

The Breakfast Club

Constitutional Minute for 21 November 2023

The Decline of Natural Law

As I said in last week's essay, belief in natural law has declined to such a low point where today some people seem to question your sincerity for even bringing up the topic. This is sad and ironic in a country where natural law played such a key role in bringing about our independence from England and shaping our constitutions and laws. We seem to be saying as a nation: "Thanks very much natural law, but we don't need you now, we have positive law, that's all we need." In other words, we mean: "Thank you God for giving us the natural law; it served its purpose, but we'll take it from here."

The chief reason for the decline in natural law belief is due to the very aggressive campaign by a handful of English atheists in the early 1900s to forcefully replace classical natural law theory with what they called "legal positivism." Jeremy Bentham (1748-1832) and John Austin (1790-1859) are generally credited as the founders of legal positivism.

The tenets of legal positivism state:

- There are no divine absolutes in law, or if there are, they are irrelevant to a modern legal system.
- Law is constructed – not discovered or revealed.
- Law evolves as man evolves.
- Judges guide the evolution of law through their decisions.
- To study law the "scientific" way, go to the "original sources," i.e., the decisions of judges.

Bentham once called natural law "nonsense upon stilts."¹ But even before the writings of Bentham and Austin reached these shores, late in their lives or even posthumously, the idea that reason alone should replace revelation had already gained a foothold in American political thought. In the words of the eminent American historian Carl Becker, enlightenment thinkers "*deified nature and denatured God. Since Nature was now the new God, source of all wisdom and righteousness, it was to Nature that the eighteenth century looked for guidance, from Nature that it expected to receive the tablets of the law; and it was just as necessary now as ever for the mind of the rational creature to share in the mind of this new God, in order that his*

¹ Sweet, William (n.d.). "Bentham, Jeremy". *Internet Encyclopedia of Philosophy*. Retrieved 11 June 2018

*conduct, including the 'positive laws of particular states,' might conform to the universal purpose.*²

Legal Positivism began to gain a foothold in America in the early 1800s but really took off after the publishing in 1859 of Charles Darwin's *On the Origin of Species* and, in 1871, *The Descent of Man*. Today, legal positivism is *de rigueur* in all but about five American law schools.³

The Decline of Natural Law; How American Lawyers Once Used Natural Law and Why They Stopped, by Stuart Banner, chronicles this issue reasonably well, but Banner ignores what I feel is an equally important cause of the decline: the rejection of Bible-based faith in this country. It is not just a decline in churchgoing, and it is not confined to Christians. Jews who formerly based their faith on the teaching of the Bible are becoming increasingly secularized as well.

The Pew Research Center⁴ regularly assesses this decline, finding in 2018 that "only 65% of American adults describe themselves as Christians when asked about their religion, down 12 percentage points over the past decade." To some, 65% may not seem too concerning -- this is still well over a majority of Americans -- but recall this is a *nationwide* average figure, and the figure in the founding period was nearly 100%. Alarming, some areas of Minnesota and Michigan already have majority Muslim populations,⁵ and while Islam promotes a rational basis for positive law it does not recognize natural law in the classical sense. As Christianity in America continues to decline, so will belief in classical natural law.

The secularization of America was placed on steroids by the secularization of public education. If we wonder why, we need look no further than the writings of "*Father of the modern public school system*" John Dewey, who wrote in 1933: "*There is no god and there is no soul. Hence, there is no need for the props of traditional religion. With dogma and creed excluded, then immutable truth is dead and buried. There is no room for fixed and natural law or permanent moral absolutes,*"⁶

While you will find people today stating they believe in "natural law," a few well-formed questions will reveal they are probably referring to the natural law of the Enlightenment, with Reason substituting for the God of the Bible. Those of you who believe a Creator God created a

² Carl Lotus Becker, *The Declaration of Independence, A Study in the History of Political Ideas*, p. 51

³ Regent University, Notre Dame, Oral Roberts, Liberty University being the most prominent ones.

⁴ <https://www.pewresearch.org/religion/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/>

⁵ <https://www.clickondetroit.com/news/local/2023/09/26/census-data-shows-arab-american-population-in-dearborn-now-makes-up-majority-of-people-living-there/>

⁶ John Dewey, "Soul-Searching," *Teacher Magazine*, September 1933, p. 33

natural law for our happiness and safety should get conversant on this topic; if not defended, it will soon disappear completely from the American legal and constitutional landscape.

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