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Natural Law – A Libertarian View

Anthony D'Amato

“In the subjugating of humans, attitudes are more powerful than armaments.”¹

INTRODUCTION

I 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. The attractiveness of that classic system was the public's attitude that natural law is limited law; it extends only to the edge of society's needs. Beyond that edge is no-law. The imaginary sphere of privacy around a person's body may be referred to, under natural law, as a law-free zone.

This idea of law running out when it reaches our sphere of privacy 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.² Law penetrates the sphere of privacy if the commander wants to regulate private acts. Libertarians who abhor the idea of big government elongating its tentacles into the private lives of citizens may overlook the fact that it was positive law that paved the way. Once legal jurisdiction has extended into the private sphere, big government does not lag far behind. Government quickly fills up the formerly private sphere by enacting a dense thicket of regulations.

Before continuing with the story of natural law and positive law, let us take up, in a relatively informal way what we mean by law. In a moment of existential clarity I assert that law is nothing other than strangers 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 I must do and are ready and able to seriously harm me if I refuse?

¹ BEN HECHT, *PERFIDY* 43 (1961).

² Positivism holds that all legal rules are the commands of society's commander-in-chief; since a commander can command anything, there is no limit to the scope of the command.

In search of an answer, we must go back to when we first realized that other people were ordering us around.

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" or "orders" even though we did not know those words either. Since our parents' commands were always interfering with what we felt like doing at that moment, 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 because those commands served us well. This is when the idea of "command" in our minds morphed into the idea of "law." A law was something that lodged itself 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, who has learned something about law, points out that when Freddie 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 second chance. But don't do it again."

Our parents' commands became law for us because we trusted them 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.³ They were training us for a time when we would be on our own. They were

³ I've couched this argument in voluntaristic terms where more extended analysis shows that the entire procedure is Darwinian. Nurturing children is a survival mechanism for the family. Parents have been selected for their proclivity to lay down laws for the family that enhance the family's fitness for survival.

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*.⁴

THE JURISDICTIONAL REACH OF 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 designed to benefit themselves. If some laws also benefit us, it is a mere side-effect. Public legislators and bureaucrats enact rules to help their families, relatives, friends, cronies and campaign contributors.

When they are not directly helping themselves and their friends, legislators have a tendency to power-trip their way into broad-ranging paternalism. 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, listening in on people's telephone calls, and intruding in many other ways into people's privacy. Although these statutes have the same look, feel, and enforcement potential as ordinary statutes, you and I have in reserve—though we don't bring up that reserve—to refuse to dignify them by the name "law." Someday perhaps the public will learn to distinguish true law (natural law) from the intrusive rules that wear law's mask.

WHY NATURAL LAW DESERVES RESPECT

So far I have argued that society makes many laws that redound to its own benefit—maintaining and securing 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, sports stadiums, shopping malls, highways, national parks, concert halls and outdoor concerts. Moreover, 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--which as Socrates said occurred at the time when we

⁴ This benign sequence of events presupposes good parents. Matters would be quite different under abusive parents, where children grow up learning to distrust all parental orders and laws, a distrust they carry with them into the outside world where they may join gangs, engage in theft, and deal in drugs.

were free to leave the society but chose to remain—is the flip side of our acceptance of the gains and benefits we derive from society.⁵

Thus as we step out into the wide world we should draw a distinction between rules that benefit society (and for that reason help you and me indirectly), and those that go beyond society's need, paternalistically intruding upon our private acts. John Stuart Mill, in the classic manifesto of libertarianism, spelled out that very distinction.⁶

