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NATURAL LAW – A LIBERTARIAN VIEW

Anthony D’Amato

In the subjugating of humans, attitudes are more powerful than armaments.
-- Ben Hecht, *Perfidy* 43 (1961).

INTRODUCTION

I will offer in this essay a radically old way of thinking about the proper limits of law. The theory and practice of natural law were worked out in ancient Greece and Rome before organized religion co-opted it. Natural law is limited law; it extends only to the edge of society’s needs. Beyond that edge is no-law.

This idea is strange to us today because we are thoroughly immersed in the positivist conception of law. Positive law is boundless; it extends to infinity in all directions. Libertarians who abhor the idea of big government elongating its tentacles into the private lives of citizens often fail to realize that it was positive law that paved the way. Once legal jurisdiction has penetrated into what once was our sphere of privacy, big government is sure to follow.

Putting aside natural law and positive law, what is law? Law in today's world is other people telling me what to do. They threaten to punish me if I don't do what they command. How can it be that I, a person who was born free and deserving of no less consideration than any other human being, find myself on a planet where other people are telling me what to do?

Let's take things from the beginning. When were we first aware of law?

LAW IN THE FAMILY

Without knowing words like law and manipulation, you and I began to realize around the age of three that our parents were manipulating the living daylights out of us. Do this; don't do that. Do not play in the street, do not hit your younger sibling, do not throw food. Rules, regulations, laws, ordinances, and norms all seem to have been invented at the drop of a pacifier. And how efficiently did our parents calibrate the punishment that would fit our crimes: no television tonight, no dessert, pick up the toys, bedtime in one hour!

We first interpreted what our parents told us to do as "commands," even though we did not know that word either. Since our parents through their commands were always interfering with what we felt like doing, we believed we had every right to disobey their commands when they were not looking. It took us several years to realize that we should obey the commands even when our parents were not watching us. This is when the idea of "command" in our minds morphed into the idea of "law." A law was something that made its home in the rational part of our brain, blocking our ability to find reasons to disobey it.

But we also began to see something very attractive about law. Unlike commands which could be arbitrary and ad hoc, laws carried with them a sense of equality, fairness, and reciprocity. Johnny steals a cookie from the pantry; his mother catches him and cuts off his television for that evening. But Johnny says that when Joey stole a cookie, she gave him a second chance. “All right,” says the mother if she is wise, “since this is the first time for you, I’ll give you a pass. But don’t do it again.”

Our parents’ commands became law for us because we trusted our parents to act in our best interests and to apply the laws equally and without discrimination. We realized that we were getting the free benefit of our parents’ greater knowledge and worldly experience. They were training us for a time when we would be on our own. They were on our side against all the evils and dangers of the world. We accepted their dictatorship because we realized that they truly *cared for us*.

PUBLIC LAW

When we left home at some point in our teenage years, we encountered a new set of regulations that replaced the old family law. But there was a striking difference: we quickly learned that public officials enact laws that benefit themselves, not us. Their laws are designed to help their families, relatives and friends, cronies and campaign contributors. To be sure, much of the time their laws help society as a side-effect of helping themselves. Thus their self-interest can spill over to help you and me.

In addition to feeding at the public trough when they can, legislators often go on a power trip to foist their own views (including their religious views) onto the public. They

enact legislation that does things like criminalizing victimless interactions, banning movies or other forms of entertainment on the Sabbath, banning pornography, forbidding the intake of drugs, placing obstacles in the way of divorce and adoption, and intruding in many other ways into people's privacy. Although these statutes have the same look, feel, and enforcement potential as other statutes, you and I at least have enough free will to refuse to dignify them by the name "law."

