

Natural Law, the Power of Courts, and the Strange Case of Annie Stumpf

—by William Bentley Ball

Abortion may be defined as the exercise by a woman of her reproductive rights. Homosexuality is one choice among other normal lifestyles. Labrador is an island off the coast of Japan. Two plus two equals five. And the God of Scripture is not the source of our rights.

I suppose that the worst pain we, as sane persons, would suffer if placed in an insane asylum would be having constantly to listen to outpourings of truculently delivered nonsense. We would want, in the matter above, to take a map of the Far East and *show* that Labrador isn't there. We'd want to take hold of the five fingers of the person who couldn't calculate and count off four of those fingers. But we'd find our efforts useless. And just as useless would it be to spell out what really takes place in homosexual unions or in abortion. Here is something worse than the invincible ignorance of which we used to speak in discussing some heretics of old. Here is an abhorrence of reason. Alas, the same abhorrence of reason marks our jurisprudence of rights.

I say this as background to the question: whether the natural law should be used as the basis for judicial decision-making. One answer is that given by Robert Bork, backed by Robert Bolt¹ and seconded by Father Canavan.² It is the obligation of the judge to observe what the laws provide. This position is not a mere matter of respecting black print; instead it is a matter of respecting *the people*. It is they who, through their legislatures, have made the laws. That is why, if a law is challenged as unconstitutional, we indulge the presumption that it is not and we condemn the presumption of the judge who, out of his own head, says that it is. It is true, of course, that the people, in writing their laws, do not always speak clearly. Hence judges often need to figure out what the people said. And here rules of statutory construction (as well as common sense) help in determining what the people really intended by what they said.³ The text of the law is simply looked over and the meaning figured out. The process is really no different when we ask whether what the people have said in a statute seems contradicted by what they have said in that other body of positive law, the basic law of their state or federal constitutions.

But Bork and his allies tell us that justices of the Supreme Court have grossly abused that process by ignoring or overriding positive law in favor of their subjective social attitudes. Bork points particularly to decisions using, pretextually, the federal constitution's Equal Protection and Due Process Clauses. Though he is far from denying that there is a natural law, he excoriates those who, whether by

abuse of those clauses or simply by resort to “natural law,” reach outside the positive law for the *ratio decidendi*.

While in its decisions on equal protection, the Court has long since departed from the original understanding of the reach of the Constitution’s equal protection provisions, the Court has also read into it an accordion-like jurisprudence, with abundant room for justices’ subjective judgments (e.g., with respect to what differences or inequalities are subject to strict scrutiny and which allow of ignoring).⁴ But it is with respect to due process that blank-check discretionary power in the justices is most intensively urged and most vehemently challenged.

The problem centers on what we are to understand when both the Fifth and Fourteenth Amendments forbid government to deprive any person of “life, liberty or property without due process of law.” There is, at the very least, a linguistic attractiveness to the idea (as emphasized by Bork and others) that “process” means “procedure” and that “due process” means “fair procedure.” Hence, it is reasoned, if all the right procedural steps are taken in a case where government is said to threaten liberties, “due process of law” will have been had. Bork argues that that is precisely the meaning conceived by those who framed the Amendments. With fair procedures and the finite terms of the Bill of Rights, we have all the protection of our rights that we need. But if some other rights need to be accorded us, amending the Constitution is the way to get them. We are bade to reject that different understanding of “due process of law” which some have long held: that it embraces substantive rights rooted in the Magna Carta.

Judge Bork and those who agree with him quote Justice Hugo Black who predicted that, if due process of law is taken to embrace substantive rights, or if rights can be created out of beatific visions of judges enamoured of “natural law,” the result will be that “our Nation ceases to be governed according to the ‘law of the land’ and instead becomes one governed ultimately by the ‘law of the judges.’”⁵ And, so it is argued, do we not have terrible proof of that as we see such Supreme Court decisions as *Roe v. Wade*⁶ with its fiction of “privacy” or, worse, the opinion of Judge David Souter, in *Planned Parenthood v. Casey*,⁷ holding that the Due Process Clause of the Fourteenth Amendment provides women a fundamental right to kill their unborn children? Are not such decisions the product of justices’ subjective choices freely available to them from the constitutional arcanum called “due process of law” (or from “natural law”)? But turn now to the view that due process of law means fair procedures and only that. I spoke in an article in *Crisis* some while ago, of the bad results *that* can produce, pointing out that Amish, criminally prosecuted in Wisconsin for their refusal to enroll their children in high school, would have not been able to claim that the Free Exercise Clause of the First Amendment afforded them protection.⁸ Under the procedural view of due process, if the requisite papers were served on them and they were given proper notice and a fair hearing, they would have been afforded due process of law.

