Natural Law

The unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct is sometimes evaluated and governed. Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government. The term natural law is derived from the Roman term *jus naturale*. Adherents to natural law philosophy are known as naturalists.

Naturalists believe that natural law principles are an inherent part of nature and exist regardless of whether government recognizes or enforces them. Naturalists further believe that governments must incorporate natural law principles into their legal systems before justice can be achieved. There are three schools of natural law theory: divine natural law, secular natural law, and historical natural law.

Divine natural law represents the system of principles believed to have been revealed or inspired by God or some other supreme and supernatural being. These divine principles are typically reflected by authoritative religious writings such as Scripture. Secular natural law represents the system of principles derived from the physical, biological, and behavioral laws of nature as perceived by the human intellect and elaborated through reason. Historical natural law represents the system of principles that has evolved over time through the slow accretion of custom, tradition, and experience. Each school of natural law influenced the Founding Fathers during the nascent years of U.S. law in the eighteenth century and continue to influence the decision-making process of state and federal courts today.

Divine Natural Law

Proponents of divine natural law contend that law must be made to conform to the commands they believe were laid down or inspired by God, or some other deity, who governs according to principles of compassion, truth, and justice. These naturalists assert that the legitimacy of any enacted human law must be measured by its consonance with divine principles of right and wrong. Such principles can be found in various Scriptures, church doctrine, papal decrees, and the decisions of ecclesiastical courts and councils. Human laws that are inconsistent with divine principles of morality, naturalists maintain, are invalid and should neither be enforced nor obeyed. St. Thomas Aquinas, a theologian and philosopher from the thirteenth century, was a leading exponent of divine natural law.

According to Judeo-Christian belief and the Old Testament, the Ten Commandments, were delivered to Moses by God on Mount Sinai. These ten laws represent one example of divine natural law. The Bible and Torah are thought by many to be other sources of divine natural law because their authors are said to have been inspired by a divine spirit. Some Christians point to the Canon Law of the Catholic Church, which was applied by the ecclesiastical courts of Europe during the Middle Ages, as another source of divine natural law.

Before the Protestant Reformation of the sixteenth century, Europe was divided into two competing jurisdictions —secular and religious. The emperors, kings, and queens of Europe governed the secular jurisdiction, and the pope presided over the religious jurisdiction. The idea that monarchs ruled by "divine right" allowed the secular jurisdiction to acquire some of the authority of religious jurisdiction. Moreover, the notion that a "higher law" transcends the rules enacted by human institutions and that government is bound by this law, also known as the Rule of Law, fermented during the struggle between the secular and religious powers in Europe before the American Revolution. For example, Henry de Bracton, an English judge and scholar from the thirteenth century, wrote that a court's allegiance to the law...
and to God is above its allegiance to any ruler or lawmaker.

The influence of divine natural law pervaded the colonial period of U.S. law. In 1690 English philosopher John Locke wrote that all people are born with the inherent rights to life, liberty, and estate. These rights are not unlimited, Locke said, and may only be appropriated according to the fair share earned by the labor of each person. Gluttony and waste of individual liberty are not permitted, Locke argued, because "[n]othing is made by God for man to spoil or destroy."

In the Declaration of Independence, Thomas Jefferson, borrowing from Locke, wrote that "all men are created equal ... and are endowed by their creator with certain inalienable rights ... [including] life, liberty and the pursuit of happiness." Jefferson identified the freedom of thought as one of the inalienable rights when he said, "Almighty God has created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint." In Powell v. Pennsylvania, 127 U.S. 678, 8 S. Ct. 1257, 32 L. Ed. 253 (1888), the Supreme Court recognized the importance of the divine influence in early U.S. law, stating that the "right to pursue happiness is placed by the Declaration of Independence among the inalienable rights of man, not by the grace of emperors or kings, or by the force of legislative or constitutional enactments, but by the Creator."

The U.S. Constitution altered the relationship between law and religion. Article VI establishes the Constitution as the supreme law of the land. The First Amendment prohibits the government from establishing a religion, which means that a law may not advance one religion at the expense of another or prefer a general belief in religion to irreligion, atheism, or agnosticism. Although the Supremacy and Establishment Clauses seemingly preclude the judiciary from grounding a decision on Scripture or religious doctrine, state and federal courts have occasionally referred to various sources of divine natural law.

For example, in Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987), the Supreme Court said that "the Founding Fathers believed devotedly that there was a God and that the inalienable rights of man were rooted in Him." In McIlvaine v. Cox'e Lessee, 6 U.S. 280, 2 Cranch 280, 2 L. Ed. 279 (1805), the Supreme Court relied on the Bible as "ancient and venerable" proof that expatriation had long been "practiced, approved, and never restrained."

