H. L. A. Hart famously claimed that part of the appeal of natural law “doctrine” is the “independence” of natural law from divine and human authority. God, according to Hart, is not necessary to natural law. By way of contrast, J. Budziszewski argues that natural law really is law and that law qua law requires an enactor. Moreover, the only plausible candidate for the enactor of natural law as law is the author of nature—that is, God. In this essay I argue that Budziszewski is right and Hart wrong. Law imposes obligations upon those under it, and obligations qua obligation are categorical rather than hypothetical imperatives. Categorical imperatives, in turn, require prescription. Consequently, prescription is necessary to any intelligible account of moral obligation. And prescription, finally, requires an authoritative prescriber.

According to H. L. A. Hart, “Natural law has . . . not always been associated with belief in a Divine Governor or Lawgiver of the universe, and even where it has been, its characteristic tenets have not been logically dependent on that belief.” Moreover, “the continued reassertion of some form of Natural Law doctrine is due in part to the fact that its appeal is independent of both divine and human authority, and to the fact that despite a terminology, and much metaphysics, which few could now accept, it contains certain elementary truths of importance for the understanding of both morality and law.” J. Budziszewski insists this way of thinking about natural law—something he calls the “Second Tablet Project”—is fundamentally misguided. Central to the account of natural law that he has elaborated across a number of works is the claim that natural law could be neither natural nor law without God. In this essay I will argue that Budziszewski is right—that the second tablet project cannot be pulled off in any coherent fashion. Natural law without God, contra Hart, is ultimately unintelligible. Indeed, I will argue that moral obligation qua obligation requires divine prescription. The basic argument for this conclusion will be my own. But I hope we might call it Budziszewskian.
AGAINST THE SECOND TABLET PROJECT

In the preface to the revised and expanded edition of What We Can’t Not Know: A Guide, Budziszewski notes that Enlightenment thinkers sought “to make natural law theologically neutral—a body of axioms and theorems that any intelligent, informed mind would consider obvious once they were properly presented.” Seeking to separate faith and reason, Enlightenment thinkers detached ethics from theology (even though some maintained the necessity of God as a purely theoretical axiom). But, as Budziszewski maintains, “the Enlightenment project collapsed” and “Modern man lost confidence in the possibility of an ethics that was both universal and yet somehow neutral” (xii). The collapse of the Enlightenment project makes clear that there is no theologically “neutral ground” from which a universal ethic can be elaborated or constructed. Consequently, contra Hart, contemporary natural law thinkers must press forward by reintegrating theology and natural law. God’s place at the center of moral law must again be recognized, as it was in older (especially medieval) Jewish, Christian, and Islamic moral reflection.

While Budziszewski advances several lines of argument concerning the relation of God to natural law, I will focus on just one. Budziszewski holds that God is necessary to explaining “natural law as law.” He frames the argument as follows:

1. Natural Law is really law.
2. Law requires enactment, therefore an enactor or legislator.
3. But law also requires promulgation, and natural law is promulgated through nature.
4. Nature could not serve as a means of promulgation unless the legislator had intended it to do so.
5. Therefore, the creator of the natural law must be that creator or fashioner of nature. This is what we call God.4

In this essay, I will focus on premises (1) and (2) of this argument. What does it mean to say that natural law really is law? Why does law require a lawmaker?

Budziszewski distinguishes the natural law as law from mere prudence, on the one hand, and from divine command theory on the other. As to the former, “Not only is ‘I want to’ different than ‘I ought to,’ but we also experience the violation of the former differently than we experience the violation of the latter. Ordinary slips of prudence lead merely to disappointment; violation of conscience leads to a sense of trespass, of breach, of transgression. The good that I betrayed was not merely commended by inclination, but commanded by authority” (180). Yet the claim that the nat-
ural law requires a divine lawmaker “is not a ‘divine command theory,’ if by that term we mean the view that law is law just because God commanded it, and that He could have commanded anything, however evil, that he willed” (181). Invoking Aquinas’s definition of law, Budziszewski argues that for natural law to be truly law, “God must be reasonable, good, and worthy of obedience” (ibid). The natural law requires a divine source. But the divine source is not beyond good and evil. Rather, the divine source must be goodness itself—more aptly, Goodness Himself.

To distinguish natural law as law from mere prudence, Budziszewski tackles Hugo Grotius’s claim that the natural law would retain a kind of force even if (though it would be impious to affirm) God did not exist. While scholars debate just what Grotius meant, Budziszewski takes him to affirm something like this: “Although a godless natural law would lose the force of ‘oughtness,’ it would retain the lower force of prudence.” Perhaps there exists a “purely prudential justification for each . . . of the natural laws” (62). So construed, Grotius holds that even if God does not exist, there are nevertheless pernicious consequences—contrary to self-interest or the satisfaction of desire—for murdering or stealing or bearing false witness. A prudential person—one simply concerned with their own interest—seeks to avoid paying the costs associated with murder and so refrains from murdering (or stealing or lying).

