Blackstone, Natural Law and the Future*

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Samevatting

Blackstone, natuurreg en die toekoms

Die gemenereg-filosoof, William Blackstone, het in 'n hele aantal opsigte tot die sistematisering en praktiese toepassing van die natuurreg en die formulering van die regte van die mens, wat daaruit voortvloei, bygedra. Een van die primêre redes vir die voortgaande invloed van Blackstone se insigte is sy verbintenis tot die goddelike oorsprong van die natuurreg – naamlik reg wat voortvloei uit die rasionele wil van die Skepper van die heelal. Voorts ondersteun Blackstone die beginsels van die natuurreg gebaseer op geregtigheid, behorende tot die natuurlike orde wat deur God geskep is en aan die mens tot sy voordeel geskenk is. In hierdie opstel word geargumeenteer dat die natuurreg-filosofie in die gemenereg-tradisie van Blackstone steeds 'n belangrike rol te speel het: alhoewel sosiale instellings tussen kulture van mekaar mag verskil, moet die positiewe reg in al sy ontwikkelende vorme gestalte gegee word deur die oorkoepelende natuurreg-norme of die risiko loop om deel van die mislukkings van die mensdom te word.

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1. Biography

William Blackstone was born to Mary Blackstone on July 10, 1723. His father, Charles, had passed away during Lady Blackstone's pregnancy, so she returned to her family to raise her children. Upon her death in 1735, William's uncle, