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Designing the “Law": Overcoming Textolatry in *Natural Law and Natural Rights* (1980)

Jude Chua Soo Meng

1. Introduction: Jurisprudence as Design

This paper discusses the Design of the “law”, only because the theorizing here has a pedigree in legal philosophy, and discussing law allows us to relate with and refer to particular jurisprudential texts where some of these ideas have been rigorously analyzed. In principle however, for this kind of institution-focused-study, “law” could have been replaced by other institutions or social phenomena worth thinking about, say “school” (Chua 2006), “poverty” (Alkire), “business” (Chua forthcoming), “marriage” (Chua, forthcoming), “professional” (Chua 200X?), and even “design” (Chua, in press), “policy” (Chua 2006) “photography” (Chua 2014), “supervision” (Chua and Lee *forthcoming* 2015). In any case, the study of institutions, such as law, and the attempt to answer the question "what is law?" in jurisprudence is actually an exercise in *Design* in the sense Gunther Kress means it. By “Design” is meant the critical *re-shaping* of a word-sign—in this case “law”—by exploiting the semiotic rescources available in order for it to become that (new) word-sign to mean that which matters to the theorist or user to refer to with that sign. Here the user/Designer offers a different translation of a word-sign so that the same *representamen* now points in *semiosis* to significations that mattered or are *significant* to the theorist. Because after being Designed the sign points to what is *significant* to the Designer, such a re-shaping of signs may be called “significal Designing” (c.f.

Welby, Petrilli XXXX, see Chua). This is contrasted with the mere *use* of a word-sign, where one simply employs the sign as it has been inherited, so that when thus used, the word-sign means for the user or theorist whatever it typically means by convention.

This is especially true if we accept the account of the development of jurisprudence in the Oxonian tradition as given in John Finnis' now classic *Natural Law and Natural Rights* (1980). By tracing the account of what "law" is, starting with H L A Hart's *The Concept of Law* (1957??) and his study of the legal subjects' "internal point of view" as well as *The Concept of Law's* methodological departure from the Austinian theory of law which defined law as the commands of the sovereign habitually obeyed – a definition derived from the observation of external acts of legal subjects – it becomes clear the question concerning what "law" is was never a naïve attempt to consolidate the common denominators of all that might be regarded as the "legal" (Finnis 1980:XX) Rather each stage of jurisprudential scholarship since Hart had been a conscious effort to choose to locate under the word-sign "law", those things which the theorist considered important to include under the phrase. Here the legal theorist was in fact significally shaping the conceptual word-sign "law", by selectively locating under the "law" those and only those meanings that the legal theorist considers important for the "law" to mean, regardless of what others have suggested should be its definition or meaning. John Finnis' *Natural Law and Natural Rights (1980)* furthers such an account of law that mattered *to the theorist who possessed sound ethical judgments*, arguing as he did that only the ethically sound theorist was best fit to develop law's focal meaning.

2. Two Notions of Textolatry

But the (significal) Design of "law" as it is articulated in that now classic text *Natural Law and Natural Rights (1980)* suffers from "textolatry", I would argue. It is nevertheless a textolatry that a complementary practice of photography can overcome, as I suggest below.

The notion of “textolatry” is borrowed from Vilem Flusser. By that I mean a kind of mediation between the (practical) truths which the (linear, written) text seeks to signal to the reader that at the same time *qua* media fails to sign that truth, and instead therefore leaves the reader unable to decode the text, and so unable to arrive at the intended, practical truths. It is analogous to the idolatry (see Flusser) that results when images are unable to sign the truths they seek to represent, and the *semiosis* therefore terminates in the image itself, rather than beyond it.

Now, the failure of texts to lead in *semiosis* to truths can be distinguished into at least two kinds. Allow me to distinguish therefore between textolatry in the strong sense, and textolatry in the weak sense. By “textolatry in the strong sense”, I refer to texts which were *intended by their authors* to achieve such and such significations but however fail to. It is sometimes argued that naïve God-talk suffers from this, when the author seeks to communicate something other-worldly and divine and believes he can but ends up leading the reader with idolatrous, anthropormorphic concepts. On the other hand, I employ “textolatry in the weaker sense” to refer to texts which, whatever was the intention of their authors, fail to signify the relevant truths they discuss and sign. In this latter sense, I mean by textolatry in its weaker sense a kind of failure of the text to sign truths, where the failure is endemic to the nature of texts in themselves. We will see an example of this below when we discuss *Natural Law and Natural Rights (1980).* Suffice to say at this point that such a limitation of the text may well have been grasped by author himself, or even if not, no attempt however is ever presumed by the author to make the text perform in ways that exceed what the text can possibly do. Whereas in the former, stronger sense, the failure is on the part of the author whose incompetent use of texts and ignorant grasp of the limitation of the texts has him imagine that the text he employs can successfully arrive at his hoped for *semiosis* and thus he vainly commits the set of text to sign those realities, the result of which is that the texts fail to sign the intended realities despite his own belief that they do.