Budziszewski, however, rejects the possibility of a purely prudential justification of natural law (or of each natural law): “a truly oughtless prudence would be unable to restrain ‘free riders.’ Anyone who thought he saw a way to obtain the benefits of these laws . . . without their costs—or who was willing to accept the costs of transgressing them—would do so” (62). By way of contrast, “the thicker prudence of the natural law tradition would point out that free riders sacrifice greater goods for lesser ones; they ought to desire better for themselves” (62). But “natural laws,” absent a divine lawgiver, do not obligate anyone to respect or follow them. One may be stupid in failing to follow such “laws”; one is not morally wrong for failing to abide by them.

We could call the foregoing interpretation of natural law the Hobbesian account. Concomitantly, what Budziszewski calls “lower prudence” can be denominated Hobbesian prudence. Hobbes proposes two ways of looking at what he calls the laws of nature. As the commands of a sovereign power (God or the state), the laws of nature are laws in the proper sense (they are non-optional requirements binding on those under them). Viewed from the standpoint of reason alone, however, the so-called laws of nature are not laws proper. Rather, they are theorems or conclusions. What can he mean by this? In concurrence with Jean Hampton, I find it
overwhelmingly likely that Hobbes means that the laws of nature—as deliverances of reason—are hypothetical imperatives. They are imperatives delivered by instrumental rationality. So construed, the laws of nature are not categorical imperatives. Now to describe the laws of nature as hypothetical imperatives is to frame them as conditionals. For Hobbes, desire determines the end of human action. That end—or desired object—forms the antecedent in the Hobbesian conditional. The consequent—which stipulates a necessary condition—is some step or course of action that must be taken in order to achieve the desired end. And just here we should note that the whole structure of Hobbes’s reasoning about the laws of nature in De cive and Leviathan has this conditional or hypothetical imperative frame. More than once Hobbes says that there is no good or evil in the nature of things but that good is relative to the desire of individuals. Generally speaking, for any person p that wants some good g for which some action a is necessary for obtaining g, then p ought to a. Thus, if Pindar, more than anything else, wants to survive and if he finds himself in a state of nature wherein he can only survive by invading Othello before Othello invades him, then Pindar ought to invade Othello. Now Hobbes thinks that all individuals, insofar as they are rational, desire to survive (or to avoid sudden and violent death) more than anything else. And Hobbes holds that this desire cannot be fulfilled in the state of nature. Thus, individuals, insofar as they are rational, ought to seek to leave the state of nature. That is, they ought to leave that state simply because they want to survive and because they can only survive by leaving it. Hobbes’s laws of nature are rules (or hypothetical imperatives) about how to leave the natural condition. More aptly, since he does not write for people living in such a state, they are steps or rules about how to stave off or forestall that state of affairs. There is an objectivity to such natural laws. What it takes to fulfill one’s desires—and, in particular, what it takes to avoid the state of nature—is not a matter of subjective perception or personal inclination. But the oughtness is a function of subjective desire plus the necessary conditions for satisfying the desire. Hobbesian laws of nature are therefore conditionals aimed at the production of civil peace, given that peace is necessary for avoiding sudden and violent death and given that individuals want to avoid sudden and violent death.

Budziszewski’s claim is that what I’ve called Hobbesian prudence is prudence without oughtness. On this count, I maintain that Budziszewski is entirely correct.
UNCONDITIONAL NATURAL LAWS: WHY HYPOTHETICAL IMPERATIVES FAIL AS AN ACCOUNT OF MORAL OBLIGATION

Following and building on Hampton’s work, I hold that hypothetical imperatives (or, moral propositions framed as conditionals) are bereft of normative force and so fail to ground or to be an account of moral obligation. This argument applies to hypothetical imperatives or precepts framed as conditionals just as such. Consequently, I maintain that hypothetical imperatives fail to ground or be an account of obligation whether wed to a subjectivist account of good and evil, as in Hobbes, or to a realist/objectivist account.

One reason hypothetical imperatives fail to ground or be an account of obligation has to do with a problem at the heart of Hobbesian subjectivism—a problem exploded by David Hume. For if we attempt to justify natural law (or particular natural laws) in terms of self-interest or desire, then we commit ourselves to an instrumentalist view of rationality. Desire or interest determine the end or goal of all human action. Reason merely tells you how to attain the goal. If there are steps that must be taken in order to attain a desired object (necessary conditions that must be fulfilled), then reason tells you to follow those steps.

