious authors, of what he saw as the confusion in people’s minds of Divine intervention in daily affairs through the ignorance or transgression of natural laws. He described how a Reverend Ebenezer Erskine speaking of the state of mind of his wife

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\textsuperscript{113} \textit{Ibid}. 154. \\
\textsuperscript{114} Cooter, \textit{The Cultural Meaning of Popular Science: Phrenology and the Organization of Consent in Nineteenth-Century Britain}. 122. \\
\textsuperscript{115} Combe, \textit{The Constitution of Man Considered in Relation to External Objects}. 36. \\
\textsuperscript{116} \textit{Ibid}. 155.
\end{flushright}
said, ‘“For a month or two the arrows of the Almighty were within her, the poison
whereof did drink up her spirits; and the terrors of God did set themselves in array against
her.”’ 117 The reverend called in other clergy to pray for her while “‘she still continued to
charge herself with the unpardonable sin, and to conclude that she was a cast-away.’” 118
Even when she recovered, Combe noted, her husband treated the phenomena in a purely
mental and religious context, despite mentioning incidentally that his wife had been
subject to ill health. Combe saw the issue in phrenological terms – for him it clearly
indicated ‘diseased action in the organs of Cautiousness’ which he saw as a cause of
melancholy. 119 Because she had claimed, prior to the affliction, the experience of a
‘discovery of the glory of Christ as darkened the whole creation’, 120 his phrenological
explanation was ‘morbid excitement of the organs of Wonder and Veneration’, and the
justification for the clergyman’s ignorance that, at the time, the physiology of the brain
was unknown. 121

One further example of Combe’s concern about the misunderstanding of the role
of natural laws illustrated his proposition that they should have been taught in
conjunction with religious instruction. He cited Hannah More, in a letter to the Rev. John
Newton, dated Cowslip Green, 23d July 1788, where she referred to the ‘great world’ as
‘enemy’s country’ in which she should always be on her guard. The beauty of the God’s

117 Donald Fraser, The Life and Diary of the Reverend Ebenezer Erskine, A.M.: Of Stirling, Father of the
Secession Church, to which is Prefixed a Memoir of His Father, the Rev. Henry Erskine, of Chirnside.
Relation to External Objects. 174.
120 Fraser, The Life and Diary of the Reverend Ebenezer Erskine, A.M.: Of Stirling. 286. Cited in
121 Combe, The Constitution of Man Considered in Relation to External Objects. 174.
world, and subsequent lack of external temptation, she believed, led to her faith having
‘less energy’. ‘Yet, in the midst of his blessings, I should be still more tempted to forget
him, were it not for frequent nervous headaches and low fevers, which I find to be
wonderfully wholesome for my moral health.’ It was her attributing of ill health to divine
intervention in her moral and religious life that bothered Combe, who again saw it as
further evidence of the need for the teaching of natural laws. He believed strongly that
without a philosophy of human nature, ‘even religious authors, when treating of
sublunary events, cannot always preserve consistency either with reason or with
themselves’. It was his requirement that natural laws be applied as tests to theological
writings which were related to the functioning of the world. This was further evidence
of his beliefs which would have clashed with clerics’ assumptions of their exclusive role
in determining the relationship between the Deity and the temporal world.

Of greatest importance, because the usual focus of natural law proponents was on
the spiritual and moral laws, were Combe’s reflections on what he saw as the calamities
arising from the infringement of the moral natural law. He believed the Moral Law was
‘proclaimed by the whole faculties acting harmoniously; or, in cases of conflict, by the
higher sentiments and intellect acting harmoniously and holding the animal faculties in
subjection’. Despite his claim that the natural laws operated independently, a statement
which he then modified by suggesting an indirect link, he appeared more comfortable
with ascribing to moral law the role of being a cohesive force. Within this relationship the
physical and organic clearly still had their individual requirements and attendant

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122 Ibid. 175.
123 Ibid. 177.
124 Ibid. 256.
punishments independent of any moral motivations. Nevertheless as Combe developed his thesis, it was difficult to accept his contention regarding the complete independence of the laws as he had originally claimed.

Because of his belief that the Moral Law implied the concept of all faculties operating together harmoniously, with, where necessary, the subjection of animal faculties, then any disturbance of this harmony was, for Combe, also a disruption of Moral Natural Law, with its attendant punishments for the transgressions. The focus was again on resolution of the matter within the physical world. As with disruptions to physical and organic natural laws, he was not discounting the role of the Deity, arguing as he did that the Deity had built in all necessary punishments to ensure the smooth operation of these laws. Whilst his beliefs were consistent with Thomist philosophy to this extent, he left no room for a clerical view of divine intervention in daily lives, nor did he consider the “sinful” concept of offences against moral laws, with spiritual judgment and punishment, confining his discussion to temporal resolution.

