system of government, a system based on consent, a task confided to the people and their elected representatives." Bork, "Natural Law and the Constitution," 19n.

11. 410 U.S., at 153.

12. *The Federalist*, No. 78.

13. *Adamson v. California* 332, U.S. 46, 65 (Frankfurter, J. concurring) (l947).

14. Roger K. Newman, *Hugo Black* (New York: Pantheon, 1994), 104.

15. "[W]hen judges understood more clearly the difference between natural law and positive law, they understood more readily that the mission of judges would not encompass the management of schools or the allocation of public housing." Hadley Arkes, "Natural Law and the Law: An Exchange," *First Things* (May 1992): 45.

16. *The Federalist*, No. 78.

17. *Summa Theologica*, Pt. II-II q. 67, art 1.

18. *Summa Theologica*, Pt. II-II q. 60, art 5.

19. *Summa Theologica*, Pt. II-II q. 67, art 1.

20. *Ibid.,* art. 2.

21. *Summa Theologica*, Pt. II-II q. 60, art 6. As Hamilton put it, Every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void." *The Federalist*, No. 78.

22. *Summa Theologica*, Pt. II-II q. 60, art 5.

23. Justice Frankfurter realized this when he struck down evidence gained by police emptying the stomach of an unconscious man. Such an action, he said, "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). "Conscience," in Frankfurter's sense, was not a subjective distaste, but the conscience of a judge, rooted in the verities of natural justice. See generally, Richard G. Stevens, *Frankfurter and Due Process* (Lanham, Md.: University Press of America, 1987).

24. 5 U.S. (1 Cranch), at 180.

The Recourse to Natural Law

–by Russell Kirk

The late Dr. Kirk delivered this paper as the 1992 Orestes A. Brownson Lecture in Politics, Law, and Religion at Franciscan University of Steubenville.

The literature of natural law is complex, copious, and monthly growing vaster. All I aspire to accomplish in this paper is to offer some general introduction to the subject; to treat of natural law and the moral imagination; to describe Orestes Brownson's assault upon "higher law" doctrine; and to suggest that in politics, appeal to natural law is the court of last resort.

Objectively speaking, natural law, as a term of jurisprudence and politics, may be defined as a loosely-knit body of rules of action prescribed by an authority

superior to the state. These rules variously (according to the several differing schools of natural-rights and natural-law speculation) are derived from divine commandment, from the nature of man, or from the long experience of humankind in community.

But natural law does not appertain merely to states and courts of law. For also it is a body of ethical principles or rules governing the life of the individual person, quite aside from politics and jurisprudence. When many persons ignore or flout the natural law for mankind, the consequences are most ruinous—as with the unnatural vices that result in the hideous disease of AIDS, or with the ideological passions, defying the norms of justice, that have so disastrously ravaged most nations ever since the First World War.

On the one hand, natural law must be distinguished from positive or statutory law, decreed by the state; on the other, from the "laws of nature" in a scientific sense–that is, from propositions expressing the regular order of certain natural phenomena. Also natural law sometimes is confounded with assertions of "natural rights," which may or may not be founded upon classical and medieval concepts of natural law.

The most important early treatise on natural law is Cicero's *De Re Publica.* The Ciceronian understanding of natural law, which still exercises strong influence, was well expressed in the nineteenth century by Froude: "Our human laws are but the copies, more or less imperfect, of the eternal laws so far as we can read them, and either succeed and promote our welfare, or fail and bring confusion and disaster, according as the legislator's insight has detected the true principle, or has been distorted by ignorance or selfishness."

As interpreted by the Roman jurisconsults, and later by the medieval Schoolmen and Canonists—Thomas Aquinas especially—the legacy of the classical *ius naturale* endured little challenge until the seventeenth century. In England during the sixteenth century it was powerfully upheld by Richard Hooker in his *Laws of Ecclesiastical Polity.* In the Christian world the natural law was received as a body of unwritten rules depending upon universal conscience and common sense, ascertainable by right reason. But with the stirrings of secularism and rationalism during the seventeenth century, a new interpretation of "natural law" began to develop, conspicuous (near the end of the century) in the works of Hugo Grotius and Baron Samuel von Pufendorf. This latter secularized concept of natural law was held by many of the *philosophes* of the eighteenth century, and took on flesh during the French Revolution, when it was vulgarized by Thomas Paine.

Nevertheless, the older understanding of natural law was not extinguished. It was ringingly reasserted by Edmund Burke, in his distinction between the "real" and the "pretended" rights of men. Through the disciples of Burke, and through the influence of the Catholic Church, the classical and Christian natural law has experienced a revival in the latter half of the twentieth century.