But, of course, we have multiple desires. As Hobbes says, desires vary not only across individuals but within each individual as well. If desire sets the goal or the end, which ones shall we satisfy? The strongest? Desires can be encouraged or suppressed. Shall we seek to strengthen some and weaken others? Indeed, from the standpoint of desire, which desire I pursue is ultimately a matter of indifference. Hobbes thinks that, insofar as we are rational, we have one overriding desire—not to die a sudden and violent death after a short life or, correlatively, to survive. But he concedes that some individuals fail to seek their own preservation. He is aware that some people seek death through suicide while others court death for glory on the field of battle. He refers to such people as sick or irrational or mad. But from the standpoint of desire alone how can they be any such thing? As Hume says,

’Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger. ’Tis not contrary to reason for me to chuse my total ruin to prevent the least uneasiness of an Indian or a person wholly unknown to me. ’Tis as little contrary to reason to prefer even my own acknowledg’d lesser good to my greater, and have a more ardent affection for the former than the latter. A trivial good may, from certain circumstances, produce a desire superior to what arises from the greatest and most valuable.
Says Hampton, “what is striking about the Humean conception is that it also says that instrumental reason also has no authority over our actions.”

Instrumental rationality, in which interest or desire determine the goal for human action, lacks any oughtness just because instrumental rationality is compatible with the pursuit of any goal at all. Human desire just as such might take as its aim any object or any state of affairs. The concern of instrumental rationality is only with the steps or actions necessary to satisfy desire, whatever that desire happens to be. Thus, on instrumental rationality we ought to destroy all of humanity or even our own lives if that is necessary to satisfy some desire that is either stronger or that we choose to pursue. Instrumental rationality tells us to preserve our lives or mankind if that is necessary to the fulfillment of some interest. But a morality which can tell Jack that he ought to destroy all mankind and Jill that she ought to preserve it, even to the point of hazarding her life so to do, is not much of a morality at all—not one that possesses oughtness (or authority) in any meaningful or regulative sense. A moral system that cannot distinguish a way of life devoted to the service of others as more desirable than one dedicated to the harm of others (just because one desires that) simply fails to be normative.

Rendering oughtness arbitrary and empty of content is a problem for hypothetical imperatives within the context of instrumental rationality. But following Hampton I have concluded that hypothetical imperatives (and moral norms construed as conditionals) as such lack any oughtness. Hypothetical imperatives are often framed as follows: If you want $g$ and you must $\phi$ in order to obtain $g$, then you ought to $\phi$. But where does the “ought” come from? It seems inserted into the conditional by sheer stipulation. The conditional should be framed more along these lines: In order to obtain $g$, you must $\phi$ (therefore if $g$, then $\phi$). That is, the causal relation of $g$ to $\phi$ only entails that $\phi$-ing is necessary for the attainment of $g$. But no more follows. After all, just because $\phi$-ing is causally related to $g$ or a necessary condition for bringing $g$ about, it doesn’t follow that anyone ought to $\phi$. For any person $p$ who desires some good $g$ for which $\phi$-ing is necessary to obtain $g$, it only follows that $p$ ought to $\phi$ if $g$ is first such that $p$ ought to seek $g$. The oughtness logically precedes the conditional. In other words, the only hypothetical imperatives that convey any oughtness necessarily rest on some categorical imperative as to what ought to be done. A morality of hypothetical imperatives all the way down cannot be made to go.

Given the foregoing, arguments that try to derive oughtness from hypothetical imperatives or conditionals are non sequiturs. Suppose, for instance, someone seeks peace and also that keeping one’s covenants is nec-
Nature’s Lawgiver: On Natural Law as Law

ecessary to attaining peace. According to a moral system constituted wholly by hypothetical imperatives, the conditional would be this: If you seek peace, then you should keep your covenants. But should is being packed into the conditional by sheer stipulation. In reality, this conditional necessarily supposes a logically prior categorical prescription: namely, seek peace. We ought to keep covenants not only because keeping covenants is necessary to keeping peace but also, necessarily, because we ought to seek peace. The categorical seek peace is necessary for the logical validity of the conditional, if you seek peace and if keeping covenants is necessary for seeking peace, then you ought to keep your covenants. In an account in which moral obligation is constituted by hypothetical imperatives all the way down, the conditional pretends to include analytically what is really a necessary and distinct premise.

In addition to Hobbes, the foregoing also applies to ethical systems constituted by hypothetical imperatives of a realist/objectivist bent. We can imagine someone who holds that there are real or objective goods—indeed, that there are some actions or states of affairs that are intrinsically good and others that are intrinsically evil—and who conceives of natural laws as hypothetical imperatives in relation to those goods. For instance, we might follow Aquinas in holding that human life is an intrinsic good. We might then note that certain actions are necessary for preserving human life (such as not murdering or not letting a neighbor in dire straits starve to death). Here again we have a conditional or a hypothetical imperative: If you seek to preserve human life (which is intrinsically good), then you must refrain from murder. The argument above entails that this conditional by itself—even with the stipulation that human life is intrinsically good—does not tell us that we ought to refrain from murder. As a conditional, it simply describes the causal connection. If refraining from murder is necessary to preserving human life, it can only be the case that we ought not murder if it is first the case that we ought to preserve human life. Full stop. The categorical imperative with respect to the intrinsic good necessarily precedes any plausible hypothetical imperative. And the oughtness is given by the categorical imperative.19