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 many other-regarding acts by providing punishment for their disobedience. But what is the actual content of natural law? On several occasions I researched this question only to find that authors avoided bringing it up. Eventually I came to the realization that if the general rules of natural law were universally known their content should not be a mystery. The most general of all the general rules of natural law, I realized, was this: that in every case, the judge tries to figure out, on the basis of the totality of the evidence, which party took unfair advantage over the other party. The party that took unfair advantage will lose the case. The mechanisms of taking unfair advantage is just the list of natural law prohibitions: murder, kidnapping, arson, rape, assault and battery, theft, burglary, breach of contract, cheating and fraud, and failure to repay a debt.⁷ In addition, a free man was required 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, duties, and prohibitions are necessary inferences from the fact that the society has survived.⁸ If we encounter any society and we investigate its laws, we will see that they contain all of these natural rules. "Natural" law is an inference from the nature of human society. Without those rules societies would sooner or later self-destruct or be conquered. We can be more accurate if we put it in Darwinian terms: societies that are missing (or not enforcing) one or more of the natural-law prohibitions are

⁵ See Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*, 49 SO. CAL. L.REV. 1079 (1976) (analyzing social obligations accepted when the decision is made not to emigrate).

⁶ JOHN STUART MILL, ON LIBERTY (1859).

⁷ Although this is not a long list, literally millions of cases can be decided under the aegis of these prohibitions. Nearly every real or imagined harm that humans can experience that can be traced to human causes (as opposed to disasters of nature) can be reasonably alleged to involve the transgression of one or more of the natural-law prohibitions listed in the text.

⁸ 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.

disadvantaged vis-à-vis all other societies in the competition for a limited space on the planet. They will eventually lose in the struggle for survival.

Rules of natural law are grounded in the firm expectation of reciprocity: thus 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.⁹ Of course, similar reasoning applies to all the rules of natural law. The lowest common denominator of all the rules of natural law is that free riding must be eliminated.¹⁰

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 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.¹¹

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.¹² It may well be a command, order, decree, dictate, edict, mandate, precept, regulation, ultimatum, or

⁹ In a classic argument that reached the deep structure 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. In short, what the thief seeks is ownership. He must then realize the inconsistency of robbing the original owner of that ownership. Hence he would have to acknowledge the justice of his punishment.

¹⁰ See ELLIOTT SOBER & DAVID SLOAN WILSON, *UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR* (1998).

¹¹ A parent who refuses for religious reasons to allow her child to receive necessary medical care is not shielded by her self-regarding sphere. Her failure to act is other-regarding vis-à-vis her child and thus is subject to legal intervention.

¹² A mother cannot lawfully refuse medical care for her child. Her child is not within her sphere of privacy (as she may claim) but rather has its own sphere. Courts have uniformly upheld the right of the state to give inoculations and immunizations to infants over the objections of their parents.

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, but these commands had to comport generally with natural law. While 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, that was in fact 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. For example, consider 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.¹³

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. If the king then issued a command that a named individual be seized and imprisoned contrary to paragraph 39, the king’s subordinates would not be bound by such a command and were legally justified in refusing to obey it. The situation is exactly similar to a soldier’s refusal to obey the command of his or her military superior for the reason that the command violates the laws of war or would constitute, if carried out, a crime against humanity.

Consider again 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 of course does not protect violators of the law. A criminal’s sphere of privacy can be penetrated by the state in order to impose physical punishment. But punishment is only a secondary effect (and a necessary one)

¹³ 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.

of a rule-based order; the primary rules themselves that guide our conduct “run out” when they cannot be justified by the needs of society. In short, under secular natural law the validity of a legal rule consists of its rational connection to the preservation of society’s interests. When I discern such a rational connection, then the rule is like the family rules of my childhood, for I am dependent upon society today as I was dependent upon my family years ago. When society’s rules add to its own protection and preservation, society’s utility for me is increased. And like the rules in the family, this (and only this) obliges me to obey those rules.¹⁴

CAN THE CONSTITUTION PROTECT US?

Readers might object that their zone of privacy is protected by the United States Constitution and hence we have the functional equivalent of a limited natural-law regime. But this objection fails for a reason that goes to the heart of natural-law theory. The Constitution, cannot protect us against the incursion of law because it is, after all, just another law. To deal with this problem and the larger problem it implicates—namely, whether natural law and positivism can co-exist—I will set forth a series of propositions. Some propositions, as we shall see, contradict other propositions. A cluster of propositions of this sort is called an *apory*, defined by Nicholas Rescher in an important recent book as “a group of acceptable seeming propositions that are collectively inconsistent.”¹⁵ We begin with three propositions under positivist theory:

- (1) The commander’s power is absolute.
- (2) The Constitution places limitations upon the commander’s power.
- (3) The two preceding propositions contradict each other.