Identifying textolatry in the strong sense is fruitful if one can correct mistaken beliefs by

writers of the signaling effectiveness of their texts. Identifying textolatry in the weak sense, on the other hand seems pointless especially when the author himself is a careful writer and is already sensitive to the limits of the texts which he employs. One could also add that it is possibly self-evidently true that all texts have *some* kind of limitation as a media and so will suffer *some* kind of textolatry in the weak sense; thus the identification of any form of textolatry in the weaker sense appears completely banal a discovery. Yet discussing textolatry in the weak sense still can be fruitful *if (and only if) the discussion of these limitations can help us identify ways that the use of another media can help overcome these*, such as is the case with photography (see below). Meaning, for a study of textolatry in the weaker sense to be meaningful, it should always be accompanied by insights into ways it can be overcome by media other than the written text, lest the identification of textolatry in the weaker sense stands accused of stating the obvious. That said, it seems to me that any such discussion can be very important, because such a discussion does not just arrest the incompetent writer's erroneous use of texts (as one might do after identifying textolatry in the strong sense), but furthers the critical writer's exploration of other ways which his intended tasks can be better achieved given the limitations of his tools, which limitations he currently appreciates. The first points out mistakes (which when corrected still leaves us with the generic problem that plague texts viz., its limitations), whereas the latter offers a solution to problems grasped.

In fact this is what I hope to do. My charge in this paper is that the now classic legal text, John Finnis' *Natural Law and Natural Rights* (1980), suffers from textolatry in the weaker sense. However, such a textolatry could be overcome with the practice of photography, or at least can benefit from a complementary study of the law by way of photography, a kind of photographic jurisprudence. In this way, I corroborate Flusser's thesis, at least in my study of jurisprudence, that the appeal to technical images in photography is an effort to overcome textolatry, although I should say here at the outset that unlike Flusser, I do not share his pessimism regarding photography and the way that it is subject to an apparatus programme.

3. What Natural Law and Natural Right *Really Means but Fails to*

Let me start by first detailing where *Natural Law and Natural Rights (1980)* is textolatrous, and later, why specifically (only) in the weaker sense (see below section 4). To do this we need to recall that the argument in *Natural Law and Natural Rights (1980)* is that "law" is a Designed concept (c.f. Kress, see Chua). To Design this concept *well* so that we arrive at its focal meaning or central case, or its significal sense (Chua, Petrilli, Welby) we must have at hand the first principles of practical reason, also called in the thomistic tradition the "natural law", which direct us to the basic aspects of human flourishing. These basic aspects of human flourishing Finnis calls the "basic goods". These are, at least in the 1980 text: knowledge, friendship, life, skillful play, aesthetic experience, religion and practical reasonableness (although there will be an addition of a distinct good called "marriage" later; for a discussion of the good of 'marriage' and its relation with the goods of 'friendship' and of 'life', also see Chua, forthcoming *Semiotica*).

The site of the textolatry is not necessarily in those places in the text where Finnis seeks to communicate the truth of these basic goods and corresponding principles which direct us to seek and/or do them as choice-worthy values. Indeed it is tempting to suggest that if anywhere this is how *Natural Law and Natural Rights (1980)* would be textolatrous. Against more traditional interpretations of natural law theory, Finnis argues that the natural law is *per se nota*, meaning, they are self-evident in the sense that they are not derived from prior justificatory premises, but are in fact grasped. This departure is typically criticized as controversially untenable, particularly for the apparently more sure-footed or at least more self-assured traditional thomist who believes he enjoys the security of a kind of foundationalism, because he thinks he can derive the natural law from a prior metaphysics or an account of human nature. The traditional thomist might therefore charge Finnis with the dissolution of the natural law, by way of kind of serious or strong textolatry when he points his reader, with his textual exposition on the natural law, to what in fact for the traditional thomist is a

chimera, rather than the natural law itself. To this it is important to recognise that traditional thomists are potentially subject to the same charge, since the attempt to derive the set of normative precepts from a descriptive account of reality is itself deeply problematic (see Finnis reply to McInerny). Of course any *tutoque* response simply says that the critique is no better than one is; so it is useful to point out that there are, over and above the anthropological evidence that Finnis himself cites (see Finnis 1980 XX), current empirical studies that corroborate some of the claims *Natural Law and Natural Rights (1980)* makes regarding that grasping of the natural law and their self-evidence (see Chua *Signs and Media*, in print*).* But there is another way Finnis survives that charge: Finnis nowhere – and perhaps this seems very ironic – sets himself out to "prove" the natural law.