What I’ve argued holds even if we speak of the good in the teleological language of purpose and proper function. Suppose we affirm that the pursuit of truth is the proper function of human beings as rational animals. That is, we have a rational faculty—one that sets us apart from other animals—the purpose of which is theoretical and practical knowledge. Human life, given that we are rational animals, is aimed at knowing truth. And, indeed, human persons just as such cannot achieve wellbeing (the fulfillment of their proper function with excellence) without reason serv-
ing the function of seeking and apprehending truth. What follows is that reasoning and living according to reason are necessary for human well-being. But all that follows thus far is a causal connection with respect to human wellbeing. It does not follow that we ought to live according to reason—that we ought to fulfill the human purpose—unless we are first bound to achieve wellbeing as the sort of beings that we are (i.e., as rational animals). Consequently, a teleological account of the good for human beings, though necessary for natural law as natural, is nevertheless not sufficient for natural law as law. Something essential is missing.

How does the foregoing relate to Budziszewski’s account of natural law? On the one hand he speaks of the “thicker prudence” of the natural law tradition. What is that thicker prudence? Is it a natural law in which moral obligation or oughtness is constituted by hypothetical imperatives all the way down but also, contra Hobbes, in which those imperatives aim at goods that are objective or intrinsic rather than subjective or relative? Or, is it a natural law in which some real, intrinsic goods are categorically prescribed and in which hypothetical imperatives receive what oughtness they have from categorical ones? As we’ve seen, a realist natural law constituted by hypothetical imperatives all the way down forgoes oughtness just as much as Hobbesian prudence. As I understand it, the Budziszewskian account implies that at least some natural law precepts are categorical rather than hypothetical. When Budziszewski treats the free rider problem with respect to the thinner or lower prudence of godless natural law, he notes that “The thicker prudence of the natural law tradition would point out that free riders sacrifice greater goods for lesser ones” when, in fact, “they ought to desire better for themselves” (62). The claim that “they ought to desire better for themselves” is stated in categorical rather than hypothetical terms.

In sum, at least one categorical imperative is necessary for the natural law to possess oughtness or obligation. But how ought we understand oughtness or obligation in relation to God?

THE NATURE OF MORAL OBLIGATION

Moral obligation is essential to the notion of natural law as law. Aquinas writes that lex derives from ligare, which means to bind. Law, he says, imposes obligations upon one to act. Consequently, natural laws as laws impose moral obligations upon human beings to act in certain ways (to preserve human life, to care for one’s children, to seek truth and to worship God) and to refrain from acting in others (lying, murdering, stealing, committing adultery). So when we ask about the nature of natural law as law, we are concerned with the nature of moral obligation.
What is moral obligation? Indeed, what is obligation more generally? In Book I of *The Rights of War and Peace*, Grotius distinguishes law as “a rule of moral actions” that imposes obligations upon us to do that “which is good and commendable” from *counsel*. Counsels, “however honest and reasonable they be, lay us under no Obligation” and so “come not under this notion of Law” (IX, 148). Laws impose obligations. Counsels give advice concerning what it would be good for one to do without placing one under a moral requirement to follow that advice. Put another way, counsels leave individuals with discretion as to what to do. Obligations, by way of contrast, remove discretion. They impose non-optional requirements upon individuals. As Nicholas Wolterstorff says, “At the center of any account of the nature of moral obligation has to be an account of the requiredness that is an ingredient of obligation. An act that I am obligated to perform is not merely an act that would be good for me to perform. It is one the I am required to perform.”\(^2\)

If law as such imposes obligations and if obligations are non-optional requirements, it follows that law as law imposes non-optional requirements upon individuals. And non-optional requirements are just the thing hypothetical imperatives do not impose.

**THE INTELLECTUALIST-VOLUNTARIST DIVIDE: TWO ACCOUNTS OF MORAL LAW**

With the nature of obligation in hand, we return to the central issue. Law as such imposes obligations on individuals to act or to refrain from acting. So when we ask about the relation of God to natural law we are inquiring about the relation of God to moral obligation. Historians of thought have distinguished two main ways of framing that relation: intellectualism and voluntarism.

This distinction traces back to Francisco Suarez, who grounded it in the contrast between Gregory of Rimini, on the one hand, and William of Ockham, Jean Gerson, and Pierre d’Ailly, on the other. Suarez characterizes Gregory’s intellectualist thesis as follows:

The natural law is not a preceptive law, properly so-called, since it is not the indication of the will of some superior; but... on the contrary, it is a law indicating what should be done, and what should be avoided, what of its own nature is intrinsically good and necessary, and what is intrinsically evil.