During the nineteenth century, natural-law concepts were overshadowed by the powerful Utilitarian system of Jeremy Benthan; by the theories of John Austin and the Analytical Jurists; by legal positivism; and later—particularly in the United States—by legal pragmatism. In the United States, the older and newer schools of natural law have contended against each other since the latter half of the eighteenth century, and both have been hotly assailed by positivistic, utilitarian, and pragmatic interpretations of law. Yet appeals to the "natural law" or "a higher law" have recurred often in American politics and jurisprudence; both conservatives and radicals, from time to time, have invoked this law of nature.

The Catholic Church continues to adhere to the classical and Thomistic understanding of the natural law—to an apprehension of Justice that is rooted in the wisdom of the species. Sir Ernest Barker put thus the idea of natural law: "This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe—from the Being of God and the reason of man. It follows that law—in the sense of the law of the last resort—is somehow above lawmaking."

The most lucid and popular exposition of natural law is to be found in the Appendix, "Illustrations of the Tao," to C. S Lewis' little book *The Abolition of Man*. Therein Lewis distinguishes eight major natural laws of universal recognition and application, together with several illustrations of each, drawn from a wide diversity of cultures, religions, philosophical discourses, and countries. He expounds the Law of General Beneficence; the Law of Special Beneficence; Duties to Parents, Elders, Ancestors; Duties to Children and Posterity; the Law of Justice; the Law of Good Faith and Veracity; the Law of Mercy; the Law of Magnanimity. No code of the laws of nature ever having existed, it is ineffectual to try to enforce that body of ethical principles through courts of law; no judge hands down decisions founded directly upon the admonition, "Honor thy father and thy mother, that thy days may be long in the land"—or the Commandment's equivalents in the Babylonian List of Sins, the Egyptian Confession of the Righteous Soul, the Manual of Epictetus, Leviticus, the Analects, or Hindu books of wisdom. Nevertheless, such perpetual precepts lie behind the customs and the statutes that shelter father and mother.

Natural laws, then, should not be taken for graven Tables of Governance, to be followed to jot and tittle; they must be appealed to in differing circumstances, and applied with prudence. As Alessandro d'Entreves writes, "The doctrine of natural law is in fact nothing but an assertion that law is a part of ethics." But, he concludes, "The lesson of natural law [is] simply to remind the jurist of his own limitations. . .This point where values and norms coincide, which is the ultimate origin of law and at the same time the beginning of moral life proper, is, I believe, what men for over two thousand years have indicated by the name of natural law."

So much, succinctly, by way of definition. Turn we now to the difficulty of explaining natural law to the average sensual man. Permit me to discourse with you for a little while about natural law and the moral imagination. Incidentally, I

am helped here by an unpublished essay by the late Raymond English, who understood and praised the natural law; and understood and despised the claims for "natural right."

The natural law cannot be understood except through the elements of poetry and imagination in the soul. The poetic and the moral imagination are parts of human reason. For the man who does not feel himself in some sense a child of God, who is not possessed by the "desire and pursuit of the whole," and for whom words like honor are meaningless, the notion of natural law must be a Mumbo Jumbo, a boggle to make children behave tolerably well, a fantasy from the adolescence or the childhood of the race. Poets, James Elroy Flecker says, are those who swear that Beauty lives although lilies die; and the natural law is the poetry of political science, the assurance that Justice lives though states are imperfect and ephemeral. Justice is to politics what beauty is to art; indeed, beauty and justice become almost identical at the highest levels of human aspiration.

Yet there exists a certain way of approaching politics, just as there exists a certain way of approaching literature or painting, which can prevent the critic or student from ever perceiving the heart of the matter; and for various reasons the self-stultifying approach has been in the ascendant in the twentieth century among students of political science. To overcome the arguments of the economic determinist or the logical positivist, who is convinced that the idea of justice is mere illusion and who proves his case either by describing selected specimens of political behavior or by linguistic analysis, is so difficult as it would be to prove the importance of Shakespeare or Michelangelo to a man who insists that poetry is nonsense and painting a waste of time. Dickens' character Gradgrind, a caricature of the philosophical radical utilitarian, is as apposite today as in the 1830s; for the statistical-semanticist-functionalist political scientist still flourishes; indeed, he has almost pre-empted the field. Political science has become a Country of the Blind, where it has become dangerous to admit that one can see the blue sky and the changing shapes of the trees and the ebb and flow of sunlight and shadow.