Confronted with the question as to whether the conveyance of a particular piece of land was legally enforceable, the Supreme Court stated that it would consider "those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great degree, the rights of civilized nations" (Johnson v. M'Intosh, 21 U.S. 543, 8 Wheat. 543, 5 L. Ed. 681 [1823]). In Dred Scott v. Sandford, 60 U.S. 393, 19 How. 393, 15 L. Ed. 691 (1856), the Supreme Court held that slaves were the property of their owners and were not entitled to any constitutional protection. In a dissenting opinion, however, Justice John McLean wrote that a "slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man."

In the later twentieth century (in a judgment overturned in Lawrence v. Texas, 539 U.S., 123 S.Ct. 2472, 156 L.Ed.2d 508 [2003]), the Supreme Court relied on Judeo-Christian standards as evidence that homosexual Sodomy is a practice not worthy of constitutional protection because it has been condemned throughout the history of western civilization (Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 [1986] [Burger, J., concurring]). State and federal courts also have considered Judeo-Christian standards when evaluating the constitutionality of statutes prohibiting bigamy and Incest. For example, Benton v. State, 265 Ga. 648, 461 S.E.2d 202 (1995), upheld the constitutionality of a Georgia statute prohibiting incest.

Despite the sprinkling of cases that have referred to Scripture, religious doctrine, and Judeo-Christian heritage, such sources of divine natural law do not ordinarily form the express basis of judicial decisions. At the same time, it cannot be said that state and federal courts have completely eliminated any reliance on natural law principles. To the contrary, many controversial legal disputes are still decided in accordance with unwritten legal principles that are derived not from religion, but from secular political philosophy.
Secular Natural Law

The school of natural law known as secular natural law replaces the divine laws of God with the physical, biological, and behavioral laws of nature as understood by human reason. This school theorizes about the uniform and fixed rules of nature, particularly human nature, to identify moral and ethical norms. Influenced by the rational empiricism of the seventeenth-and eighteenth-century Enlightenment thinkers who stressed the importance of observation and experiment in arriving at reliable and demonstrable truths, secular natural law elevates the capacity of the human intellect over the spiritual authority of religion.

Many secular natural law theorists base their philosophy upon hypotheses about human behavior in the state of nature, a primitive stage in human evolution before the creation of governmental institutions and other complex societal organizations. In the state of nature, John Locke wrote, human beings live according to three principles—liberty, equality, and self-preservation. Because no government exists in the state of nature to offer police protection or regulate the distribution of goods and benefits, each individual has a right to self-preservation that he or she may exercise on equal footing with everyone else.

This right includes the liberties to enjoy a peaceful life, accumulate wealth and property, and otherwise satisfy personal needs and desires consistent with the coterminous liberties of others. Anyone who deprives another person of his or her rights in the state of nature, Locke argued, violates the principle of equality. Ultimately, Locke wrote, the state of nature proves unsatisfying. Human liberty is neither equally fulfilled nor protected. Because individuals possess the liberty to delineate the limits of their own personal needs and desires in the state of nature, greed, narcissism, and self-interest eventually rise to the surface, causing irrational and excessive behavior and placing human safety at risk. Thus, Locke concluded, the law of nature leads people to establish a government that is empowered to protect life, liberty, and property.

Lockean Jurisprudence has manifested itself in the decisions of the Supreme Court. In Powell v. Pennsylvania, 127 U.S. 678, 8 S. Ct. 1257, 32 L. Ed. 253 (1888), Justice Stephen J. Field wrote that he had "always supposed that the gift of life was accompanied by the right to seek and produce food, by which life can be preserved and enjoyed, in all ways not encroaching upon the equal rights of others." In another case the Supreme Court said that the "rights of life and personal liberty are the natural rights of man. To secure these rights ... governments are instituted among men" (U.S. v. Cruikshank, 92 U.S. 542, 2 Otto 542, 23 L. Ed. 588 [1875]).

In the spirit of Lockean natural law, the Fifth and Fourteenth Amendments to the Constitution prohibit the government from taking "life, liberty, or property without due process of law." The concept of "due process" has been a continuing source of natural law in constitutional jurisprudence. If Lockean natural law involves theorizing about the scope of human liberty in the state of nature, constitutional natural law involves theorizing about the scope of liberty protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.