The actual words of the Constitution, as the saying goes, can not rise from the sheet of paper and grip the commander around the throat until he rescinds his unconstitutional command. But what about the meanings of those words? Can they rise up from the paper? Do they fare better in the struggle for the commander’s mind?

Every experienced judge or attorney will recognize that words do not have a single, fixed, determinate meaning. Even the word “meaning” can mean different things in different contexts (for example, what

¹⁴ Under natural law, is there also a “duty to warn” a stranger who is in peril? A qualified “yes” is defended in Anthony D’Amato, *The Bad Samaritan Paradigm*, 70 NW. U.L. REV. 798 (1976).

¹⁵ NICHOLAS RESCHER, PARADOXES 7 (2001).

is the meaning of a metaphor? How literally may we take it?) A strong-willed government may even say that the entire Constitution changes meaning during a serious national emergency. Consider the Japanese Internment Cases of World War II.¹⁶ 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. To save the Constitution, their constitutional rights were suspended. This kind of maneuver is always available, in some degree, when a court decides it must get around a legal barrier.¹⁷ All that's needed is apocalyptic thinking—a willingness to exaggerate by several orders of magnitude a minor threat to the nation. A current example is the exclusion of combat aliens from habeas corpus protection by the Military Commission Act of 2006.¹⁸ The Act gives the Executive the power to decide the threshold question whether a captured alien is an enemy combatant. If the Executive acts in bad faith or makes a mistake, the captured person could be detained for years without ever seeing a judge or magistrate. This is, of course, what King John did that led to the Great Writ of habeas corpus. The rationale? To defeat terrorists we must put the Constitution aside.

Although the U.S. Constitution has been interpreted to establish for citizens, at least by inference,¹⁹ a zone of privacy, there are two hidden logical premises that need to be brought to the surface:

(4) Legal jurisdiction is universal within U.S. territory. [A basic rule in the positivist tradition.]

(5) The Constitution can establish certain zones of privacy for individuals by rendering invalid any rules or statutes that attempt

¹⁶ *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).

¹⁷ 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 acknowledged the unpopularity of citing the *Korematsu* case, but had some good words to say about it anyway. It was a precedent for *Bush v. Gore* in that great popular unrest and agitation could break out if the nation had to go several months without a President. Hence it was justified for the Supreme Court to ignore the laborious provisions in the Constitution for resolving close elections.

¹⁸ Military Commission Act of 2006, 120 Stat. 2600 (Oct. 17, 2006).

¹⁹ For example, the Fourth Amendment's prohibition against unreasonable searches and seizures.

to invade those zones. [so long as the public abides by the Constitution.]

(6) The two preceding propositions contradict each other.

By contrast, natural law proceeds as follows:

(7) Legal jurisdiction is limited to social needs. [Basic rule in the natural-law tradition.]

(8) Zones of privacy are beyond the reach of law. [The public simply does not recognize legal jurisdiction as penetrating 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 shell of self-regarding acts.

THE ROLE OF RELIGION

Many people are troubled by “natural law” because of religious overtones. Roman Catholicism has cited natural law in support of its ban upon the use of contraceptives, explaining that contraceptives are “unnatural.” 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: the shell of privacy where law did not and could not intrude.

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? Organized religion could assert its jurisdiction over that zone, regulate it (calling it primarily “sins of the flesh”) and count on financial contributions from the regulated persons. The parishioners would pay money to the church out of shame, guilt, or even (for several centuries) to purchase indulgences.²⁰

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; 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 criterion²¹ 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

²⁰ In the later Middle Ages, The Roman Catholic Church sold temporal remittance of after-life punishments. See CATHOLIC ENCYCLOPEDIA, Indulgences. Martin Luther saw corruption in this practice, broke away from Catholicism, and initiated the Protestant reformation.