In fact, precisely where Finnis seeks to make a case for these basic goods and their practical principles, the text is attentive to the limits of the writing tools for the task at hand. Thus for instance, after having explained the reality and the self-evidence of the natural law, Finnis admits point blank that it all sounds "fishy"—an admission which gestures his appreciation of the difficulty of persuading his reader of the truth of the natural law. Again when discussing the grasp of the basic good of (truthful) knowledge (which is one of the basic goods), Finnis offers no more than a straight forward descriptive account of how one moves from the inclination to know, to the grasp of the basic good of knowledge. In the immediately following extended discussion outlining the defense of the good of knowledge, Finnis is clear that this is merely a *dialectical argument,* premised on the interlocutor's explicit denial of the good of truth, showcasing the performative self-contradiction apparent in such a denial. This establishes merely a speculative self-evidence of the basic good, much in the same way the "*cogito ergo sum*" is logically self-evident because its denial is incoherent. Here *p* self-evident because ~*p* is always incoherent, and *modus tollens,* therefore *p* has always to be true.

This is *not* an example of how the natural law is grasped as true and as a binding obligation when thinking practically without demonstrative proof, and thus "self-evident"; whereas it is this latter crucial sense that the natural law is self-evident: in the *different* sense where *p* is self-evident

because it is grasped as intelligible and normatively binding, even if ~*p* is not always (logically, speculatively or performatively) incoherent. There is also the observation to be made, that when discussing and listing the other basic goods, there is no similar dialectical defense of their reality and choice-worthiness. (In fact Finnis himself admitted that besides this dialectical argument in defense of the basic good of truth, he has no others in relation to the other basic goods, an admission he made during tutorials with me (and Timothy Webster) at Notre Dame in 2003).

This suggests, to the credit of its author, *Natural Law and Natural Rights (1980)* does not suffer from textolatry in the strong sense: the text is aimed at articulating an account of the reality of the first principles of practical reasoning and the choice-worthy basic goods and there are indeed thought experiments and exercises of remembrances that do, arguably, deliver on the promise of surfacing the basic goods *to the extent that they aim to do*, which is to say, within recognized and openly admitted limits. Finnis does not claim to make them do more than they can, and indeed here and there acknowledges the challenges of achieving the task at hand with these.

But there is, to my mind, a textolatry that is interesting to identify. What as a *written* work *Natural Law and Natural Rights* (1980) fails to develop—because *qua* text it cannot—is the potential that the act of concept formation or selection has for leading the theorist to a grasp of the natural law and the basic goods. Recall: the task of identifying the focal meaning, which Natural Law and Natural Rights (1980) recommends the theorist do, requires the guidance of an evaluative criteria, given in the practically reasonable viewpoint. It is such a viewpoint which offers the theorist a sound account of what are the basic (common) goods constitutive of human flourishing, with which to relate to an account of law, thus arriving at an account of the law that matters, and is thus focal, as said above. Currently, however, a fair reading of what Finnis has in mind here requires the *importing* of the practically reasonable viewpoint, with which to discern that focal meaning of "law". Such a practically reasonable viewpoint, with its grasp of the basic goods, is known or developed prior to and separately from the evaluative development of the focal meaning of law. Having arrived at such a practically reasonable viewpoint, the theorist recollects its deliverances and calls on that body of

ethical insights in order to shape, construct and develop the focal meaning of "law". Thus *prior* to the construction of a concept of "law" as the "coordinated pursuit of the basic goods; guided by the principles of practical reasonableness and attentive to moral absolutes; and subject to the need for *determinatio* when prescribing precise prescriptions concerning what is to be done, etc. etc." (c.f. Finnis, 1980, passim), in the earlier chapters, Finnis offers arguments and expositions on behalf of the reality and veracity of the seven basic goods, as well as the principles of practical reasonableness that follow from these. When reflecting on the central case of law, however, Finnis' focus is merely on *applying* that account of basic goods given in the practically reasonable viewpoint. Thus in relation to the act of discerning the focal meaning, the grasp of basic goods has epistemic priority. The discernment of the focal meaning achieves just that – the shaping construction of the focal meaning. The point is that the exercise of developing the focal meaning does not also concomitantly aid our grasp of the very basic goods.

And perhaps this is not incorrect; we cannot in fairness, expect anything other than this. But why not? Why cannot the act of shaping the focal meaning also deliver the very basic goods and the practically sound viewpoint which can be employed as the evaluative criteria to shape the focal meaning? There are in fact some reasons, internal to the thomistic and new natural law tradition that Finnis works from, to think it should be able to do that.