It was his attempts to explicate the functional variations in the operation of moral laws that well demonstrated Combe’s belief in the value of phrenology to explain human behaviour. He believed that phrenology, by demonstrating differences of relative size in the mental organs, showed the corresponding differences in the activity and ability of the various faculties. These measurements, in turn accounted for variations in human sentiments. Combe explained:

Phrenology, by demonstrating differences of relative size in the mental organs, accompanied by corresponding differences in the power and activity of the faculties, enables us to account for these varieties of sentiment. A code of morality framed by a legislator in whom the animal organs were large, and the moral organs small, would be very different from one instituted by another
lawgiver, in whom this combination was reversed. In like manner, a system of
religion, founded by an individual in whom Destructiveness, Wonder, and
Cautiousness were very large, and Veneration, Benevolence, and
Conscientiousness deficient, would present views of the Supreme Being widely
different from those which would be promulgated by a person in whom the last
three faculties and intellect decidedly predominated.\textsuperscript{125}

Combe could identify morality as a science, and variations from the behaviour and the
religion of the Creator as imperfections of the mind; to this end, he made use of
Phrenology. In his application of the hypothesis, he developed terminology to describe
his concepts. He advocated the teaching of Phrenology, as the science of the mind, along
with natural laws as a counter to prejudices.\textsuperscript{126} He argued therefore ‘that obedience to the
dictates of these powers is rewarded with pleasing emotions in the mental faculties
themselves, and with the most beneficial external consequences; whereas disobedience is
followed by deprivation of these emotions, by painful feelings within the mind, and by
much external evil’.\textsuperscript{127}

In advocating ‘Obedience’, Combe pointed out the pleasing emotions experienced
by the faculties – the ‘fountain of pleasure’ derived from the harmonious gratification of
all the faculties and senses. He identified forms of behaviour, with phrenological
terminology, which when gratified in a moral way, produced great joy. These included:
Philoprogenitiveness, Adhesiveness, Acquisitiveness, Constructiveness, Love of
Approbation, and Self-Esteem. The understanding of what he saw as the operation of
these was too little appreciated by people because he believed they had imperfect
knowledge of the natural moral law. This was further reason for education in natural laws

\textsuperscript{125} Ibid. 256.
\textsuperscript{126} Ibid. 257.
\textsuperscript{127} Ibid. pp. 258-259.
and the constitution of the mind. As well as igniting controversy generally, Combe came under specific criticism for blurring the distinction between ‘scientific’ natural laws and moral laws, particularly by establishing a causal relation between obedience to the latter and the reward or punishment by the former: William Whewell (1794–1866) in 1883 and, later in the century, Thomas Huxley. Even though, from an agnostic perspective, Huxley would have taken issue with Combe anyway, Huxley attacked this conflation ‘as the distinguishing mark of a pseudoscience’.

Combe, however, further explained the importance of the constitution of the mind, with reference to the physical senses. He commented on the manner in which the eye had been perfectly adapted by the Deity to the laws of sight, as had the ear to the laws of sound. He inferred from this that the moral and intellectual constitution would be similarly adapted to the order in the world. A person who was ‘deficient in Tune’ and couldn’t distinguish melody would be cut off from the gratification enjoyed by a person whose organ was ‘in a state of vigour and high cultivation’. He mentioned two states: ‘vigour’ and ‘high cultivation’ which were significant and distinctive features relevant to natural law. ‘Vigour’ referred to the constitution and health of the organ, which Combe believed was scientifically verifiable. This was the Deity’s input to the situation. The second, ‘high cultivation’ was the human contribution. As part of the effective implementation of the moral law there was, he believed, an obligation to cultivate one’s talents, thus maximising morally appropriate pleasure. ‘The principle is universal, and

129 Combe’s reference to the adaptation of the eye to its function is interesting in that the complexity of the eye’s structure has often been cited in philosophical arguments for original design as one of the ‘proofs’ of the existence of God.
130 Combe, The Constitution of Man Considered in Relation to External Objects. 263.
admits of no exception, that want of power and activity in any faculty is accompanied by deprivation of the pleasures attendant on its vivacious exercise’. He saw as the first natural punishment, exclusion ‘from great enjoyments attendant on virtue’ a condition which would apply to ‘criminals and profligates of every description’. Combe’s second natural punishment of immoral conduct resulted from his belief that as with a conflict among the faculties, the world is arranged on the principle of the supremacy of the moral sentiments where ‘observance of the moral law is attended with external advantages, and infringement of it with evil consequences’. In these circumstances he was considering human action rather than Divine intervention. This would vary according to the circumstances, ranging from the withholding of affection, through retribution for dishonesty, to the maximum degrees of judicial punishment.