For men and women, on the contrary, whose imagination is not desiccated, it is almost impossible to deny the existence of natural law, after experiencing the peculiar deep tranquillity of a great drama; for that experience is the intimate and inexpressible consciousness of an ending just and right according to certain vast proprieties of which human beings, at best, are only dimly though powerfully aware. In *Hamlet* or *Oedipus* or *Saint Joan* or *Anna Karenina*, the reader is conscious of a moral law of nature which is never flouted without loss or suffering. Consider, for example, how intolerable it would be, were Macbeth to die in a state of

grace and happiness as if he were saintly, or if the character of Richard III, despite his evil acts, were to be gentle and tranquil as that of Cordelia. The very fact that such suggestions are ridiculous is proof of the awareness in our civilization of the law of nature.

Natural law in literature does not mean that humane letters always must preach a pretty doctrine of virtue triumphant and vice punished in neat earthly terms: this would be absurdly unreal. What great literature has to demonstrate is the very real truth that virtue forms the good character, regardless of turns of fortune or of the mean material satisfactions achieved by the wicked. This lesson is obvious in the great tragedies: in them, aberration from the moral norm is followed by penalty, anguish, and wide spreading disruption; only when the price has been paid is peace restored—the peace of return and catharsis.

The typical political scientist nowadays is unmoved by such drama. Perhaps natural law is avoided by the political scientist because nine-tenths of natural law is outside politics proper, and is a limitation upon the scope of the state. Thus in Dante's *Inferno* only two or three of the sins for which men and women are damned fall within the definition of crime, and so of the direct coercive concerns of the state. But the state exists for the ends of the good life, and therefore, while it cannot enforce morality, it must know what morality is, and what the conditions of morality are. Moreover, there exists a considerable portion of natural law which is clearly political, and in Shakespeare's Histories the poet concentrates on these social and political aspects. Consider *King John*, and the way in which his usurpation results in loss, invasion, excommunication, personal deterioration, and assassination.

Or take *Troilus and Cressida*, which presents Shakespeare's theory that there is, and ought to be, in a political society an ordered harmony that reflects the harmony of the universe and of the human soul. Here is the authentic voice of the classical doctrine of political natural law: that there is a reasonable moral and political order, that this order is reflected in the laws and authorities of a reasonably just state, and that the breach of this order means anarchy and tyranny and the triumph of the horrid theory that might makes right. The play's emphasis on harmony, order, discipline, and established procedures as the conditions of justice is adamant; for if the orderly structure of consent, authority, and responsibility is broken, the price will be paid in confusion, inefficiency, corruption, rebellion, sudden death, and the naked struggle for power. All this seems too obvious to be worth arguing; and yet how remarkably little attention has been paid to the obvious in our liberal-democratic era!

The last word on this subject may be given to a Russian writer. Toward the close of *Anna Karenina*, Tolstoy allows his mouthpiece, Levine, to meditate on the problem of whether ideal values are real.

> Under every article of faith of the church could be put the faith in the service of truth instead of one's desires." "And each doctrine did not simply leave that faith unshaken; each doctrine seemed essential to complete that great miracle, continually manifest upon earth, that made it possible for each man and millions of different sorts of men, wise men and imbeciles, old men and children . . . to understand perfectly the same one thing, and to build up thereby that life of the soul which alone is worth living, and which alone is precious to us.

The preceding passage is especially interesting because it rejects mere reasoning (in the sense of enlightened deductions from self-interest) as the basis for knowledge of natural law. Right reason is a function of the poetic imagination, and human beings are—in spite of Thomas Hobbes—poetic animals.

Just here it may be well to remark that the natural law is meant not merely for statesmen and political ends, but primarily for the governance of persons—for you and for me, that we may restrain will and appetite in our ordinary walks of life. Natural law is not some code that we thrust upon other people: rather, it is an ethical knowledge, innate perhaps, but made more clearly known to us through the operation of right reason. And the more imagination with which a person is endowed, the more will he apprehend the essence of the natural law, and understand its necessity. If such a one, despite his power of imagination, offends against the natural law, the greater will be his suffering. So I have found in the course of a peregrine life. And over a good many decades I have discovered that most contemners of the natural law are dull dogs, afflicted by a paucity of imagination. As Adam Miokiewicz instructs us,

> Your soul deserves the place to which it came,
> If having entered Hell you feel no flame.

Now for some examination of Orestes Brownson on abuses of the doctrine of the natural law. In March, 1850 on the floor of the United States Senate, William Henry Seward made his famous declaration that there exists "a higher law than the Constitution." At once a heated controversy arose. In January, 1851, Brownson published his review-essay entitled, "The Higher Law," in which he refuted the claim of Seward, the Abolitionists, and the Free-Soilers to transcend the Constitution by appealing to a moral "higher law" during debate on the Fugitive Slave Bill.