LAWS THAT ARE WORTHY OF OBEDIENCE

As I conceded above, society makes many laws for its own benefit—to maintain and secure itself through time. You and I profit from a well-functioning society. We can take advantage of schools, museums, the theatre, films, social clubs, opera, golf courses of sports stadiums, shopping malls, highways, national parks, concert halls and outdoor concerts,. In addition, economies of scale make it possible for society to provide 24-hour police and firefighter services, taxis, hospitals and emergency rooms, and ambulances. Every member of society benefits from a standing army and navy that protect society from foreign enemies or sudden aggression. Our obligation to obey society's laws, as Socrates said, arises from our willing acceptance of our gains from living in society.¹

Thus, as we step out into the wide world, we should draw a distinction between rules that benefit society (and indirectly help

¹ For further analysis of the particular benefits we have accepted by virtue of choosing not to emigrate from a society, see Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 *So. Cal. L.Rev.* 1079 (1976).

us), and rules that go beyond society's needs and intrude upon our private acts. John Stuart Mill, in the classic manifesto of libertarianism, spelled out that very distinction.²

Mill drew a line between self-regarding acts and other-regarding acts. The latter are acts that directly infringe upon the rights or specific interests of others. Natural law prohibits these acts by providing punishment for their disobedience. Most of the content of natural law can be categorized in terms of general prohibitions: murder, kidnapping, arson, rape, assault and battery, theft, burglary, breach of contract, cheating and fraud, and failure to repay a debt. A free man also had to contribute to the fortification and defense of the society against external enemies, a civic duty which included the payment of taxes. All these rules, and minor supplementary rules, arise with the force of logical compulsion from the existence of a society.³ Without them societies would fall apart. They are furthermore grounded in the firm expectation of reciprocity: the prohibition of theft restricts your actions but at the same time prohibits others from stealing from you. Or to put it differently, one of the benefits you get from living in society is police protection against theft; you "pay" for this benefit by refraining from stealing from others.⁴

By contrast, self-regarding acts are those that injure no one except possibly the actor. Mill lists gambling, drunkenness, incontinence, idleness, and uncleanness—acts or omissions that society has no business regulating. Mill further explains: "No person ought to be punished simply for being drunk, but a soldier or a policeman should be

² John Stuart Mill, *On Liberty* (1859).

³ Perhaps the only contingent rule in the set is the prohibition of theft. One might conceive of a communist society where there is no private property and hence nothing to steal. However, as far as anyone knows, communism has nowhere succeeded in abolishing personal property; individuals hold it with great tenacity.

⁴ In a classic statement of the deep logic of natural law, Denis Diderot wrote in his famous *Encyclopedia* that the thief is also a firm believer in the law against theft. After all, once having stolen an item, the thief wants the police to protect his newly acquired property against theft by others.

punished for being drunk on duty.” Mill’s language here is almost ambiguous (surprising for such a great prose stylist). The punishment is not quite for “being drunk on duty,” but rather for dereliction of duty. The drunkenness itself is a purely self-regarding act, whereas dereliction of duty (whether because of drunkenness or any other causal factor) is intrinsically other-regarding.

The line Mill drew between other-regarding and self-regarding acts is the same line that marks the outer boundary of natural law. Acts that are lawful under natural law are acts that connect up with the needs of society. Social needs include the prohibitions just mentioned (“murder, kidnapping, arson, rape, . . .”) A rule that reaches beyond societal needs and tries to regulate an individual’s self-regarding acts is not a law at all. It may well be a command, order, decree, dictate, edict, mandate, precept, regulation, ultimatum, or ukase. The king may have issued it personally; and it might be backed by the full force of the state. But it is not worthy of the title of law

We sometimes think of medieval kings as sovereign holders of all the executive, legislative, and judicial powers of their states. In fact they were not legislators because all the law that was needed was already present in the unwritten natural law. The kings had power as judges to hear cases, but their decisions could not change the natural law. And we have seen that they could issue commands or directives. It is difficult for us today to believe that a phrase as innocuous as “the law of the land” could actually be a constraint upon a king. Yet that was the gravamen of the Magna Carta signed and accepted by King John in 1215. The signers and witnesses knew that “the law of the land” referred to the unwritten immutable principles of natural law. Here is paragraph 39:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.⁵

Thus even though King John embodied the executive, legislative, and judicial powers of the kingdom, and even though he was referred to as its sovereign, he nevertheless could not make law that would overturn, or be contrary to, the law of the land.

Consider the specific prohibitions in paragraph 39. To imprison someone is to deprive him of his privacy. To strip him of his possessions leaves him without the physical means of defending his private life. King John agreed that he had no right to do these things except in the execution of a lawful judgment. Natural law does not protect violators of the law. However, by not violating the law, a person was protected by that law even against the sovereign. And most important of all, natural law “ran out” at the edges of society’s needs. A rule of law was only justifiable if it was rationally connected to society’s needs to preserve itself as a viable institution and to protect itself against foreign enemies.