On their face the Due Process Clauses appear to offer only procedural protection, guaranteeing litigants the right to be informed of any legal action being taken against them and the opportunity to be heard during an impartial hearing where relevant claims and defenses may be asserted. In the 200 years following the writing of the Constitution, however, federal courts interpreted the Due Process Clauses to provide substantive protection against Arbitrary and discriminatory governmental encroachment of fundamental liberties. Similar to the rational empiricism by which Enlightenment thinkers identified Human Rights in the state of nature, federal judges have identified the liberties protected by the Due Process Clauses through a reasoned elaboration of the Fifth and Fourteenth Amendments.

The federal judiciary has described the liberty interest protected by the Due Process Clauses as an interest guaranteeing a number of individual freedoms, including the right to personal autonomy, bodily integrity, self-dignity, and self-determination (Gray v. Romeo, 697 F. Supp. 580 [1988]). The word liberty, the Supreme Court stated, means something more than freedom from physical restraint. "It means freedom to go where one may choose, and to act in such manner ... as his judgment may dictate for the promotion of his happiness ... [while pursuing] such callings and
avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment" (MUNN V. ILLINOIS, 94 U.S. 113, 4 Otto 113, 24 L. Ed. 77 [1876] [Field, J., dissenting]).

The full breadth of constitutional liberty, the Supreme Court has said, is best explained as a rational continuum safeguarding every facet of human freedom from arbitrary impositions and purposeless restraints (Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 [1961]). The government may not intrude upon this liberty unless it can demonstrate a persuasive countervailing interest. However, the more that the U.S. legal system cherishes a particular freedom, the less likely a court is to enforce a law that infringes upon it.

In this regard the Supreme Court has identified certain fundamental rights that qualify for heightened judicial protection against laws threatening to restrict them. This list of fundamental rights includes most of the specific freedoms enumerated in the Bill of Rights, as well as the FREEDOM OF ASSOCIATION; the right to vote and participate in the electoral process; the right to marry, procreate, and rear children; and the right to privacy. The right to privacy, which is not expressly enumerated anywhere in the Constitution, guarantees the freedom of adults to use Birth Control (GRISWOLD V. CONNECTICUT, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 [1965]) and the right of women to terminate their pregnancy before the fetus becomes viable (ROE V. WADE, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 [1973]).

During the 1990s the right to privacy was enlarged to recognize the right of certain terminally ill or mentally incompetent persons to refuse medical treatment. In Cruzan v. Missouri Department of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), the Supreme Court ruled that a person who is in a persistent vegetative state, marked by the absence of any significant cognitive abilities, may seek to terminate life-sustaining measures, including artificial nutrition and hydration equipment, through a parent, spouse, or other appropriate guardian who demonstrates that the incompetent person previously expressed a clear desire to discontinue medical treatment under such circumstances.

The Court of Appeals for the Ninth Circuit later cited Cruzan in support of its decision establishing the right of competent but terminally ill patients to hasten their death by refusing medical treatment when the final stages of life are wrought with pain and indignity (Compassion in Dying v. Washington, 79 F.3d 790 [9th Cir. 1996]). However, the Court of Appeals for the Second Circuit ruled that physicians possess no due process right to assist terminally ill patients in accelerating their death by prescribing a lethal dose of narcotics (Quill v. Vacco, 80 F.3d 716 [2d Cir. 1996]). Similarly, in a notorious case involving Dr. Jack Kevorkian, the Michigan Supreme Court ruled that patients have no due process right to physician-assisted suicide (People v. Kevorkian, 447 Mich. 436, 527 N. W. 2d 714 [1994]).

In the Cruzan decision, the manner in which the Supreme Court recognized a qualified right to die reflects the Enlightenment tradition of secular natural law. Where Locke inferred the inalienable rights of life, liberty, and property from observing human behavior, the Supreme Court said in Cruzan that "a Constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."

For example, in Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the Supreme Court protected the constitutional right of a person to decline a smallpox vaccination that was required by state law. In Washington v. Harper, 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178 (1990), the Court ruled that the liberty interest guaranteed by the Due Process Clauses prohibits the government from compelling prisoners to take antipsychotic drugs. These cases, as well as others, the Supreme Court reasoned in Cruzan, establish that all U.S. citizens have a general right to refuse unwanted medical treatment, which includes the specific right of certain mentally incompetent and terminally ill persons to hasten their death.

Historical Natural Law

Another school of natural law is known as historical natural law. According to this school, law must be made to conform with the well-established, but unwritten, customs, traditions, and experiences that have evolved over the
course of history. Historical natural law has played an integral role in the development of the Anglo-American system of justice. When King James I attempted to assert the absolute power of the British monarchy during the seventeenth century, for example, English jurist Sir Edward Coke argued that the sovereignty of the crown was limited by the ancient liberties of the English people, immemorial custom, and the rights prescribed by Magna Charta in 1215.