He agreed with Seward and the Abolitionists that "there is a higher law than the Constitution. The law of God is supreme, and overrides all human enactments, and-every human enactment incompatible with it is null and void from the beginning, and cannot be obeyed with a good conscience, for 'we must obey God rather than men.' This is the great truth statesmen and lawyers are extremely prone to

overlook, which the temporal authority not seldom practically denies, and on which the Church never fails to insist."

Brownson continued:

> But the concession of the fact of a higher law than the Constitution does not of itself justify the appeal to it against the Constitution, either by Mr. Seward or the opponents of the Fugitive Slave Law. Mr. Seward had no right, while holding his seat in the Senate under the Constitution, to appeal to this higher law against the Constitution, because that was to deny the very authority by which he held his seat...After having taken his oath to support the Constitution, the Senator had, so far as he was concerned, settled the question, and it was no longer for him an open question. In calling God to witness his determination to support the Constitution, he had called God to witness his conviction of the compatibility of the Constitution with the law of God, and therefore left himself no plea for appealing from it to a higher law.

We cannot be bound, Brownson continued, to obey a law that is in contravention of the law of God. "This is the grand principle held by the old martyrs, and therefore they chose martyrdom rather than obedience to the state commanding them to act contrary to the Divine law. But who is to decide whether a special civil enactment be or be not repugnant to the law of God? Here is a grave and perplexing question for those who have no divinely authorized interpreter of the divine law."

The Abolitionists and Free-Soilers, Brownson remarked, had adopted the Protestant principle of private judgment. "But this places the individual above the state, and is wholly incompatible with the simplest conception of civil government. No civil government can exist, none is conceivable even, when every individual is free to disobey its orders whenever they do not happen to square with his private convictions of what is the law of God."

The Church, Brownson writes, is the authoritative interpreter of the divine law. He reminds his readers that the state is ordained of God; but the state is not the supreme and infallible organ of God's will on earth.

> Now it is clear that Mr. Seward and his friends, the Abolitionists and the Free Soilers, have nothing to which they can appeal from the action of government but their private interpretation of the law of God, that is to say, their own private judgment or opinion as individuals; for it is notorious that they are good Protestants, holding the pretended right of private judgment, and rejecting all authoritative interpretation of the Divine law. To appeal from government to private judgment is to place private

> judgment above public authority, the individual above the state, which, as we have seen, is incompatible with the very existence of government, and therefore, since government is a divine ordinance, absolutely forbidden by the law of God—that very higher law invoked to justify resistance to civil enactments. . . No man can ever be justifiable in resisting the civil law under the pretense that it is repugnant to the Divine law, when he has only his private judgment, or, what is the same thing, his private interpretation of the Sacred Scriptures, to tell him what the Divine law is on the point in question, because the principle on which he would act in doing so would be repugnant to the very existence of government, and therefore in contravention of the ordinance, therefore of the law, of God.

Brownson's argument—which we have not time enough to analyze in full here—in substance is this, in his own words: "Mr. Seward and his friends asserted a great and glorious principle, but misapplied it." It was not for them to utter commands in the name of God. Their claims, if carried far enough, would lead to anarchy. The arguments of some of their adversaries would lead to Statolatry, the worship of the state.

"The cry for liberty abolishes all loyalty, and destroys the principle and the spirit of obedience, while the usurpations of the state leave to conscience no freedom, to religion no independence. The state tramples on the spiritual prerogatives of the Church, assumes to itself the functions of schoolmaster and director of consciences, and the multitude clap their hands, and call it liberty and progress!"

Brownson advocated compliance with the Fugitive Slave Law, which clearly was constitutional; indeed, obligatory under Article IV, Section 2 of the Constitution. It was his hope to avert the Civil War which burst out ten years later. "Now there is a right and a wrong way of defending the truth, and it is always easier to defend the truth on sound than on unsound principles," he wrote. "If men were less blind and headstrong, they would see that the higher law can be asserted without any attack upon legitimate civil authority, and legitimate civil authority and the majesty of the law can be vindicated without asserting the absolute supremacy of the civil power, and falling into statolatry,—as absurd a species of idolatry as the worship of stocks and stones."

Very possibly, we have found in these passages from "The Higher Law" and in Brownson's general argument various considerations highly relevant to our own era. Permit me, in conclusion, to suggest how we may have recourse to the natural law during this concluding decade of the twentieth century, and how sometimes resort to the teachings of the natural law is an act of desperation.