For a fact, the construction of the focal meaning is a kind of open ended exercise that leads one straight to questions about what matters, period, and not just what is important for the law. Of course, one is thinking about phenomenon that is in some way fenced in by the notion of "law" and neighbouring concepts in that field. So whatever one thinks about as one is developing the focal meaning, has to have some form of relevance to law. Thus whatever ideas one considers should either itself be immediately recognizable as constituting the idea of "law", even if controversially, or it should have some kind of relation, however minor, to what in turn can be put under the category

"law". Even with these ties, if you will, the consideration of what, amongst these limited field of possibilities will need to be guided by a normative criteria of importance and choice-worthiness that judges what is important and choice-worthy – not merely about beings or phenomenon in the field, but of what is important and choice-worthy *in themselves.* As explained above, at the end of the day, only a sound grasp of what is important in themselves allows the theorist to develop a sound grasp of what is important in the field, since what is important in the field is inevitably what under "law" should be relevantly related to those things that are important in themselves. And so in relation to questions about what is important in "law", one ultimately needs to inquire after the question: "what are in themselves important, and should be sought for their own sakes?" This throws the inquiry open.

Because at this point, as one scans about for some criteria with which to use in order to develop a focal meaning of law, one will have to confront the question: what is choice-worthy for its own sake? Here, *this* inquiry is truly open ended. For *this* question is after "what is, without qualification, important?", and not: "what within the discipline called "law" is important?" (although after answering this question about what is important in itself, then follows the inquiry about what should be classified under "law" as important, guided by the answers from the first inquiry). In this way, answers to these questions will not be guided by professional conceptions of the legal. Rather such questions are primarily ethical ones. They are questions about what, from the point of view of moral philosophy (and not legal theory), are important for human beings to have and seek. When undetermined by any kind of agenda, but attempted in a climate of intellectual honesty, one is inevitably confronted by the need to consider *ethically,* what, at the end of the day, matters in itself. What really matters? What do we need to seek and do, that would be worth seeking and doing, for their own sakes?

But such questions at this stage of the *ethical* inquiry process are not merely invitations to

recall and import a set of ethical norms identifying basic goods that had been previously grasped, as Finnis appears to suppose. The very process or act of asking oneself these questions, I think, can also be *that exercise through which* the grasping of the basic good occurs presently. Meaning, it is not merely a case of importing a set of basic goods grasped previously. Rather, what could happen may well include the grasping of these basic goods *here and now*, resulting in the present recognition of a set of values as basic goods that, prior to this inquiry, had not been grasped as goods. How so? Well, after all, the self-interrogating inquiry into what matters is fundamentally an exercise in practical reasoning. Such questioning interrogations into what really matters, when performed in an open ended way, makes the agent decide with full interest and seriousness what he or she should do and choose, and so puts the agent into the mode of reasoning that is fully practical (as compared to the merely speculative or theoretical), and entry into such a mode of thinking has the agent open to and also attentive to the natural law. During this event, the natural law can "show", to borrow from phenomenology.

All this would suggest that, even in the case of the development of the focal meaning of law, the theorist would be involved in a mental exercise that opens his mind and will to the "showing" of the first principles of practical reason and their prescription to seek (and do) the basic goods. Now Finnis in *Natural Law and Natural Rights (1980)* nowhere develops this possibility, which I think needs to be developed. Indeed this way of arriving at the practically reasonable viewpoint informed by the "showing" of the natural law gets to the heart of the new natural tradition. An important claim that distinguishes the new natural law theory from other competing thomistic natural law or virtue ethics moral philosophy is the position that the theorist grasps underived and hence self-evident principles of the natural law which are given in and therefore grasped during practical thinking. Whereas the other ways of confirming their reality and veracity, such as through a dialectical defense of their undeniability is merely ancillary. Even the suggestion *pace* Aristotle to trace the ends of one's activity all the way to some final end which is sought for no other reason does no more than to invite the acting person to recognize that *that* final end is one that he *had grasped (in the distant or*

recent past) worth seeking for its own sake, presumably when he was thinking practically. Without having already grasped some end worth seeking for its own sake, he could not have embarked on that series of actions terminating in that particular final end, which he now recalls and analyzes. In other words one of the major premises of *Natural Law and Natural Rights (1980)*, amonsgt other things, is the point that ethics of the practically reasonable viewpoint (which is employed to Design the law), and specifically an ethics whose the first principles are the precepts of the natural law, is arrived at when thinking *practically.* Thus following the *Natural Law and Natural Rights* in 1980, Finnis spends the great part of *Fundamentals of Ethics* (1983)—which is just as textual and hence subject to the same criticisms—to clarify this point. But entering the mode of thinking we characterize as practical is afforded by that kind of open-ended evaluative inquiry into what matters, period, performed precisely during these moments of selective evaluation of the focal meaning of law. My point is, to "read" *Natural Law and Natural Rights (1980)* correctly, is not to read merely what Finnis put down in *the text* of *Natural Law and Natural Rights (1980)* and to neglect what has been omitted in that text (and we might add that even in the additional new chapter of the recent second edition these related ideas were not developed or addressed), but to decode the *Natural Law and Natural Rights (1980) qua* text in the way I have been alluding to above: that read correctly *Natural Law and Natural Rights (1980)* really points to the insight that the natural law is shown in practical thinking, which is afforded in the very performance of an evaluative discernment of the focal meaning of law. Indeed I think this is insinuated by the promise that *Natural Law and Natural Rights (1980)* is not "about ethics" (Finnis 1980:XX), but is the doing of ethics – an promise that for reasons that will be apparent (see below), *Natural Law and Natural Rights (1980)* did not fulfill well.