But both of the above arguments, it will be noted, are cast in terms of *results*. The substantive due process/natural law argument is called bad especially because it leads to the rule of judges and to chaos (wholly irrespective of happy endings in some cases).⁹ If it refers to anything but fair procedure, it must refer to procedure *and* to everything else. The “procedural due process” argument is called bad because it cuts off the broad imaginable scope of constitutional protection. While I see the practicality of the former argument, I am aware that no living human being knows precisely what the framers meant when they drafted due process into the Constitution. To me, at least, it seems more likely that they intended substantive rights to fall within its meaning, including, not only the substantive rights listed in the Bill of Rights, but even rights found elsewhere. If that is so, does that not mean that judges are empowered to render decisions on the basis of natural law (whether that is in the course of expounding a particular interpretation of due process or equal protection or declaring a right not found anywhere in the Constitution)? The answer depends on what we mean by natural law.

Those who criticize judges’ employment of natural law in making decisions do so because it means resort to some ultimate principle outside of the text of positive law. Under that conception, the Supreme Court has been swimming in natural law throughout its history. Looking just at the decisions of recent terms, we see the Court finding that the criminal trial of an incompetent defendant violated “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”¹⁰; considering whether the right to choose abortion is “central to personal dignity and autonomy”¹¹; and exploring whether “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”¹² Where are any of these sentiments located if not in the conscience or mind or emotions—*i.e.*, the *self*—of the justices who made them up? We argue in a circle when we say that it’s obvious that Lord Jeffreys was an “unfair” judge, or that Justice Souter’s notion of “human dignity” as supporting baby-killing is “right.” Where did he go to find that out? But so it is, too, with those who insist that “fair procedures” is what is meant by due process. How is “fair” determined? What makes a procedure “fair”? We do not at all answer the question by saying that that’s what “tradition” thought was “fair.” “Tradition” didn’t think anything; tradition is simply the consensus of an earlier age, the then prevalent aggregate of thoughts of individuals. When we call a procedure “fair” because tradition so holds it, we are again resorting for justification to something outside the available positive law.

Should it not then be our conclusion (a) that there exists no real limitation on judicial process—that whatever “rights” written in by ideologue judges as home-made law, on blank checks of due process, or as emanations of natural law, are to be enforceable as part of the rule of law? Or (b) that such a chaotic result can be foreclosed only if justices limit the due process concept to mean fair procedures?

Critics of reading substantive rights into due process, with some eagerness, lump natural law with all the subjective aberrations which point to the chaos they fear. For some, natural law then becomes a subject of comedy, likened to the prophecies of Jim Baker or the “God told me this” of Jimmy Swaggart.

Over against all of this is a somewhat different view of natural law—to quote the statement of Father James V. Schall: “The most elementary statement of natural law as it exists in human beings is simply to ‘do what is reasonable.’”¹³ All opinions of Supreme Court justices which have ever spoken of rights have been exercises of attempts to *reason* respecting those rights—even the anti-life opinions in *Wade* and *Casey* with their pleadings for “personal dignity and autonomy.” But the justices who wrote those opinions—even they—must acknowledge that, on occasions past, the Court has found itself to have been wrong and hence then overruled a prior constitutional holding¹⁴ (or so modified it as virtually to have overruled it). These revisions are an acknowledgement of what Scholastic philosophy speaks of as “right reason”—i.e., it is not enough that the Court has ruled and given reasons for its ruling: the reasons may be found to have lacked rightness. That being agreed, we must extend Father Schall’s starting definition of natural law to read: “to do what is reasonable in the light of right reason.” But whose resort to reason is a resort to “right reason”? How do we find “right reason”? It is on this that the debate over natural law should focus. In our search, we can go rummaging through the philosophic bric-a-brac of Court opinions of the past half-century, with their frequent *ad hoc* guesswork, their sentimentality and, worse than all else, their materialist conception of man as autonomous. Or we can go to the wisdom of our ancient and enduring Scriptural tradition and recognize that there is a law “written on the human heart and part of the Covenant,”¹⁵ ascertainable by men, available to men, binding upon men. As John Paul II has expressed it, natural law “is nothing other than the light of understanding infused in us by God, whereby we understand what must be done and what must be avoided.”¹⁶ The Holy Father here points to the commands found in both the Old and New Testaments.