The natural law is not derived from God as a Lawgiver, since it does not depend upon His will, and... in consequence, God does not, by virtue of that law, act as a superior who lays down commands or prohibitions. Indeed... Gregory... says that even if God did not exist, or if He did not make use of reason, or if He did not judge of things...
correctly, nevertheless, if the same dictates of right reason dwelt within
man, constantly assuring, for example, that lying is evil, those dictates
would still have the same legal character which they actually possess,
because they would constitute a law pointing out the evil that exists
intrinsic in the object.22

On the intellectualist thesis attributed to Gregory, for any person \( p \) and
any act \( a \), if \( p \) is obligated to \( a \) the reason is that \( a \) is intrinsically good or
rationally necessary. If, however, \( p \) is forbidden to \( a \), this is because (and
only because) \( a \) is intrinsically evil. Obligation—to act or to refrain from
performing some act—is entirely a function of intrinsic good and intrinsic
evil. On this view, then, obligation is analytically or conceptually included
in intrinsic good such that obligation automatically follows from intrinsic
goodness.

Insofar as Suarez’s accurately depicts Gregory’s position, Gregory
gives us Grotius’s impious hypothesis before Grotius. Yet Gregory’s intel-
lectualist position is clearly not what I called Hobbesian prudence. We are
not dealing here with instrumental rationality or a subjectivist (or other-
wise antirealist) view of good and evil. Rather, good and evil are objec-
tive realities given in the nature of things. And yet it seems equally clear
that the account of moral obligation proffered here is not a hypothetical
imperative account. Gregory appears to conceive of moral precepts as cat-
egorical imperatives—but categorical imperatives the oughtness of which
precedes divine lawmaking or prescription.

Suarez contrasts the intellectualist thesis he attributes to Gregory with
the voluntarist thesis of Ockham, Gerson, and d’Ailly:

[T]hat the natural law consists entirely in a divine command or
prohibition proceeding from the will of God as the Author and Ruler
of nature; that, consequently, this law as it exists in God is none other
than the eternal law in its capacity of commanding or prohibiting with
respect to a given matter; and that, on the other hand, this same natural
law, as it dwells within ourselves, is the judgment of reason, in that
it reveals to us God’s will as to what must be done or avoided. . . .
[Further] that the whole basis of good and evil in matters pertaining to
the law of nature is in God’s will, and not in a judgment of reason, even
on the part of God himself, nor in the very things which are prescribed
or forbidden by that law. The foundation for this opinion would seem
to be that actions are not good or evil, save as they are ordered or
prohibited by God; since God himself does not will to command or
forbid a given action to any created being, on the ground that such an
action is good or evil, but rather on the ground that it is just or unjust
because He has willed that it shall be done.23
The voluntarist thesis, as described by Suarez, holds that any act $a$ is obligatory for any person $p$ just because (if and only if) God has commanded $p$ to $a$. Likewise, any person $p$ is obligated not to perform any act $a$ if and only if God has forbidden $p$ to $a$. Divine commands are, on the voluntarist’s position, necessary and sufficient for moral obligation.

Theorists have often juxtaposed natural law and divine command theory by placing natural law in the intellectualist camp and divine command theory in the voluntarist camp. By way of contrast, Francis Oakley has argued that the medieval period bequeathed to subsequent periods two theories of natural law: intellectualist natural law, which Suarez attributes to Gregory and which Oakley and others attribute to Aquinas, and voluntaristic natural law attributed to William of Ockham and others. In other words, the intellectualist-voluntarist distinction cuts through natural law theory rather than distinguishing natural law from divine command theory. What distinguishes intellectualism from voluntarism is the nature of moral obligation and its relation to God.

With the intellectualist-voluntarist divide in view, let’s return to Grotius. Based on Book I of *The Rights of War and Peace*, Grotius is taking sides in the intellectualist-voluntarist controversy, and he clearly comes down on the intellectualist side. He notes that there is a “Sense of the Word *Right*, according to which it signifies the same Thing as *Law*, when taken in its largest Extent, as being a *Rule of Moral Actions, obliging us to that which is good and commendable*” (IX, 147–48). Moreover, “Natural *Right* is the Rule and Dictate of *Right Reason*, shewing the Moral Deformity or Moral Necessity there is in any *Act*, according to its *Suitableness or Unsuitableness to reasonable Nature*, and consequently that such an *Act* is either forbid or commanded by *GOD*, the Author of Nature” (X, 150–51). Further, “The *Actions* upon which such a Dictate is given, are in themselves either Obligatory or Unlawful, and must consequently, be understood to be either commanded or forbid by God himself” (X, 151–52). Indeed, in its most fundamental precepts, “the Law of Nature is so unalterable, that God himself cannot change it. For tho’ the Power of God be infinite, yet we may say, that there are some *Things* to which this infinite Power does not extend, because they cannot be expressed by Propositions that contain any Sense, but manifestly imply a Contradiction. For Instance then, as God himself cannot effect that twice two should not be four; so neither can he, that what is intrinsically Evil should not be Evil. And this is *Aristotle’s Meaning*, when he says... *Some Things are no sooner mentioned than we discover Depravity in them*” (X, 155–56).