In relating the moral law to business dealings he referred to a phrenological behavioural form, Acquisitiveness. Applying these not only to the manufacturer, he included also the merchant, the lawyer, and the physician. If each were dedicated to supplying the wants of his fellow man, then Combe argued that he would maximise his success, and gratify his acquisitiveness, ‘if his every proceeding be accompanied by the desire to act benevolently and honestly towards those who are to consume and pay for the products of his labour’. The rewards for adhering to the moral law would include not only appropriate financial remuneration, but the enjoyment of gratifying their own moral faculties, as well as respect and a sound reputation. To ensure their rewards for obeying the moral and intellectual laws, Combe nominated the observance of three conditions:

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131 Ibid. 263.
132 Ibid. 264.
133 Ibid. 265.
1st, The department of industry selected must be really useful to human beings: Benevolence demands this; 2d, The quantum of labour bestowed must bear a just proportion to the demand for the commodity produced: Intellect requires this; and, 3d, In our social connexions, we must scrupulously attend to the fact that different individuals possess different developments of brain, and in consequence different natural talents and dispositions, – and we must rely on each only to the extent warranted by his natural endowments.\textsuperscript{134}

There was no difference in the laws he applied to business dealings from the underlying principles that Combe was applying to all forms of obedience to the moral natural laws; the only variations were to the desires being satisfied and the nature and strategies of the tasks being executed. There was a similar sense of pleasure attached to all.

John Davies argued convincingly that while Combe’s interest in phrenology was initially for its ‘scientific’ value in determining the relationship between human behaviour and the physical structure of the brain, its broad community appeal was in its role as a popular philosophy\textsuperscript{135}. This was most certainly the case with The Constitution of Man where the primary focus was on the necessity for humans to obey the Deity’s natural laws which could be better understood through the insights given by an understanding of phrenology. Throughout the text phrenology is shown as a tool for enhancing this human knowledge.

George Combe thus showed his commitment, not merely to phrenology, but, more importantly, to an understanding of the very nature of Man and his relationship with the Deity utilising insights derived from phrenology. This dramatic evidence of the continued role of natural law theory in nineteenth-century Britain was reinforced by the considerable public following of his beliefs subsequent to the publication of The

\textsuperscript{134} Ibid. pp. 265-266.
\textsuperscript{135} Davies, Phrenology: Fad and Science; a 19th-Century American Crusade. 164.
Constitution of Man, not only in Britain, but also in the United States. Unlike Charles Foster, James Lorimer and D. Caufield Heron, Combe showed little interest in the juridical implementation of natural law or its relationship to positive law. While vigorous debate about the relevance of natural law theory to international law and imperialism continued around him, Combe took no part in it. Unlike Henry Drummond’s religious approach to natural law which indivisibly melded the temporal and spiritual worlds, Combe focused on the operation of natural laws, and religious practices solely in the physical. While rejecting the strictures, and terrors, of Calvinist thinking, his interpretation of Man’s relationship with a remote Deity showed the imprint of his religious upbringing. Because he was inextricably linked to phrenology, its rise and its demise, there has been a tendency to overlook George Combe’s contribution to nineteenth-century natural law theory.

The subsequent association of phrenology with fairground quackery which contributed to Combe’s being largely overlooked historically, has been unfair to phrenology as well. The anachronistic observation of phrenological ‘quackery’ fails to recognise the scientific approach to it of Spurzheim and Combe. The remarkable parallels between it and modern study of the mind, particularly in reference to the recognition of the separate functions of areas of the brain, suggest that the pioneering role of the legitimate study of phrenology still remains unappreciated.
CHAPTER TEN: JOHN SEELEY

In one respect, Sir John Robert Seeley (1834–95) prominent late Victorian intellectual, and Regius Professor of Modern History at Cambridge, appeared an unlikely advocate of natural law. R. T. Shannon reports that Seeley’s scientific colleagues at University College London (1863–69) ‘impressed him by their confidence in the claims for a commanding future role for positivist principles and experimental science’. ¹ In this chapter, however, I will argue that Seeley was an example of the nineteenth-century natural law theorists who could comfortably accommodate natural and positive law. Natural law underpinned the principles by which positive law was determined. Natural law was an integral part of Seeley’s natural perception of religion.

In his essay *Natural Religion* (1882), Seeley propounded a controversial view, questioning the role of the supernatural in religion.² While he was most celebrated for his text *The Expansion of England*, Duncan Bell describes him as ‘a notorious figure in the pervasive conflicts over the nature of religious belief, especially through his best-selling study of the moral example of Christ, ‘Ecce Homo (1866)’, published during his time at UCL.³ At the time he preferred to publish it anonymously, concerned about the effect it

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² The similarities between the essence of natural religion and the theories of natural law and rights make Seeley a suitable subject for inclusion in this analysis. These revolve around the role of the Deity in establishing natural laws for the natural world and for humans. The criticisms of his positive thinking when considered with his advocacy of natural laws are further evidence of the accommodation of nineteenth-century natural law theory with positivism.

could have both on Christians, non-Christians and his family. Deborah Wormell suggests that Seeley’s religious and political views developed from his association with positivists and Christian Socialists towards the latter 1860’s. Seeley proposed a natural religion where the power and beauty of the deity were worshipped on the basis of evidence in the natural world. Wormell noted that ‘Seeley’s dissent from Evangelicalism and affiliation to the Broad Church occurred at a time when traditional interpretations of Christian doctrine were increasingly found to be inadequate in the light of Biblical criticism and new discoveries in natural science’. The linking of his teaching with pantheism and his criticism of established church teaching, however, made his ‘affiliation’ far from complete.