WHAT ABOUT THE CONSTITUTION?

At this point Americans might object that their zone of privacy is protected by the United States Constitution and hence we have the equivalent of a limited natural-law regime. But this objection fails for a reason that goes to the heart of natural-law theory.

⁵ Magna Carta, para. 39. The phrase is also found in paragraphs 42 and 45. In paragraph 55 the exact phrase was “the law of the realm,” but the text does not signal any difference in this change of one word.

The Constitution, after all, is just another law. To say that the Constitution protects our rights is just to say that one law protects us against other laws that the legislature might pass. Yet while it is true that the Constitution is a “higher law” that trumps laws enacted by Congress, fundamentally they are both laws. As laws, they must be interpreted. As laws, they are subject in the United States to the definitive interpretation of the Supreme Court. It is easy to assume that constitutional law must exercise at least a minimal restraint upon the government, and therefore one ‘law’ is capable of limiting another. But consider the Japanese Internment Cases of World War II.⁶ There the Supreme Court suspended all the rights of Japanese-American citizens and forced them into concentration camps where they had no constitutional protection. This magic trick was rationalized on the basis that in rare instances the Constitution has to be violated in order to save it. The Japanese-American citizens were deemed a potentially subversive group that could aid the Empire of Japan in overthrowing the government of the United States and abolishing the Constitution forever. This judicial move, I’m afraid, is always available when a court decides it must get around a legal barrier.⁷

Although the U.S. Constitution has been interpreted to establish for citizens, at least by inference,⁸ a zone of privacy, there are two hidden logical premises that need to be brought out into the open:

(1) Legal jurisdiction is universal within U.S. territory.

⁶ *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Ex Parte Endo*, 323 U.S. 283 (1944).

⁷ In a talk on *Bush v. Gore*, 531 U.S. 98 (2000), given at Northwestern Law School several months after the case was decided, Judge Richard Posner said that it was unpopular to invoke the *Korematsu* case, but it stands as a precedent for the result in *Bush v. Gore*. He explained that there could have been great popular unrest and agitation if the nation had to go several months without a President. Hence it was justified for the Supreme Court to ignore the provisions in the Constitution for resolving close elections.

⁸ For example, the Fourth Amendment’s prohibition against unreasonable searches and seizures.

(2) The Constitution can establish certain zones of privacy for individuals by rendering invalid any rules or statutes that attempt to invade those zones.

By contrast, natural law proceeds as follows:

(3) Legal jurisdiction is limited to social needs.

(4) Zones of privacy are beyond the reach of law. There is no jurisdiction over such zones.

These premises can be tested by a hypothetical case. A person chooses to get drunk in his home. Under present-day constitutional law, that person has not committed a crime and hence the law should protect his privacy. But we know the law can change. There may come a time when getting drunk at home is a misdemeanor. Everyone agrees, including the drunkard, that such a change can be effectuated by a new interpretation of the Constitution by the Supreme Court. Analytically we can say that the law already has jurisdiction over the drunken citizen; it simply has not chosen to exercise its jurisdiction at the present time, but can change its mind when the Supreme Court changes its mind.

Under natural-law theory, law simply has no force when it extends beyond the boundary of social need. There can be no law about drunkenness at home because “jurisdiction” ends at the outer boundary of self-regarding acts.

WHAT ABOUT RELIGION?

Many people are troubled by “natural law” because it reminds them of the intrusions of organized religion into our private lives. Roman Catholicism has proclaimed that the use of contraceptives is a violation of natural law. There has also been an element of antipathy among some Catholics toward homosexuality, stemming from St. Thomas Aquinas’s argument that it is “unnatural” and hence violates natural law. In this essay I have been talking only about secular natural law—that which was worked out by Aristotle, Cicero, Justinian, and other Greek and Roman jurists of the classical period. Its theory was complete well before Emperor Constantine in the fourth century instituted Christianity as an official religion of the Roman Empire.