4. Textolatry in Natural Law and Natural Rights (1980)

For: furthering this line of thought is hindered by the fact that the thesis cannot be easily

communicated unless we steer away from the traditional *textual* presentation of any such an argument. Meaning to say, further discussions of jurisprudence and of the Design of the law cannot be merely centered on a jurisprudential text, which will risk perpetuating what I would characterize as the mis-reading of *Natural Law and Natural Rights (1980).* This is a pedagogical point. What I will suggest is that, if the practical reasoning and its "showing" of the natural law to be experienced by the reader(s), they should not be left to read and decode more word-based jurisprudential texts, but should be exposed to a different educational or pedagogical mode – a visual mode involving the photographic collection of images – and be encouraged to Design the law by thinking with the textual sign *and visual signs, and be given the occasion in their Design curriculum to encounter and decode visual signs and their significations.*

Consider this: the discussion of the evaluative selection of the focal meaning of Law in John Finnis' *Natural Law and Natural Rights (1980)* is done purely in the written form. Indeed Natural Law and Natural Rights (1980) as it is presented is presented in writing, and this immediately limits what *qua* a textual medium the work Natural Law and Natural Rights (1980) can do. What we cannot expect it to do, or to do well, in all fairness, is for the written description of the evaluation of the focal meaning, even if demonstrated or exemplified in the later chapters of *Natural Law and Natural Rights (1980),* to showcase that kind of interrogative inquiry that puts the inquiring agent into the mode of practical reasoning by which the natural law shows.

Because *qua* written, the presentation of these ideas are mediated with symbolic textual codes removed from sense experience. That's the first point. As the reader reads the text, he is invited to decode the word-signs which refer him to concepts. Even if some of these concepts by further *semiosis* calls to mind sense experiences, these are but abstract memories of the original sense experience, rather than a true and fresh re-impression of the human sense apparatus. Now, any attempt to have the reader *think with the text, and think in terms of the concepts signed by the text*

while developing the focal meaning could not have likely resulted in the showing of the natural law, in the way that we would have liked it to. Being abstract and thus far removed from sense experience, the text does not effectively put the reader into the ontological state that another agent, say someone who confronts real-life sense experiences, and deliberates in order to discern what is to be done, might be immersed in. In the latter case, the agent truly deliberates between possibilities given in sense experience, and sense experience is crucial for the grasp of the natural law. Thus Aquinas says in *De Veritate,* Q. 16, Art. 1:

> As Dionysius says, **divine wisdom "joins the ends of nobler things with the beginnings of lesser things." For natures which are ordained to one another are related to each other as contiguous bodies, the upper limit of the lower body being in contact with the lower limit of the higher one. Hence, at its highest point a lower nature attains to something which is proper to the higher nature and shares in it imperfectly.** Now, the nature of the human soul is lower than the angelic nature, if we consider the natural manner in which each knows. For the natural and proper manner of knowing for an angelic nature is to know truth without investigation or movement of reason. But it is proper to human nature to reach the knowledge of truth by investigating and moving from one thing to another. Hence,*the human soul, according to that which is highest in it, attains to that which is proper to angelic nature, so that it knows some things at once and without investigation*, although it is lower than angels in this, that it can know the truth in these things only by receiving something from sense. However, there is a double knowledge in the angelic nature: one, speculative, by which angels see the truth of things simply and independently; and the other, practical. This second type of knowledge is posited both by the philosophers, who hold that the angels are the movers of the heavens and that all natural forms pre-exist in their foreknowledge, and by the theologians, who hold that the angels serve God in spiritual duties, according to which the orders of angels are distinguished. *Hence it is that human nature, in so far as it comes in contact with the angelic nature, must both in speculative and practical matters know truth without investigation. And this knowledge must be the principle of all the knowledge which follows, whether speculative or practical, since principles must be more stable and certain***.** Therefore, this knowledge must be in man naturally, since it is a kind of seed plot containing in germ all the knowledge which follows, and since there pre-exist in all natures certain natural seeds of the activities and effects which follow. Furthermore, this knowledge must be habitual so that it will be ready for use when needed. Thus, just as there is a natural habit of the human soul through which it knows principles of the speculative sciences, which we call understanding of principles, so, too, there is in the soul a natural habit of first principles of action, which are the universal principles of the natural law. This habit pertains to synderesis. This habit exists in no other power than reason, unless, perhaps, we make understanding a power distinct from reason. But we have shown the opposite above. It remains, therefore, that the name synderesis designates a natural habit simply, one similar to the habit of principles, or it means some power of reason with such a habit. And whatever it is makes little difference, for it raises a doubt only about the meaning of the name. However, if the power of reason itself, in so far as it knows naturally, is called synderesis, it cannot be so considered apart from every habit, for natural knowledge belongs to reason by reason of a natural habit, as is clear of the understanding of principles.