For Grotius, moral obligation is entirely a function of intrinsic good and evil. The relation of divine will to moral obligation is that God com-
mands that which is good because it is good and forbids that which is evil because it is evil. Grotius seems to maintain intrinsic good and evil would exist even if God did not. And if intrinsic good and evil could exist without God and moral obligation is a function of intrinsic good and evil, then moral obligation would also exist without God. That, I suggest, is what Grotius means to affirm.26

Where intellectualists subordinate divine will to moral obligation, voluntarists subordinate good and evil and moral obligation to divine will. For many scholars, the paradigm voluntarist remains William of Ockham.27 In *Quaestiones in librum secundum Sententiarum*, Ockham contends that acts that are now vicious—such as adultery, robbery, or even hatred of God—could be rendered virtuous “if they were to agree with the divine precept just as now de facto their opposites agree with the divine precept.”

Ockham appears to ground this contention in two underlying reasons: (1) “evil is nothing other than the doing of something opposite to that which one is obliged to do,” and (2) God is “obliged to the causing of no act.”28 These propositions cohere with Ockham’s larger framework. Though he appropriates the *potentia dei absoluta et ordinata* distinction from Albertus Magnus and Thomas Aquinas, he radically reconceives the absolute power of God as constrained only by the necessity of divine existence and the law of noncontradiction. If the *potentia dei absoluta* refers to those logically possible worlds that God could actualize and the *potentia dei ordinata* to the world God has in fact established, then Ockham’s position is that God could actualize any logically possible world save for ones in which He does not exist or the law of non-contradiction does not hold.29 But in that case God could actualize a possible world in which there are beings like us for whom murder is good, just because God has declared it good, and preserving innocent life is evil, just because God has forbidden it. As it happens, God has in fact ordained (or actualized) a world in which murder is wrong and preserving innocent human life good. Moreover, he has established a world in which moral obligation is imposed by natural laws apprehended by right reason which in no case fails. But the underlying ontology of Ockhamist natural law is thoroughly voluntaristic—making moral obligation in the world we inhabit a function of nothing other than arbitrary, omnipotent will.

How shall we situate Budziszewski in relation to the intellectualist-voluntarist divide? Consider Budziszewski’s position in relation to the intellectualist thesis as affirmed by Grotius. Grotius quite obviously rejects ethical voluntarism. To the extent that scholars refer to divine command theory as an instance of ethical voluntarism, Grotius rejects divine command theory as well. So does Budziszewski. Both Grotius and Budziszewski
agree that some actions are intrinsically good (seeking truth, preserving human life, worshipping God). They concur that others are intrinsically evil (murder, theft, and adultery, for instance). Moreover, they agree that we *ought* to do those things which are intrinsically good and ought not do those things which are intrinsically evil. But Grotious appears to hold that we can have intrinsic goodness without God, and consequently, that moral obligation would be possible without Him. Budziszewski disagrees on both counts. The lawgiver is necessary. The lawgiver is not subordinate to a moral law that transcends Him. And the intellectualist thesis seems to affirm just this. So Budziszewski is not an intellectualist.

But Budziszewski also rejects voluntaristic natural law. His critique of divine command theory aims at the sort of world in which good and evil and moral obligation are as arbitrary—and therefore lacking in substance—as they are in Ockham’s theory (though we should note that most who call themselves divine command theorists today would reject such an account of morality as well). Goodness is not arbitrary but, rather, identifiable with God Himself. As C. S. Lewis says, God is Goodness; Goodness is divine.30

Where does that leave us? Budziszewski rejects both intellectualism and voluntarism. The lawgiver is necessary to *oughtness*. But superior power alone won’t do the trick. Budziszewski’s rejection of intellectualism and voluntarism strikes me as fundamentally right. Both intellectualism and voluntarism fail as accounts of moral obligation and so fail as accounts of law as such. Yet both contain essential ingredients for an intelligible account of moral law.