Evident in Seeley’s assumptions concerning the natural world were natural laws. At the same time he rejected pantheism by considering the natural world as the manifestation of God’s creation, not as God. Nevertheless, Seeley’s efforts to distinguish his natural religion from pantheism, while carefully considered, were not entirely unambiguous. He determined ‘it is quite possible to believe in a God, even a personal God, of whom Nature is the complete and only manifestation’. This assertion, although stating his belief, was capable of pantheistic interpretation. Prior to this he had asserted, ‘I cannot believe any religion to be healthy that does not start from Nature-worship’. The ambiguity of his declared position was furthered by his stating, ‘let it be allowed that Nature is merely the collective name of a number coexistences and sequences, and that

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God is merely a synonym for Nature’. Although he was using this statement in the context of discussing controversies concerning the Divine Being and the relationship of the human body to the soul, it did little to support the separation of his own beliefs from pantheism. Evidence of negative reaction was that Lord Shaftesbury classed Ecce Homo as the worst of those books ever ‘vomited from the jaws of hell’. It was hardly surprising as John Pollock, his biographer wrote:

… now and for the rest of his life it was his [Lord Shaftesbury’s] heartfelt and earnest desire to see the Church of England and the Church of the nation, and especially of the very poorest classes, that she may dive into the recesses of human misery and bring out the wretched and ignorant sufferers to bask in the light and life and liberty of the Gospel.

Deborah Wormell notes Ecce Homo angered many Trinitarians, while ‘Henry Sidgwick remarked that it depicted Christ as a proto-Benthamite’. Duncan, however, argues that ‘his religious views were never as radical as they might at first have appeared’. Indeed he can be seen as a fairly conventional follower of the broad church theologians. Whilst Seeley was personally clear on his distinction between Nature and God, it is evident that he didn’t necessarily communicate this clarity.

Seeley’s conception of natural laws began from his agreement with ancient theorists about human sociability. ‘We start of course from the fact that man is a social or

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9 Ibid. 45.
13 Bell, "Unity and Difference". 569.
gregarious animal’. Nevertheless he differed somewhat from the positions of Henry Drummond and George Combe and other theorists of spiritualism whose works developed from the ancient tradition’s assumption of natural sociability. Where Drummond saw natural law as extending from the temporal world, of both physical and moral laws, into the spiritual, Seeley, like James Lorimer and Charles Foster disregarded the physical laws in proposing theories as they pertained to human behaviour, seeing them as quite separate. Seeley’s position was closer to that of Combe where their focus was on the natural world, but Combe insisted strongly on the bond between the physical or scientific laws and the moral or spiritual laws. Ironically where Foster and Lorimer were working to establish a science of jurisprudence, Seeley was challenging the role of science and scientists as well as that of theology.

Seeley and Combe had one other distinct feature in common and for similar reasons. Both dismissed what they saw as irrelevant church teaching. Both were reacting against the religious teachings of their upbringing. Whilst Combe was opposing Calvinist hell-fire preaching for its approach as well as for failing to teach Combe’s own concept of morality, Seeley was criticising the established Anglican Church for being elitist, for teaching a more subdued form of sin and damnation, and for not teaching conventional morality.15

By the teaching of morality, I do not mean the teaching that we ought to be moral, but the teaching what is moral and what is not. The former kind of teaching enters into most sermons, though I’m afraid not quite all. The latter is, of course, not

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15 See George Combe discussion in chapter 8.
entirely absent; but when we are speaking of the average of sermons, it is impossible to concede more.\textsuperscript{16}

As R T Shannon observed, Seeley believed: ‘Morals could not be severed from society. Morality made religion, not religion morality. A higher, ideal, view of service both to the state and from the state must be propagated’.\textsuperscript{17}

In an opening address to the Society of Ethical Propagandists, Seeley claimed that ‘never, surely was the English mind so confused, so wanting in fixed moral principles, as at present’.\textsuperscript{18} He further observed, ‘Christian teaching of the present day is insufficient, exceedingly insufficient’.\textsuperscript{19} Wormell argues that with this focus Seeley could be described as ‘a lapsed Evangelical, whose preoccupation with morality, “enthusiasm” and insistence on the Biblical origins of his views are the hallmarks of his upbringing’.\textsuperscript{20}

Where he saw that the obvious vices were stigmatised, Seeley considered that ordinary moral behaviour was largely overlooked. If this were not enough to offend high churchmen he further complained that ‘the constantly shifting and progressive character of moral duty is not recognised’.\textsuperscript{21} This opposition to inflexible dogma was consistent with both his objection to conventional established church teaching, and his advocacy of a more flexible natural religion, based on natural laws. He regarded the established church as ‘a conservative Church linked to the governing aristocracy’, and thus able to

\textsuperscript{19} \textit{Ibid.} 20.
\textsuperscript{20} Wormell, \textit{Sir John Seeley and the Uses of History}. 29.
\textsuperscript{21} Seeley, \textit{Lectures and Essays}. 248.
gain the full confidence of only that group. Seeley believed that the teaching of morality in the churches should be more flexible, more contemporary, less dependent upon ancient Biblical references and drawn, where possible, from English history and biography. Bell supports this stating that Seeley was ‘extremely critical of the Church of England, [he] believed that it was failing in its appointed task of educating the nation morally, of providing a sense of concord and purpose for society’. Seeley further declared that ‘in the popular Christianity of Church and Chapel there is more than enough of error, and mischievous error’. 