Whatever one makes of Aquinas' medieval worldview and his assimilation of Dionysian theological

categories to explain why humans grasp the natural law by way of *synderesis* in the way we do, Aquinas' point is fundamentally a down-to-earth, Aristotelian one. Here he is saying what ethics is not: ethics is not a Platonic exercise in armchair philosophy. One needs to have *sense experience* to grasp the concepts in ethics and their veracity or normative validity. Of course, a reader may have a good store of memories of sense experience, but the point remains that such a collection of sense experience is gained *outside* of the thinking with this text. Without this externally acquired collection of sense experience, the text itself is impotent insofar as the epistemic seeding of the natural law is concerned. But this epistemic seeding of the natural law, or the "showing" of the natural law, is what *Natural Law and Natural Rights (1980)* seeks to (but now we see risks failing to) do.

Furthermore, reading a text is not exactly an ontological state to be in to enter that practical mode for the natural law to show. As the person reads the text, his choices and deliberations invite introspection. Thinking risks becoming *historical*. That is the second issue. Perhaps it has to do with *reading texts* as such: one reads word-signs and the mind is constantly recalling meanings conventionally signed by these words, and then formulating an interpretation of these. One reaches into one's own memory to develop these interpretations. How else can one offer an interpretation, except by a constructivist employment of what one already has in one's mind? Such a historical consciousness is focused on the remembrance of event(s) in the past, which which to develop an intelligible appreciation of what the text is alluding to. One naturally thinks back in time, searching one's store of axiological beliefs—beliefs which have already been formed. One looks *backwards* into oneself, searching about. This habit of mind, once entered seems to me less conducive for practical thinking than has been noticed: here one more easily draws from and hence imports ethical ideas one has already formulated and which one already believes correct, along with ideas and impressions one collected in the past. So one is focused on a form of speculative recall in reproducing ethical ideas one already thinks true, rather than being present to and open to the "showing" of the natural law in practical thinking. But cannot historical conscious, albeit due to

reading the text, also be practical in the sense that it shows the natural law for some people? Yes, but not typically because of historical recollection; rather one recalls the insights gained in a kind of a-historical practical thinking and gained outside of and prior to the current reading and thinking with the text. If so, then the point is conceded that the text is in that respect futile. Of course, a person with great powers of imagination may deliberate as if he were someone experiencing choices in real life, and thus for him the natural law may "show", and this has to be conceded, but to that I might suggest that this would be the exception rather than the norm, particularly since the habit of reading scholarly texts mutes the imaginative faculty somewhat in favor of abstract conceptual recall. In any case the point is not that thinking with a text inevitably becomes instrospectively historical and speculative. Rather the point is that there is a risk it would, because the introspective historical route is very seductive. So already the text *qua* text is "set up" to be mis-understood, and thus to be wrongly decoded.

So there are problems when thinking with a text, compared with real life evaluative thinking. In each ontological state, the agents tends to receive different signs and significations respectively, and the experience of reading and thinking with the text does not quite compare or match up to the agency of real-life choices when confronted by a reality mediated through sense experiences. As a written work, there is a textolatry in the weaker sense in *Natural Law and Natural Rights (1980)* where the signification of meanings by linear writing fail to put the reader into a similar semiotic state that someone who in is in real-life scenario and thus an ontologically distinct state of being might be, and so leads to challenges when decoding the text correctly. Now this textolatry is inherent to the text; firstly, texts and its signaled concepts represent and thus distance us from the semiotic experience that arises from the ontologically different real-life (evaluative) *sense* experience relevant for the "showing" of the natural law; secondly, texts when read set us on a historical mode of thinking, which risks steering thinking in the direction of speculative recollection (for application), rather than the (evaluative) practical thinking which "shows" the natural law.

5. Photography and the Overcoming of Textolatry

Both causes for textolatry can, however, be addressed by complementing the study of the legal text with photography. In this case, the reader is invited not just to read a text, but to engage in a photographic exercise. He is asked to *take pictures*. But of what?