Does this not mean that judges are justified in ignoring the positive law in favor of direct appeals to natural law? Inevitably it does, and ethically it must. *But necessarily it rarely must.* Judge Bork is right in expressing dismay over the abuses visited upon the nation through the constitutional free-wheeling of justices. He holds that the protections afforded us by the constitutions (state and federal) are abundant, should be enforced according to their originally intended meanings and that additions to those protections, if needed, should come about through constitutional amendment. Can we imagine exceptions?

Hadley Arkes has correctly asked whether such conservative critics of substantive due process “would hold back the hand of judgment if a state suddenly declared that black people, or Asians, were no longer ‘persons’ in the eye of the law, and therefore the law could not protect them from assaults and lynchings”?¹⁷

Of course, this turn is exactly what has happened to millions of our people, the unborn human beings who have been murdered. Let me add a hypothetical to Professor Arkes's example. It is the case of *Stumpf v. State of Jackson*. The State of Jackson is mythical, but the facts of the case are not all that mythical:

The State of Jackson, in 1997, enacts the Quality of Life Act (QLA) with the support of a large majority of the voters. Described by its proponents as “an extension of the reproductive rights already established in our law” and “a humanitarian expression of the values found in our welfare, environmental and family laws promotive of the quality of human life,” the QLA amends Jackson’s criminal law of murder to permit euthanasia, within 90 days of delivery, of “post-fetal products of conception” which are determined by the State Quality of Life Board to be “so severely defective physically as to (a) foreclose any possibility of the product’s being able to live a marginally normal existence in the future, (b) constitute an intolerable prospective burden on those who produced it.” It is the producers of the product who are thus allowed either to terminate its existence themselves or through a physician (who is likewise rendered exempt, in this matter, from the law of murder). Section 18(G)(3) of the QLA, headed “Fair Procedures,” requires that persons seeking the relief afforded by the Act seek a declaration of eligibility on Form 13336, wherein they are to state their grounds for seeking relief. A prompt hearing by the Board is mandated. The Board is comprised of experts from the fields of medicine, psychology, economics, and social welfare, in addition to two clergypersons and two representatives of the general community. Joe and Annie Stumpf beget a female product severely brain-damaged, blind and with cerebral palsy.¹⁸ Immediately after the delivery, Joe and Annie file the Form 13336 application and right after that become divorced. The Board soon declares their eligibility. Annie now has a change of mind about “killing my poor baby girl” and seeks an injunction to stop it. In court her attorney argues that the life of a person is at stake and a mother’s interest in preserving the life of her child; that the Due Process Clause of the Fourteenth Amendment protects the interests of both. But the Supreme Court of Jackson holds: (1) This product of conception is no more a person than it would have been a month previous while still in the womb (when legally it was not a person and lawfully its life could have been terminated); (2) The state has a compelling interest in the protection of meaningful human life—here, that of citizens, like Joe, the quality of whose lives (as the people of Jackson by the QLA clearly saw) will be radically diminished by having to maintain a totally defective product; nor should that burden be transferred to other taxpayers through public agencies; (3) No due process issue arises here. While the Fourteenth Amendment bars the state from depriving any person of life without due process by law,¹⁹ here the life of no person is threatened. Further, no state action is involved, the state being but a passive determiner of eligibility and not the depriver of the product’s life. And Annie cannot claim that she is denied due

process since she and her product were afforded the eminently fair procedures under Section 18(G)(3). Annie now seeks review by the U.S. Supreme Court which has agreed to hear this case of first impression. The media are buzzing with it, giving much camera to poor Joe. ACLU, PAW, Universalists and many forward-looking groups are filing *amicus* briefs in favor of QLA and warning that if it is struck down the hard-earned reproductive rights of all women will go down with it. The Catholic bishops, many evangelicals, and orthodox Jews are filing as *amici* on the side of Annie and her product. An interesting note: Officials of the AARP, which has experienced a violent anti-QLA reaction among the oldest of its members, is pondering joining them.