Within the same Society of Ethical Propagandists the concept of natural laws or first principles was restated by Felix Adler. Felix Adler (1851–1933) was a German-born Jewish intellectual who studied at Columbia University in the United States and at Heidelberg University in Germany. He founded the Society of Ethical Propagandists. The society was founded precisely to address the perceived problems of a lack of moral or ethical guidance from established religion, and the reconciling of science and religion. Referring to ‘first principles’ Adler argued that it was impossible to reach complete agreement, ‘but the main leadings of the moral force within us, as exemplified in the preferences of civilized men, are, on the whole, in one direction’. The significance of Adler’s comments, and those of other members, was that all were focusing on the same motivating moral force in mankind. Though not identifying it specifically with the appellation of natural law or God’s law they were referring to the same attributes that

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22 Ibid. 249.
23 Ibid. 265.
24 Bell, "Unity and Difference." 569.
were so identified in previous centuries, and by others in their own. Where Grotius had theorized the inconceivable notion that God be removed from the equation; this society was now addressing that as a realistic possibility. This was further evidence of the mutation of natural law, even to where it included its renaming. The original characteristics were still present: a set of behaviours, morals, or rules within humans that were independent of an individual’s motivations; either determined by God or innate to the human psyche. Distinctions between God’s or nature’s rules had been blurred to the point of interchangeability. This blurring recalls the point that Austin’s problem with natural laws was largely semantic; they were seen generally as congruent.27

Seeley claimed that ‘the true object of theology at the beginning was to throw light upon the natural laws’.28 Having considered that its original method was crude, he noted that it had attempted to solve problems which science would consider insoluble. When a ‘new method’, science, was successfully developed Seeley stated caustically ‘theology stuck obstinately to its old one, and when the new method proved itself successful, theology gradually withdrew into those domains where as yet the old method was not threatened, and might still reign without opposition’.29 It was this apparent disjunction between theology and the temporal world that Seeley rejected. He believed that by maintaining old traditions of analysis and teaching, theology, as practised, had become irrelevant. Throughout his life, Seeley maintained a strong commitment to education, particularly a liberal one. He saw this as more relevant than the contemporary

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27 Refer to the chapter on Foster 61-63. Austin had dismissed natural laws as misnamed God’s laws. Historical usage failed to distinguish any difference between them.
28 Seeley, Natural Religion. 18.
29 Ibid. 18.
chutch teaching of theology. Bell observes that, in common with other Victorians, 'Seeley was above all else concerned with the challenge to reconcile science and religion'. He saw a direct link between the growth of scientific enquiry and the retreat of religion and the name of God, into the supernatural. Scientists, he believed, were equally culpable, where 'scientific men began to say they had nothing to do with God'.

Yet Seeley judged that this situation concerning science should not have existed, because the scientific man should have recognised God’s power from nature, and thus been a theist. ‘There is no stronger conviction in this age than the conviction of the scientific man, that all happiness depends upon the knowledge of the laws of Nature, and the careful adaptation of human life to them’. Here he quite specifically acknowledged natural law as the foundation of his religious theory. His belief was that theology was misdirecting mankind away from the true recognition of God in Nature. While expressing disapproval of Theology for its concentration on the supernatural and its distraction from the natural world, Seeley elucidated his understanding of and the purpose for a natural religion, of which an elemental part was natural law. While it was unimportant whether people’s reference was to God or Nature:

the important thing is that their minds are filled with the sense of a Power to all appearance infinite and eternal, a Power to which their own being is inseparably connected, in the knowledge of whose ways alone is safety and well-being, in the contemplation of which they find a beatific vision.

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30 For a detailed discussion of Seeley’s attitude to education see Wormell, *Sir John Seeley and the Uses of History*. pp. 48-75
31 Bell, "Unity and Difference." 570.
33 Ibid. 20.
34 Ibid. 23.
On the subject of natural laws Seeley would have found some unexpected agreement with Austin, the jurist. Whilst addressing the issue of Theology’s discounting of natural laws, Seeley stated ‘Theology cannot say the laws of Nature are not divine; all it can say is, they are not the most important of the divine laws’. Austin’s point, as discussed, in establishing the nature of jurisprudence, was also that natural laws were divine laws, but misnamed. Nevertheless, Seeley left little doubt about his position regarding natural law when he stated, ‘All human activity is a transaction with Nature. It is the arrangement of a compromise between what we want on the one hand, and what Nature has decreed [my emphasis] on the other’. He further observed that ‘all beauty or glory is but the presence of law’.