The photographic study. Well, as a photographic and visual study of law in its focal meaning, he is asked to go out (into the streets, say) and visit the whole panorama of visual possibilities and from that panoramic field of possibilities select that which *to him* should belong to or be related to law in its focal sense, and so to collect images of these only. When doing so, he is of course welcome to collect images that capture what to him is important to capture, even if visually there is no explicit connection to the legal; such a connection can be developed much later. He should have limited frames—say 36 frames—on a camera. I would suggest shooting black and white, because the possibility of capturing an image in color risks narrowing the photographer's choices given the temptation to collect only the colorfully beautiful. Of course, if this is not a temptation for the agent, then shooting in color would work well, but once deprived of the possibility of color, it is easier to avoid being obsessed with merely collecting colorfully beautiful images, and safe from this seduction, it is now easier for the theorist photographer to open to other conceptions of the aesthetic not having to do with the colorful, as well as other kinds of values or basic goods beside beauty. I would recommend shooting a black and white *film* camera, if only because it removes the temptation to “chimp”, which is to constantly look at one's image on a digital camera's LCD screen, thus distracting from the task of shooting and looking at the things one's shoot. Of course this may be addressed, but in my experience not very successfully, by simply doing one's best to resist the temptation to chimp. The camera should be small and not obtrusive, such as a rangefinder (like the Leica Screwmount or M series) or cameras which share the rangefinder ethos (like the Fuji X100 series), so that it does not attract unnecessary attention and allows the theorist to move into places he

wishes to be to take pictures more freely. It is useful and a pleasure to have a bright, glass prism viewfinder although framing one's picture through an electronic viewfinder or the digital camera LCD might work.

After that exercise, it is possible that the task include the further selection of 15 – 20 choice frames from amonsgt the 36 frames (say) taken. The selected images are then reflected on, and reflections could discuss what went through one's mind when taking or selecting these images, and what were the (normative) *reasons* that these images appealed to the theorist. And the point of that reflection and discussion is to consider what normative ideas "showed" for the photographer theorist. These showed ethical ideas, which are principles as well as choice-worthy goods, can then be employed theoretically to guide the construction and Design of the focal meaning of law.

Some preliminary remarks. Such a photographic exercise is intended amongst other things as a visual practice parallel to the act of developing the focal meaning of law, guided by readings of jurisprudential texts. It is meant to complement, rather than replace, the reading of the relevant texts like *Natural Law and Natural Rights (1980);* the photographer-theorist should have some familiarity with these texts, at least enough to understand that when capturing the law with a camera, he is seeking to capture a focal meaning of the law, and is not engaged in photography for any other irrelevant motives. Like the process of developing the focal meaning of the law when thinking with the text, one is evaluating and choosing what should come under that word-sign law. When taking pictures of what best signifies the law, the photographer theorist is also selectively evaluating what images best deserve to be included in that photographic frame, and only these a set within the framelines of the viewfinder. So there is in this photographic study, like the working out of the focal meaning apart from this photographic study, the need to choose what is important in law, *as well as* what is important in themselves, which the theorist will then relate with the law in its focal sense as he sees it. Like the development of the focal meaning of the law aided by the reading of texts, it is possible that one cannot locate present examples of law that address or relate with a particular value or basic good (since current legal entities may actually be situated in the far periphery of the concept

of law compared to the central case), so also it is possible that the photographic theorist may not be able to capture an image that instantiates the legal connection with a particular basic good or value which he thinks important. Nevertheless, the photographer theorist, like the textual theorist, could still identify that value, and then develop an preferred account of law that relates or addresses that basic good. Finally, when identifying the value or basic good that is important, it is not necessary that one captures a visual example that positively instantiates that good or value; it is acceptable for the photographer theorist to capture an image of the *negative* example of that good or value, by capturing an image which instantiates the deprivation or absence of that good, and in discussions explain that the image was meant to highlight the basic good (and its relevance for the law) contrary to the evil of its absence as represented here in the photograph. Still the main parallel between the textual theorist and the photographer theorist is in their ongoing need to *reflect selectively and evaluative-ly on "what might be the choice-worthy goods?" first and foremost*, and then in relation to these, the kind of law that would be related to these and that would fit the central case. In thus reflecting, the theorist is able to enter into the practical mode of thinking in which the natural law "shows". Excepting that, as has been argued, given the textolatry of the guiding jurisprudential text, the textual theorist cannot do this well; and here is where I suggest the photographic theorist does better because with the camera he is better placed to overcome the textolatry of *Natural Law and Natural Rights (1980).*

There are several ways an exercise such as this overcomes the textolatry of jurisprudential texts like *Natural Law and Natural Rights (1980)* and its related two causes highlighted above.

Overcoming the un-availability of sense experience. The theorist is now put in touch with sense experience, or at least sense experience is closer to him, and he is re-inserted or re-situated into that ontological state which parallels or even instantiates that ontology of an agent confronting real-life choices, engaging the sensed world as one does so. Therefore there is a much better chance that, with that ontological state in which there is sense experience, there can be the *semiosis* that shows the natural law. Why? For a start he is *out there*, *looking* through a viewfinder, into the world

and having a visual sense of the world. *He is seeing* and not just thinking or imagining. Furthermore, the photographic exercise lures him into the world where is also *hears, smells* and sometimes bumps into and so touches. If he is in a scene and part of it, he may have emotional feelings which he also experiences. The camera is like a behavioral prosthesis, in the sense that it aids the re-situation of the theorist into the world that is existentially relevant. He is relocated into the life-world of and invited to focus on real-beings (*ens*), rather than be trapped in a life-world built with intentional beings (*ens-intentionale*).