* * *

As Brownson remarks, the natural law (or law of God) and the American civil law are not ordinarily at swords' points. Large elements of natural law entered into the common law of England—and therefore into the common law of the United States—over the centuries; and the Roman law, so eminent in the science of jurisprudence, expresses the natural law enunciated by the Roman jurisconsults. No civilization ever has attempted to maintain the bed of justice by direct application of natural law doctrines by magistrates; necessarily, it is by edict, rescript, and statute that any state keeps the peace through a system of courts. It simply will not do to maintain that private interpretation of natural law should be the means by which conflicting claims are settled.

Rather, natural law ought to help form the judgments of the persons who are lawmakers—whether emperors, kings, ecclesiastics, aristocratic republicans, or representatives of a democracy. The civil law should be shaped in conformity to the natural law—which originated, in Cicero's words, "before any written law existed or any state had been established."

It does not follow that judges should be permitted to push aside the Constitution, or statutory laws, in order to substitute their private interpretations of what the law of nature declares. To give the judiciary such power would be to establish what might be called an archonocracy, a domination of judges, supplanting the constitutional republic; also it surely would produce some curious and unsettling decisions, sweeping away precedent, which would be found highly distressing by friends of classical and Christian natural law. Only the Catholic Church, Brownson reasoned, has authority to interpret the laws of nature; but the Supreme Court of the United States, and the inferior federal courts, and our state courts, take no cognizance of papal encyclicals. Left to their several private judgments of what is "natural," some judges indubitably would do mischief to the person and the republic. The Supreme Court's majority decision in the case of *Roe v. Wade*—in which a pretended "right of privacy," previously unknown, was discovered—in actuality amounted to a declaration of the "natural right" of a mother to destroy her offspring. The Supreme Court now seems to be repudiating that particular doctrine;[1] but it seems to me curiously naive to fancy that American courts always would subscribe to Thomistic concepts of the laws of nature, and abjure Jacobin doctrines of natural right. Courts of law must be subordinate to the general legislative authority; otherwise the Book of Judges is followed by the Book of Kings.

In the seventh edition of *The Conservative Mind*, I have written that the first canon of conservative thought is "Belief in a transcendent order, or body of natural law. Political problems, at bottom, are religious and moral problems. A narrow rationality, which Coleridge called the Understanding, cannot of itself satisfy human needs. . . True politics is the art of apprehending and applying the Justice which ought to prevail in a community of souls." The natural law, in an age when

Dinos seems to be King, is the one great remaining defense of order, whether order in the soul or order in the commonwealth.

So men discover when the fountains of the great deep are broken up. In Germany, when Adolph Hitler came to power, doctrines of natural law were in the sere and yellow leaf. Legal positivism was altogether triumphant: the state was said to be the source of all justice, and could do no wrong.

Then the Nazis proceeded to those measures which laid waste all the traditions of civility; theirs was an inhumane domination. Yet Hitler had been elected Chancellor lawfully, and although he had abrogated the Weimar Constitution, still the Reich was the Reich, and to its laws all Germans owed loyal obedience, in the teachings of positivistic jurisprudence.

In this desperate exigency, certain little knots of courageous Germans began to plan the killing of the tyrant. They were army officers, landed proprietors of ancient family, professional men. They all had been reared in the doctrine that the state must be obeyed in all things. Yet the Reich had been perverted. They turned, if reluctantly, to the doctrines of natural law—they who had been upholders of the German state. Several such conspiracies against Hitler were formed; all failed, and the heroic adherents to the natural law paid with their lives, after torment. (I knew Ludwig Freund, one of the two survivors of the first plot.) Those bold spirits all had been law-abiding traditionalists of the sort approved by Vergil in Augustan times. But, coming to apprehend that the natural law stands higher than the positive law, they laid down their lives in the attempt to take a tyrant's life.

Such is the natural law as extreme medicine. But it is not to such violence that ordinarily the recourse to natural law will lead us. When the time is out of joint, we repair to the teachings of Cicero and Aquinas and Hooker about the law of nature, in the hope that we may diminish man's inhumanity unto man. We find in the Catholic Church an authority on the meaning of justice which has been vindicated, rather than overthrown, by the fraud and violence of our twentieth-century Time of Troubles. The natural law lacking, we become so many Cains, and every man's hand is raised against every other man's.

Notes

1. Editor's note: Kirk wrote this before the 1992 decision of *Planned Parenthood v. Casey*, 112 s. ct. 2791.