Seeley’s conviction concerning the existence and relevance of natural laws to his society further exemplified the complex pattern of thinking amongst nineteenth-century natural law theorists. Where Thomas Hobbes had rejected the ancient view of natural law, which emphasised human sociability, in propounding a modern natural law theory of universal human self-interest, nineteenth-century British theorists: Foster, Lorimer, Drummond, Combe discarded this thinking, utilising a theory based on human sociability. Seeley’s belief in human sociability linked him with these contemporary law theorists. In expressing his belief that the proper understanding of, and obedience to, natural laws would lead to the development of the ‘perfect or ideal state’, Seeley saw a useful role for political science, which ‘if it is to be worth anything, must show us what is

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35 Ibid. 23.
36 Ibid. 27.
37 Ibid. 32. Seeley did not elaborate on this point. It does show again Seeley’s conviction that natural laws were God’s laws; they were not separate.
right’. With this conviction, ‘we are apt to enter on the inquiry with no other category in
our minds but the category of right and wrong’.\textsuperscript{38} In this regard, he cited the ‘ancient
method’ of Plato and Aristotle. Significant in these observations was the implicit
rejection, not only of Hobbesian modern natural law theory but also of Benthamite
utilitarian thinking. Thus there were, for Seeley, intrinsic natural laws based on divinely
determined modes of behaviour and Nature was imbued with these. As such, along with
Nature generally, they were temporal manifestations of the Deity. They were based
neither on human self-interest and survival, nor on functionality determined from time to
time by their usefulness to general human activity. They were in fact one facet of the
‘beatific vision’ that Seeley believed would be discovered through the practice of a
natural religion.\textsuperscript{39}

Common to both Lorimer and Seeley was a rejection of contract theory as the
beginnings of society. Lorimer had dismissed contract theory explicitly when he argued
that ‘a primitive contract by which men are supposed to have agreed to observe the
principles of justice’ implied a prior identification of these principles through natural
law.\textsuperscript{40} Seeley’s rejection, rather, was implicit. The development and indeed the
contemporary existence of the state were not achieved through some agreement. ‘The
English state may be held together in some degree by a common interest, still it is not a
mere company composed of voluntary shareholders’.\textsuperscript{41} Seeley was accepting that while
the coming together of English people into a state had self-interest as a partial motivation,

\textsuperscript{38} Seeley, \textit{Introduction to Political Science . Two Series of Lectures}. 18.
\textsuperscript{39} Seeley, \textit{Natural Religion}. 23.
\textsuperscript{40} Lorimer, \textit{The Institutes of Law}. 12.
\textsuperscript{41} Seeley, \textit{Introduction to Political Science . Two Series of Lectures}. 35.
it was not the primary impetus as in the Hobbesian concept of natural law. Nor was a ‘shareholders’ concept of an implicit contract the basis of the formation of the state either, a further rejection of contract theory.

Seeley’s explanation of human association was rather a linear, and in some ways, less appealing one. He saw the state as ‘a union which has its root in the family, and which has grown, and not merely been arranged, to be what it is’. The less flattering comparison, though a common one for those who ascribed to human sociability, was his observation:

Now, it is surely impossible not to admit that this phenomenon [England], vast and highly developed as it now appears, is in its large features similar to the most primitive and barbarous tribe. 42

A comparison of the English state to a barbarous tribe had implications for the issues of colonial expansion and international law. Where, for example, Vittoria’s interpretation of natural law had been used both in opposition to and in support of colonisation, depending on one’s conception of social structure and land use, Seeley was arguing that states and tribes were the same in structure, merely different in their stage of development. Where all states were in varying degrees of size, economic development, technological and social progress, such thinking also had implications for international law – particularly in questions concerning the constitutional elements of a nation and the manner in which peoples of varying, particularly limited, social development should be dealt with. Most important was the issue as to what stage barbarism ended and civilisation began. Seeley stated:

42 Ibid. 35.
When we have once got rid of the notion that the tribes and clans of barbarism are contemptible and unworthy of attention, we obtain a somewhat different view of the state. Before, we naturally regarded states, since they were peculiar to civilised people, as being more or less of the nature of inventions, like the art of writing; but now we see they are more like language itself, that is, though they may differ infinitely in the intelligence they display, yet they are found uniformly and universally, or nearly so, wherever human beings are found.  

Despite their agreement on the origins of natural law, Seeley would have found little support for his belief in the qualities of barbaric tribes neither from Lorimer, nor from Drummond after his experience of native lawlessness in Africa, nor from Euro-Christian natural law jurists and theorists. 

Seeley’s belief was that the origins of the state were to be found in kinship, which was the basis of association in the most primitive of human groupings. It began with the kinship of families, and by natural mutual accommodation extended to the growth of tribes. He believed the process continued through the increased numerical size of groups from communities to states. The singular aspect of his argument was that the same features, a sense of kinship, and the processes of agreement, dispute, conflict and resolution maintained, in more complex forms, those of the family and the original tribes. Thus there was unbroken continuity between the tribe and the modern state. In a jurisprudential context Seeley would have found some commonality in implying an unbroken jural connection between the primitive state, the codification of Roman law and the development through common law of the British state.