Overcoming the historical consciousness. The photographer is also put in the present. This is very apparent—he is looking, scouting around for what *at present* is available in his field of visual possibilities. And indeed this is the ongoing consciousness: there is a "*presence-ing"*, if I may. Of course, collecting images often presupposes and employs a point of view, which is already had. Thus there is no preventing the photographer/theorist from identifying and collecting images that instantiate what *he already thinks important and important in relation to law.* Here there is merely in importing of a ethical criteria *already believed true.* Yet because he is going about collecting images against the context of a field of infinite visual possibilities *not* of his design and imaginary construction, there is a good chance he can *encounter* a frame that is very different from what he thinks would be relevant. Indeed, there is quite an element of serendipity in photography—sometimes possibilities surface, and one sees it is sufficiently "interesting", and one captures it before trying to process it theoretically by importing and applying one's presupposed ethical ideals. Here it is the reality and image calling out to the (puzzled and amused) photographer, rather than the photographer calling out to the image based on his interpretive frame. This frame may initially be a kind of saturating phenomenon (cf Marion), because un-receivable by his ethical paradigm and be judged irrelevant, but there is also a chance that it can stimulate a revision of that ethical paradigm. The latter is in fact possible. Quite often our ethical paradigms are inherited, cultural beliefs, or else are the consequence of unreflective forgetfulness – and the encounter with the visual "other" may provoke, at a deeper level, certain unsettling insights and associated feelings, say

of indignation or empathy. The photographer-theorist is welcome to collect an image of this, which he considers interesting but which he may not yet have the relevant discourse to capture its significance, perhaps because his inherited ethical paradigm and ethical discourse does not fit with or cannot capture it, and would typically displace it. Furthermore, experienced photographers will testify that at times, it is after the image is taken and developed, that when one is looking at the photograph that then and only then one sees something that one had not observed when the frame was shot: here the image "calls out" to the photographer and invites him to try to make sense of its prickling attractiveness, its *punctum* (c.f. Roland Barthes).

6. Conclusion: Some Final Considerations Concerning the Camera Apparatus

In this paper I have tried to make the case that the practice of photography can be employed to overcome, to borrow Vilem Flusser, a kind of weak textolatry inherent in legal texts, such as in *Natural Law and Natural Rights* (1980) by John Finnis. By putting the photographer-theorist back into the world of *sense* and by *"presence-ing"* him, the practice of photography can re-situate him ontologically and semiotically into that life-world of practical thinking in which the natural law shows. It is this grasp of the natural law that is the methodological center-piece in the Design of the law in the philosophy of law, without which *Natural Law and Natural Rights (1980)* and the new natural law tradition with it appears theoretically vacuous.

But one cannot escape the objections raised by Flusser himself concerning the photographic apparatus: that it is programmed and it steers the photographer to do what the camera's *programme* wishes to do. This suggests that, rather than achieve what I have in mind, the user of the camera might end up simply performing as the camera wishes. If so then it might be suggested that if there is indeed the "showing" of the natural law, this "showing" may really be due to the camera programme rather than the practical thinking and related agency of the photographer-theorist. This objection deserves a separate treatment, but I would still put down some brief responses. I think there is some in

with Flusser's criticism of photography: there are certainly photographers who dance about in play, collecting images from all kinds of viewpoints, and are focused on and trapped in doing what the camera apparatus affords and so leads him to do, rather than use the camera as a tool to achieve his own aims. As current examples of what he is criticizing one thinks of the photographer who goes through every possible application in his Iphone and creates different images with different color combinations, textures and distortions, or the Lomography photographer who experiments to see what kinds of images result from cross-prossessing or expired films. But the photography as I recommend is not done like that. Rather my photographer theorist uses very few functions of the camera and limits the image taking to black and white. This minimizes the obsession with the camera and its program, causes the camera to become “transparent” or “invisible” to the photo-taking event, and allows the photographer-theorist to “do *his* thing”, in this case to focus on the act of locating images of what to him matters *in the visual field*, rather than images that the camera can produce. His interest is not in the production of interesting images as such, but in the ethical ideas associated with these images. Further my photographer-theorist is working with a limited number of frames, and he cannot afford to be a post-modern collector of infinite viewpoints. But these considerations, I admit, deserve further critical discussion.

Appendix:

Gallery of black and white photos taken and short reflections in the photographic study of "Law", in the manner described above:

[Here I will insert a link to the Leica Photographie Gallery which will showcase samples of my black and white images – to be ready by early November 2014]

THE END

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