**THE INCOHERENCE OF INTELLECTUALISM AND VOLUNTARISM**

On the intellectualist thesis, any person *p* has an obligation to perform an act, *a*, if and only if *a* is intrinsically good. On this way of thinking, obligation follows analytically or conceptually from goodness. With Robert Merrihew Adams I maintain that this way of thinking is deeply flawed.31 There are various kinds of goods. There is the good of a beautiful portrait such as Rembrandt’s *Return of the Prodigal Son* or of a profound musical composition such as Mozart’s *Requiem*. And then there is good in action. Insofar as a good scene or portrait or piece of music really is good and a good act also really is good and insofar as only the latter can be obligatory, it follows, necessarily, that obligation is not analytically packed into the idea of good. Moreover, if we focus just on actions, we can distinguish various kinds of good acts. There are intrinsically good acts that are merely permissible, but not obligatory. For instance, St. Paul says that—given the circumstances—it is better to remain single than to marry. Clearly
remaining single out of devotion to God is intrinsically good. But marriage is also intrinsically good. And St. Paul leaves it to the discretion of individual Christians to choose either state. Neither is obligatory. Clearly, however, some actions are both good and obligatory. We ought to tell the truth; we ought not lie or murder or steal. So we can distinguish intrinsically good acts that are permissible but not obligatory from intrinsically good acts that are required (telling the truth, not lying). Further still, some actions are supererogatory. They are better than we have to do. They go beyond obligation. Into this class of acts we might include laying down our life for a friend. Now according to Adams, the mere conceptual possibility of supererogatory actions (even if there are in fact no such acts) entails that obligation does not follow analytically from good (or intrinsic good). Rather, the obligatory marks off a set of good actions.\textsuperscript{32}

To adapt an argument from my critique of conventional contractarianism and of ethical voluntarism, we can conceive of a set of all good actions.\textsuperscript{33} We can represent the set of logically possible good actions as follows (\(A_1, A_2, A_3, \ldots A_n\)). Some of these actions are good (even intrinsically good) but not obligatory—they are merely licit. Others are both good and obligatory. And we cannot tell which are intrinsically good and obligatory and which are intrinsically good but not obligatory on the basis of intrinsic goodness. To see why, we must consider something true of sets more generally. For any set we can imagine (e.g., the set of all prime numbers running from 2 to infinity), it is impossible intelligibly to distinguish among the members of the set on the basis of the property or properties by which the set is defined. Thus, 13 cannot be distinguished from 2, 3, 5, 7, 11, and 31 on the basis of primeness. Applied to the set of all good actions the general principle necessarily entails the impossibility of intelligibly distinguishing some good acts from others on the basis of goodness alone. If some good acts are obligatory whereas others are not, the basis for distinguishing them—or predicating obligation of certain of them—cannot be goodness (or intrinsic goodness) alone. Obligation must come, at least in part (though I hold only in part) from some property that transcends that set. We need something in addition to intrinsic goodness to mark off which ones are required of us from those that are not. And all of this means that \textit{oughtness}—especially in the thick sense of obligatoriness—is not analytically included in goodness or intrinsic goodness. Something more is required. But if intellectualism or intrinsic goodness by itself fails to provide an intelligible account of obligation, then intellectualism fails as an account of natural law as law and, indeed, seems to leave us with nothing more than conditionals or hypothetical imperatives, which, as we saw above, are devoid of oughtness.
The *something more* that intellectualism requires is prescription from the will of one possessed of the authority to prescribe. This perhaps explains the allure of theistic voluntarism. Voluntarists have recognized that law as law is distinct from counsel in that it imposes obligations on those under it, where the obligations in question are requirements, are nonoptional. The problem for ethical voluntarism generally (and so for theistic voluntarism) is much the same as the problem for intellectualism. As above, we can conceive of a set of all exercises of will (W₁, W₂, W₃, W₄, . . . Wₙ). And from the principle that it is impossible intelligibly to distinguish among the members of a set on the basis of the property (or properties) by which the set is defined, it necessarily follows that it is impossible intelligibly to distinguish among exercises of will on the basis of will alone. But in that case, necessarily, we cannot distinguish a good will from a bad or malevolent one, for instance, on the basis of sheer will. We cannot distinguish will that is superior from one that is subordinate on the basis of will alone. And we cannot distinguish obligatory exercises of will from those that are not on the basis of nothing but will. If some exercises of will are binding for us, in contrast to others that are not, it must (in part) be on the basis of a property that transcends the set of exercises of will—it must be on the basis of a rule and measure normative for willing that is therefore not reducible to will alone. Consequently, voluntarism also fails as an account of moral obligation and so of natural law as law. In the end, voluntarism provides injunctions or commands or imposes putative requirements. But it provides no basis for distinguishing binding commands from speech in the injunctive mode or merely putative moral requirements from actual ones. Without real goodness, I maintain, there is no basis on which such distinctions can be made. (Consequently, voluntarism latently presupposes that which it explicitly denies).