Organized religion saw that a vacuum had been created by natural law: beyond the boundary of society’s needs was the zone of no-law. This private sphere was not the concern of the state. People could act within the private sphere in complete freedom from the regulations of society. But why should people enjoy the luxury of this freedom when organized religion could take it away from them, regulate it, and charge them money for regulating it? Here was an opportunity to greatly enhance the power of the clergy. Religion could claim control over the entire sphere of privacy without threatening the political establishment. The church could “render to Caesar the things that are Caesar’s,” and yet obtain sovereignty over the vast area of human privacy. The church could fill that area with rules, regulations and prohibitions; the word for them was “mortal sins.” It could provide punishments more horrible than anything the state could dream up: never-ending pain by burning in hell forever. Religion transformed the freedom of its faithful

into servitude. When various Protestant groups split off from Roman Catholicism, nearly all of them opted in favor of preaching even greater restrictions on people's private lives. For true believers, faith varied inversely with freedom.

WHERE DOES NATURAL LAW COME FROM?

Natural law proceeds from the bottom up. It is an empirical law in the Aristotelian sense: it takes social facts and normalizes them. The law then becomes what societies do. However, if everything societies did were normalized, the norms would be full of contradictions. For example, you could not have laws against murder or theft if murders and thefts were included in the social data. One needs a criterion⁹ of selection. Although it would be virtually impossible to program a computer with a quantifiable criterion, common sense readily solves the problem. Thus, murder if allowed would wipe out society; hence murders must be excluded from the data. Theft if allowed would destroy private property; hence it must be excluded. Fraud if allowed would disable markets; hence it must be excluded. In short, natural laws are society's protective mechanisms, not knowable a priori. Just like the existence of an animal or plant is a Darwinian success story, the existence of a society is evidence that it has maintained and enforced a set of internal controls that we call natural law.

Natural law simply locked into the universal common sense of people that the societies that nurture them must be repaid by following its internal controls and

⁹ The term "criterion" is, unless carefully defined, could beg the question. Wittgenstein analyzed the concept of a criterion and showed—via the later analytical gloss provided by Albritton—how circularity could be avoided in specific contexts. See Rogers Albritton, "On Wittgenstein's Use of the Term 'Criterion,'" 56 *J. Phil.* 845 (1959).

contributing a share of one's energy and talents to its maintenance. No one was entitled to a free ride. However, everyone's private life was simply external to society.

THE WORLD'S GREATEST DECEPTION

Grounded as natural law was in a shared willingness to support the society of which one was a member, it is unremarkable that it held sway for about the first four millennia of recorded history. Yet it was just a mental construct, a popular attitude. The ease in which it was displaced is probably the most frightening fact in human history. When the people of the world threw out natural law, they discarded the freedom that it had protected. They accepted instead a law that could intrude upon and regulate their private lives. One might say with Eric Fromm that the public escaped from freedom. But the escape was so gradual, so unheralded, so little remarked, that scholars did not even notice when the revolution was completed. Legal positivism's victory is so thorough that even the question of an alternative to it, much less the specific natural-law alternative, hardly ever enters anyone's mind.

With the rise of parliaments and other legislatures in European countries five centuries ago, courts that applied the unwritten natural law were increasingly regarded as a captive of the aristocracy opposed to the new scientific and industrial revolution. The public increasingly turned against judicial decision-making based on a universal natural law as being subjective and unscientific. It instead embraced the new parliamentary legislation that seemed to serve redistributive justice. The idea that law is nothing but a command appealed to the public as a way of dissolving the uncertain clouds of natural

law and substituting in their place a written, determinative, democratic series of statutes—with the promise that they would soon occupy the entire field of law. The law that judges were obliged to apply was now supposed to consist almost entirely of statutory law. The judges were expected to discard the set of natural laws that Oliver Wendell Holmes Jr. later disparaged as the “brooding omnipresence in the sky.”¹⁰

But the one factor that made it easiest for lawyers, judges, and the public to abandon natural law was the fact that legal positivism did not create a greater intellectual challenge or a more complex paradigm than the natural-law theory it desired to replace. Instead, it was far easier—intellectually lazier, if I may so characterize it—to embrace the far simpler jurisprudential theory of legal positivism. Here are the two fundamental positions:

NATURAL LAW: Law is superior to a command.