Magna Charta also laid the cornerstone for many U.S. constitutional liberties. The Supreme Court has traced the origins of grand juries, petit juries, and the writ of Habeas Corpus to Magna Charta. The Eighth Amendment proportionality analysis, which requires that criminal sanctions bear some reasonable relationship to the seriousness of the offense, was foreshadowed by the Magna Charta prohibition of excessive fines (Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 [1983]). The concept of due process was inherited from the requirement in Magna Charta that all legal proceedings comport with the "law of the land" (In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 638 [1970]). Due Process of Law, the Supreme Court has observed, contains both procedural and historical aspects that tend to converge in criminal cases (Rochin v. California, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183 [1952]). Procedurally, due process guarantees criminal defendants a fair trial. Historically, due process guarantees that no defendant may be convicted of a crime unless the government can prove his or her guilt Beyond a Reasonable Doubt. Although the REASONABLE DOUBT STANDARD can be found nowhere in the express language of the Constitution, the Supreme Court has said that the demand for a higher degree of persuasion in criminal cases has been repeatedly expressed since "ancient times" through the common-law tradition and is now "embodied in the Constitution" (In re Winship).

The legacy of the trial of John Peter Zenger, 17 Howell's State Trials 675, further illustrates the symbiotic relationship between history and the law. In 1735, Zenger, the publisher of the New York Weekly Journal, was charged with libeling the governor of New York. At trial Zenger admitted that he had published the allegedly harmful article but argued that the article was not libelous because it contained no inaccurate statements. However, in the American colonies, truth was not considered a defense to LIBEL actions. Nonetheless, despite Zenger's admission of harmful publication and lack of a cognizable legal defense, the jury acquitted him. The Zenger acquittal spawned two ideas that have become entrenched in U.S. jurisprudence.

First, the acquittal gave birth to the idea that truth is indeed a defense to accusations of libel. This defense received constitutional protection under the First Amendment in NEW YORK TIMES V. SULLIVAN, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Looking back, the Supreme Court came to describe the Zenger trial as "the earliest and most famous American experience with freedom of the press" (McIntyre v. Ohio Elections Commission, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426, [1995]).

The Zenger trial is also the progenitor of Jury Nullification, which is the power of a jury, as the conscience of the community, to acquit defendants against whom there is over-whelming evidence of guilt in order to challenge a specific law, prevent oppression, or otherwise achieve justice. For example, the Zenger jurors issued an acquittal despite what amounted to a confession by the defendant in open court. Some observers have compared the Zenger trial to the trial of O. J. Simpson, in which the former football star was acquitted of a double Homicide notwithstanding DNA Evidence linking him to the crimes. According to these observers, JOHNNIE COCHRAN, defense attorney for Simpson, implored the jurors to ignore the evidence against his client and render a verdict that would send a message denouncing POLICE CORRUPTION, perjury, and racism.

All three schools of natural law have influenced the development of U.S. law from colonial to modern times. In many ways the creation and ratification of the Constitution replaced Scripture and religion as the ultimate source of law in the United States. The federal Constitution makes the people the fundamental foundation of authority in the U.S. system of government. Many of the Framers characterized the Constitution as containing "sacred and inviolate" truths. In the same vein, Thomas Paine described the Constitution as a "political Bible."

In 1728 many Americans understood that the Common Law encompassed the Law of Nature, the Law of Reason,
and the Revealed Law of God, which are equally binding at all times, in all places, and to all persons. The law of history could have been added to this list. Between 1776 and 1784, 11 of the original 13 states made some allowance for the adoption of the English common law. One federal court said that the Constitution "did not create any new rights to life, liberty or due process. These rights had existed for Englishmen since Magna Charta. The Declaration of Independence ... merely declared and established these rights for the American colonies" (Screven County v. Brier Creek Hunting & Fishing Club, 202 F. 2d 369 [5th Cir. 1953]). Thus, natural law in the United States may be best understood as the integration of history, secular reason, and divine inspiration.

Further readings


Cross-references

Abortion; Constitution of the United States; Death and Dying; Hobbes, Thomas; Jurisprudence; Libel and Slander; "Second Treatise on Government" (Appendix, Primary Document).

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natural law

n. 1) standards of conduct derived from traditional moral principles (first mentioned by Roman jurists in the first century A.D.) and/or God's law and will. The Biblical ten commandments, such as "thou shall not kill," are often included in those principles. Natural law assumes that all people believe in the same Judeo-Christian God, and thus share an understanding of natural law premises. 2) laws derived from nature and reason, embodied in the Declaration of Independence assertion that "all men are created equal, that they are endowed by their creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of happiness. 3) The opposite of "positive law," which is created by mankind through the state.