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43 Ibid. 38.
44 For further discussion of Drummond’s first hand witnessing of native retribution, refer to my chapter on Henry Drummond. He would certainly have accepted Seeley’s belief in the role of kinship amongst primitive peoples.
45 For a detailed explanation of his analysis see J Seeley Introduction to Political Science, Two series of Lectures. pp. 37-41.
Initially it seems unsurprising that in his lectures in *The Expansion of England*, Seeley scarcely referred to his earlier writings on natural religion. The intent of the texts appeared quite different. Where *Ecce Homo* and *Natural Religion* had a philosophical, religious and metaphysical focus; that of *The Expansion of England* was a practical analysis of England’s imperial expansion and the political, social and economic relationship of colonies to England itself. Referring to this change of focus in *The Expansion of England* and *The Growth of British Policy*, R T Shannon observes that ‘Seeley abandoned ethical universalism and positivist scientism as the central thrust of his strategy and regrouped his intellectual forces on decidedly national and historical lines’.46 While Daniel Deudney discusses Seeley’s ‘imperial federalism’ and asserts ‘Greater Britain was a vision of national idealism’,47 he claims that Seeley, along with Mackinder and Wells ‘announced their materialist orientation in unmistakable terms’.48

Whilst this is a reasonable inference, it overlooks the fact that while the intents of both areas of Seeley’s study were quite different, they were not mutually incompatible. There is, more significantly, in these views an unchallenged assumption that Seeley could change his ideological focus so dramatically and suspend his interest in natural religion. By contrast, Duncan Bell makes the compelling point ‘that it is only possible to map the topography of his [Seeley’s] global vision by situating it within the wider framework of

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47 Daniel Deudney, "Greater Britain or Greater Synthesis? Seeley, Mackinder and Wells on Britain in the Global Industrial Era," *Review of International Studies* 2001, no. 27. 203. Sir Halford Mackinder, (1861–1947) was a British political geographer who argued that industrial advances, such as railways, by increasing land mobility made Eastern Europe the strategic heartland of Eurasia. H G Wells (1866 1946) was an English author, most noted for his science fiction, but also a non-fiction writer on history, politics and social matters.
48 Ibid. 191
his conception of the sacred’.\textsuperscript{49} Bell concedes that whilst Seeley did indeed stress the importance of material factors in politics, ‘he regarded religion, more than technology, as the motor driving the wheels of human history… It is impossible to grasp his political thought – including, and perhaps especially, his notion of Greater Britain – without locating it in his conception of a universal religion’.\textsuperscript{50} Bell notes that Seeley argued most prominently in \textit{The Expansion of England}, ‘that there were three essential preconditions for state unity: the existence of a community of race, a community of religion, and a community of interest. Of these, religion was the “strongest and most important” ’.\textsuperscript{51}

Wormell concurs with this view where she states that ‘for Seeley and other Broad Church historians, history revealed a purposeful universe directly ruled by God’s providence. The science of history uncovered the laws which were, as Seeley put it, “the causes which promote their [states’] prosperity or bring about their decay” ’.\textsuperscript{52} These views add force to the argument that Seeley, through his concept of natural religion emphasised the relationship between God’s, or nature’s laws, and the functioning of society. There was in fact, no inconsistency between Seeley’s positions in \textit{Ecce Homo}, \textit{Natural Religion}, \textit{the Expansion of England}, and \textit{The Growth of British Policy} even though in the latter he did not make reference to his natural law or religious views.\textsuperscript{53} For Seeley religion was an integral part of the state and conversely the state was the vehicle by which religious influence was consolidated and extended. As Bell argues, ‘the country

\textsuperscript{49} Bell, "Unity and Difference." 560.
\textsuperscript{50} Ibid. 566.
\textsuperscript{51} Ibid. 574.
\textsuperscript{52} Wormell, \textit{Sir John Seeley and the Uses of History}. 96.
is the sphere within which the other objects either live or lived, and as such it takes precedence over them; the state subsumes society and all those in it. This simple insight lay at the heart of Seeley’s political religion’. Given its primacy, religion must flourish, but it will do so best within the structure of the state.

Reference to things ‘natural’ in Seeley’s later writings exemplified the universally casual and varied use of the term. It compounded the general ambiguity regarding the concepts of natural law and natural rights. The question then arises, what exactly was meant by ‘natural’? In common with similar abstract nouns it defies a singular definition. Seeley claimed, for example, the ‘eternal discord of England and France appeared so much a law of nature that it was seldom spoken of’. This use cannot refer to an immutable moral or religious law, though some Englishmen may have judged the conflict a messianic spiritual crusade, but rather to a state of political inevitability given the conflicting English and French imperatives. His use of the term is no further explained when referring to the government of India from a distance as ‘less natural if by “natural” we mean “instinctive,” but if we mean by it “reasonable,” which is surely different, we must not call it unnatural simply because it is not the system of bees or of plants’. It is clearly evident that, like Drummond, who saw natural law as extending from the physical to the intellectual and spiritual, Seeley believed his concept of natural religion based on natural law underpinned all physical processes and human actions. In this way, certain processes occurred ‘naturally’, and God’s laws were manifest through natural laws.