POSITIVISM: Law is a command.¹¹

Thus, if we simply regard all of law as a species of command, we can evaporate whatever concepts of natural law floating in the air above the hubbub of “legal” commands.

¹⁰ *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.)

¹¹ Of the four leading legal positivists, Jeremy Bentham regarded law as a command. John Austin wrote that law properly so-called is a command. Hans Kelsen wrote that law is a coercive order. H.L.A. Hart invoked the image of a gunman in an alley ordering you to hand over all your money. He then argued that many qualifications and conditions that the state imposes upon law remove it from the image of the gunman situation writ large. The argument, however, does not succeed. The command of the gunman remains at the core of Hart’s concept of law. See H.L.A. Hart, *The Concept of Law* 22 (1961). The command theory leads Hart mistakenly to describe international law as primitive. For further argument see Anthony D’Amato, *The Neo-Positivist Concept of International Law*, 59 *Am. J. Int’l L.* 321 (1965). Pertinent excerpts from the voluminous writings of Bentham, Austin, and Kelsen can be found in Anthony D’Amato, *Analytic Jurisprudence Anthology* ch. 2 (1990).

This maneuver greatly simplifies the law. In fact it simplifies it all the way back to the time when we were three years old. Commands were a one-way projection of our parents' authority over us. Their commands to a three-year-old mind seemed arbitrary and annoying. Suppose, as we grew older, those commands never cohered into a rational system of laws. Suppose the commands kept coming at us with no structure or rationale. Then we would have no idea about what "law" could be like. All we would know was that we were on the receiving end of a barrage of commands. When we ventured forth into the real world, we would be bombarded by similarly arbitrary directives. We would then be living arbitrarily-ruled lives; we would not know what it would be like to have our zone of privacy. For a command can be *anything*. There is no limit to the scope or coverage of a command. The command is whatever rule the commander wants it to be.

John Austin, one of positivism's leading theorists, wrote that laws properly so-called are nothing but commands. Law is "set by political superiors to political inferiors."¹² International-law scholars associated with Yale Law School have taken the position that the United States, as the world's superpower, can enforce its commands against all other states and hence makes international law. In discussing international law before the American Society of International Law, Professor Michael Reisman told the overflow audience: "The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior."¹³ In brief, and taken literally, might makes right.

¹² John Austin, quoted in Anthony D'Amato, *Analytic Jurisprudence Anthology* 40 (1990).

¹³ W. Michael Reisman, *The View from the New Haven School of International Law*, 86 *ASIL Proceedings* 118 (1992).

We have come full circle back to my first definition of today's law: other people telling us what to do and punishing us if we don't do it. By accepting and internalizing the notion of positivism as a command, we have discarded our defenses against the intrusions of other people. When they or their friends become lawmakers with the mighty but relatively thoughtless power of the state behind them, we are easy prey.

Our personal liberty is not all that we have forfeited to the law. We have also given up a level playing field to reduce or eliminate the power factor. Assume A is bigger and stronger than B, and they have a dispute:

(5) In a world without law, A wins every time irrespective of merit.¹⁴

(6-1) In a world of positive law, A will more likely be a member of the lawmaking class than B and hence can steer the decision his way.

(6-2) In a world of positive law, the strongest persons (including A) might in the limit set themselves up as masters and enslave everyone else.

(7) In a world of natural law, the dispute will be settled by a third party (usually a judge). The more meritorious party will win.

CONCLUSION

About five hundred years ago the world underwent a slow but profound change of mind-set: from a belief in natural law to an acceptance of legal positivism. In doing so the world gave up the idea that law was

¹⁴ See Guido Calabresi & Douglas Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral, 85 Harv. L. rev. 1089 (1972).

inherently limited and could not apply beyond the needs of society. Instead it bought into the idea of law as a command that was inherently unlimited. It also accepted as commanders the persons who were physically the stronger.

Would it be possible to have a reverse revolution? I have no idea about how to bring it off. But I do know that unless people see what they are missing, they cannot know in which direction to proceed.

NOTE TO THE EDITORS: I am always grateful to receive suggested changes and improvements, but I retain the right of final cut.

Anthony D'Amato
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