In the spring of 1996 Justice Antonin Scalia had made two highly publicized addresses on religion's relationship to the public order. In one, delivered before a Baptist audience in Mississippi, he called for the return of America to Bible-centered values. In the other, at Gregorian University in Rome, he said that those values should not be reflected in public policy if a majority does not wish them to be. Scalia is thus at one with Robert Bork (and Chief Justice Rehnquist) in their rejection of natural law, not *in se*, but as affecting public policy.

Remembering that a large majority of Jackson's voters favor the QLA, and that Annie Stumpf was accorded fair procedures, we may wonder how Scalia will vote when Annie's case is heard by the Supreme Court.

Notes

1. R.H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 354-355.
2. F. Canavan, *The Pluralist Game: Pluralism, Liberalism, and the Moral Conscience* (Lanham, Maryland: Rowman & Littlefield, 1995), 52-53.
3. See, e.g., Pennsylvania Statutory Construction Act, 1 Pa. C.S.A. §1501, *et. seq.*
4. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).
5. *In Re Winship*, 397 U.S. 358, 384 (1970).
6. 410 U.S. 113 (1973).
7. *Planned Parenthood v. Casey*, 505 U.S. , 112 S.Ct. 2791, 120 L.Ed2d 674 (1992).
8. *Crisis* 8 (June 1990): 286.
9. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Rochin v. California*, 342 U.S. 165 (1952).
10. *Medina v. California*, 505 U.S., 112 S.Ct. 7572, 120 L.Ed.2d 353, 363 (1992), quoting *Speiser v. Randall*, 357 U.S. 513, 523 (1958).
11. *Planned Parenthood v. Casey*, 505 U.S., 112 S.Ct. 2791, 120 L.Ed.2d.674, 698 (1992).

12. *Ibid.*
13. J.V. Schall, "Natural Law and Human Rights," *Loyola Law Review* 38 (1992): 289, 292.
14. *Brown v. Board of Education*, 347 U.S. 483 (1954); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
15. Pope John Paul II, *The Splendor of Truth* (Boston: St. Paul Books & Media, 1993), 13.
16. *Ibid.*, 22.
17. H. Arkes, "A Jurisprudence of Natural Rights: How An Earlier Generation of Judges Did It," *The Heritage Lectures* No. 364 (1991).
18. Precisely such a baby is presently being cared for by a Catholic couple in Harrisburg, Pennsylvania.
19. The Fifth and Fourteenth Amendments' references to "life" do not state protections against private actions but only against *governmental* action. Our statutes against murder arise from the common law (and hence from Scriptural tradition).

Constitutional Interpretation, Unenumerated Rights, and the Natural Law

—by Stephen M. Krason

The topic of this symposium is a broad one, which can be approached from many different angles. My contribution shall be to address the following question: Should American judges rely on natural law to adjudicate constitutional cases, especially involving questions of individual rights, when provisions of the U.S. Constitution do not give them a clear answer? My answer to this long controversial jurisprudential question is yes, and my aim shall be both to argue the reasons why and to respond to the typical arguments to the contrary.

There is no question for the Catholic that human law must be shaped by the natural law. As Pope Leo XIII said in the encyclical *Libertas Praestantissimum*, "Nature herself proclaims the necessity of the State providing means and opportunities whereby the community may be enabled to live properly, that is to say, according to the laws of God."¹ As St. Thomas Aquinas writes, "every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law."² Indeed, this Catholic tradition is no different from other elements of the Western heritage, going back to the ancient Greeks, which have held that law and government must be shaped by principles of justice not