54 Bell, “Unity and Difference.” 572.
56 Ibid. 39.
Like Lorimer, Seeley, while believing in the universality of natural law and rights, acknowledged that their applicability varied with degree of civilisation, and minimised the role of barbarian groups accordingly. In his 1885 series of lectures Seeley developed a view similar to that of Lorimer. In his exposition on the nature of the state he observed, ‘when we have once got rid of the notion that the tribes and clans of barbarianism are contemptible, we obtain a somewhat different view of the state’. In describing the nature and origins of the state, he indicated where previously ‘we naturally regarded states, since they were peculiar to civilised people, as being more or less of the nature of inventions’. He continued, ‘though they may differ infinitely in the intelligence they display, yet they are found uniformly and universally, or nearly so, wherever human beings are found. 57 In his later text, *The Expansion of England*, Seeley appeared to be dismissive of uncivilised races. Viewing them from a European perspective, he claimed that ‘the native Australian race is so low on the ethnological scale that it can never give the least trouble’. He was less condescending to the New Zealand Maoris, stating ‘the Maori is by no means a contemptible type of man’, comparing them to the Highland Clans in Scotland of the eighteenth century and the trouble they gave the English. 58 Again there was no necessary inconsistency; while he was dismissing the political effectiveness of barbarian peoples he was not contradicting his previous view that they ‘belong to something which may be called a polity, and is subject to something which may be called a government’. 59 Some insight into his understanding of civilisation can be gained from his perception of three stages of civilisation in India: the hill-tribes’ barbarism; the ‘Mussulman stage’; ‘and

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thirdly the arrested and half-crushed civilisation of a gifted race, but a race which has from the beginning been in a remarkable manner isolated from the ruling and progressive civilisation of the world’.\textsuperscript{60} Seeley even extended this racial thinking to the formerly powerful nation, Spain, arguing that where the English Empire was of civilised blood throughout, the Spanish Empire had a ‘mixture of barbarism in its blood’.\textsuperscript{61} Both Seeley and Lorimer showed their belief that the universalism of natural law was not incompatible with a concept of racial differences.

Seeley’s later beliefs also diverged from the Thomist beliefs of natural law in regard to his views on property. Where Lorimer claimed that natural law, and property ownership preceded any contractual agreement or any civilisation, Seeley believed, certainly at his time of writing that:

Property can exist only under the guardianship of the State. In order therefore that the lands of the New World might become secure enjoyable property, States must be set up in the New World. Without the State the settler would run the risk of being murdered by Indians, or attacked by rival settlers of some hostile nationality.\textsuperscript{62}

This reflected a decidedly positivistic and civic-based outlook, which was seemingly at variance with a universalistic perception of natural law. Yet, in fact, it was a demonstration of a capacity of each perception to accommodate the other, as interpreted in a jural context by Caulfeild Heron, which was a most definite post-Enlightenment, nineteenth-century interpretation. In Seeley’s view, it was a function of natural law,

\textsuperscript{60} Seeley, \textit{The Expansion of England}. 243.
\textsuperscript{61} Ibid. 138.
\textsuperscript{62} Ibid. 57.
demonstrated by American secession, ‘which prompts every colony when it is ripe, to set up for itself’.63

Seeley’s belief concerning a natural religion governed by natural laws was a mutation of the natural law tradition that was evident in a post-Enlightenment nineteenth-century Britain. While it assumed human sociability, in the ancient natural law tradition of universalism, it nevertheless had positivistic elements which argued that the state, in laws and religion, was the most effective means both of implementing God’s laws and of civilised development. It is inappropriate in fact to separate Seeley’s concept of the state from his understanding of religion. He provided an example of the ability of ancient and modern natural law not only to meld and exist in the later nineteenth century but to hybridise to accommodate elements of positivism and nationalism.

63 Ibid. 151.
CONCLUSION

By focusing on canonical figures rather than broadening their analysis to the wider community, a number of historians have failed to recognise the continued acceptance of natural law and natural rights theories throughout nineteenth-century Britain. Most significantly the character of those natural law and rights theories was markedly different from earlier theories of natural law: it was a meld of ancient, Enlightenment and modern natural law and demonstrated an acceptance of and an accommodation with positive law, historicism, and even with the often antagonistic theories of utilitarians. It was a particularly pragmatic understanding of natural law. The question then arises: how does the unearthing of this enduring body of natural law thought through the nineteenth century change our understanding of the natural law tradition? The belief amongst a number of scholars has been that whilst natural law was vibrant from medieval times through to the eighteenth century it disappeared in nineteenth century Britain, replaced by civic or positive law, only to be revived after World War II and the Holocaust with the Declaration of Human Rights in 1948 in the guise of human rights, (or, according to Samuel Moyn, with the US presidency of Jimmy Carter). The process of this evolution would be seen to have taken a rather different path if we acknowledge the continued role of natural law and rights in nineteenth-century Britain. Moreover, the particularly pragmatic nature of nineteenth century natural law, suggests that we may wish to re-evaluate the character of the twentieth century tradition of natural rights manifested as human rights discourse.
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