²¹ The term “criterion”, 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).

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 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.²² 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. Positivism's 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.”²³

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

²² See Eric Fromm, *ESCAPE FROM FREEDOM* 36-37 (1941).

²³ *Southern Pacific v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J.).

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 fundamental positions:

(9) NATURAL LAW: Law is superior to a command.

(10) POSITIVISM: Law is a command.²⁴ A command can modify or delete any law.

(11) The two preceding propositions contradict each other.

Thus, if we simply regard all of law as a species of command, we can eventually delete (by enacting elaborate legal codes) whatever concepts of natural law may be floating in the air above the hubbub of “legal” commands.²⁵

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.

²⁴ 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. 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).

²⁵ While codification seems to supplant common-law rules in the short term, over the longer term the codified rules begin to “unravel” in that they become increasingly problematic. There is a kind of positive entropy in legal codification. The full argument is spelled out in Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983).

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."²⁶ 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."²⁷ In brief, and taken literally, might makes right.

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 not necessarily thoughtful 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:

(12) In a world without law, the stronger party A wins every time irrespective of merit.²⁸

(13) 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 A's way.

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

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

²⁶ John Austin, quoted in ANTHONY D'AMATO, *ANALYTIC JURISPRUDENCE ANTHOLOGY* 40 (1990).

²⁷ W. Michael Reisman, *The View from the New Haven School of International Law*, 86 *ASIL PROCEEDINGS* 118 (1992).

²⁸ See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).

RESOLVING THE PARADOX

About five hundred years ago the world underwent at a glacial pace a 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 inherently limited and could not apply beyond the needs of society. Instead it bought into the idea of law as a command, and commands themselves were inherently unlimited. The world accepted as commanders the persons who were physically the stronger.

At this point we should take inventory of the fifteen propositions that constitute our apory. We find that consistency among all the propositions is impossible; in short, we have a paradox. Rescher advises in cases of paradox that we *add* new propositions to the cluster in hope of finding a way out. But we have an initial difficulty in the case where positivism and natural law compete with each other for control of the public mind. We need to acknowledge proposition (16):

(16) When natural law and positivism clash in the real world, positivism wins.

(17) Positivism wins in the real world because it employs brute force.

(18) In the world of the intellect (as opposed to the real world), the winner of a clash between natural law and positivism rests on the attitude of each person.

Proposition (18) reminds us of the earlier observation in this essay that commands are unbounded because the state has the power to use physical coercion against persons who violate the state's commands. The state, following positivist theory, calls these commands "law". But the public's attitude is not amenable to coercion. A person can obey a command for reasons of prudence but may harbor a mental reservation against the command because it seems to be an unjustifiable overreaching of society's rights of maintenance and self-preservation.

Let us take two societies, X and Y, on extreme ends of a spectrum. In X, everyone believes that law is any rule that is enforced by the state. In Y, everyone (including the police and the military) believes that just because a rule is enforced does not make it "law." A dictator in Y would find himself in the position of King John: that even the people closest to him will not carry out certain kinds of commands.²⁹

²⁹ As a thought experiment, suppose that the President of the United States is impeached. He orders the military to arrest and detain all Senators and Congresspersons. Even though he is commander-in-chief, we know almost intuitively that the military services will not obey such an order.

We do not need to find a real society that is like Y in the above hypothetical example. It is sufficient for resolving the paradox that Y is conceivable. We end up with:

(19) Positivism and natural law can coexist if the public is convinced that a command does not necessarily implicate “law,” and that “law” does not necessarily implicate a command.

In the world today, it is an unfortunate fact that most nations are bunched up very close to X on the X-Y spectrum, and few if any can be located near the Y end of the spectrum. There are many years and maybe generations to go before people appreciate how much liberty they have lost by assuming that all commands issuing from the government constitute the law. We have a long way to go to move nations from the X position toward the Y position. But since we are engaged in a battle for public attitudes, our consolation is that natural law’s weapons in the battle are the forces of rationality, reason, and justification. In this interesting sense, writing about natural law can serve also as a good way to fight for it.