When it comes to moral obligation, we discover something lacking in both intellectualism and voluntarism. Goodness alone lacks prescription. Sheer will gives us commands or speech in the injunctive mode without providing any basis upon which such commands or requirements might bind. Even so, with both intellectualism and voluntarism we also discover necessary ingredients of moral obligation—intrinsic goodness, on the one hand, and prescriptive will, on the other. This entails, I submit, that moral obligation is a compound property.³⁴

Given the foregoing, even if Gregory and Grotius are right to hold that intrinsic goodness can exist without God or that it somehow exists independent of or logically antecedent to Him (though I think they are wrong for metaphysical reasons), nevertheless obligation could not exist in such a world because intrinsic goodness, though necessary for moral obliga-
tion, is not sufficient for it. The prescription or requiredness essential to obligation as obligation is absent in such a world. But if obligation is absent in such a world and if obligation is essential to law as law, then moral law would also be absent therein. Moral obligation qua moral obligation, and so law qua law, requires prescription. But prescription requires a prescriber. And a prescriber, finally, is a lawmaker. Thus, natural law requires a lawmaker. Such a prescriber must also possess the authority to prescribe. And it’s hard to see what might possess the authority to prescribe intrinsic goods save goodness itself. But if goodness itself is prescribing, then goodness itself is exercising agency—is a person. So it is that natural law requires God—for natural law, as law, requires Goodness exercising personal agency.

In view of the foregoing, I conclude that Budziszewski is right to claim that there can be no natural law without a lawgiver. Moreover, he is right to reject the notion of an omnipotent lawmaker who is beyond good and evil and who constructs good and evil simply by commanding and forbidding. What natural law ultimately requires is a lawgiver who is Goodness as such.

Notes


Nature’s Lawgiver: On Natural Law as Law


11. Hobbes often calls the laws of nature “the means to peace” (e.g., *De cive* III.31, p. 151).


13. He refers to each person’s “end” as being “principally their own conservation,” *Leviathan*, XIII.3, p. 75.


15. For instance, he refers to those who pursue glory careless of their preservation as “madmen.” In this vein, he says, “the Passion whose violence, or continuance maketh Madness, is either great vaine-Glory; which is commonly called Pride, and self-conceipt; or great Dejection of mind,” *Leviathan*, VIII.8, p. 41. In *De homine*, he says, “Excessive self-esteem impedes reason; and on that account is a perturbation of the mind, wherein a certain swelling of the mind is experienced because the animal spirits are transported,” XII.9, p. 60. As Hampton suggests, the comment that immediately follows—“Proper self-esteem, however, is not a perturbation, but a state of mind that ought to be” (p. 61)—is staggeringly out of place in a system dedicated to value subjectivism; Hampton, “Hobbes and Ethical Naturalism,” 342–43.

16. Cited in Jean Hampton, *The Authority of Reason* (Cambridge: Cambridge University Press, 1998), 137. As C. S. Lewis says concerning instinct, one cannot judge the “comparative dignity” of instincts on the basis of instinct. For on only that basis, “there is no ground for placing the preservation of the species above self-preservation or sexual appetite,” *Abolition*, 36.


18. Though, to be fair, Hampton does not sharply distinguish instrumental rationality and hypothetical imperatives. Rather, I’m suggesting her own argument tells against any conceivable account of a moral system constituted entirely by hypothetical imperatives.
19. One could argue that this is why Aquinas presents the first and most fundamental precept of the natural law—“that good ought to be done and pursued and that evil ought to be avoided” (ST I-II, Q. 94, a. 2, p. 40)—as a categorical imperative. He then proceeds to describe certain goods to which human beings have natural inclinations. But human obligation with respect to these goods is not constituted merely by the fact that they are goods to which human beings have a natural inclination but also by the categorical prescription found in the first and fundamental premise of the natural law.

20. ST I-II, Q. 90, a. 1.


26. There is a version of the intellectualist thesis, often attributed to Aquinas, in which God is necessary to moral obligation but only indirectly. According to Anthony Lisska, “An act is right, Aquinas argues, because it is in accord with the requirements of human nature, not because it is reducible to a divine command. That God may have created the structure of human nature differently is not the issue. Of course that could have taken place. But once human nature had been established, certain moral rules follow from the divine archetype of human nature,” *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford: Oxford University Press, 1996), 115. See also Mark C. Murphy, *God & Moral Law: On the Theistic Explanation of Morality* (Oxford: Oxford University Press, 2011), 76–85. I disagree with this interpretation of Aquinas; still, I would argue that the intellectualist interpretation of Aquinas also falls prey to my argument below.


34. I argue this position more extensively in “Reason and Will in Natural Law.” See also C. Stephen Evans, Kierkegaard’s Ethic of Love: Divine Commands and Moral Obligations (Oxford: Oxford University Press, 2004), chaps. 1 and 5, and Evans, God & Moral Obligation (Oxford: Oxford University Press, 2013). According to Alasdair MacIntyre, “In [classical theism] moral judgments were at once hypothetical and categorical in form. They were hypothetical insofar as they expressed a judgment as to what conduct would be teleologically appropriate for human beings. . . . They were categorical insofar as they reported the contents of the universal law commanded by God,” After Virtue, 2nd ed. (Notre Dame, Ind.: University of Notre Dame Press, 1984), 60.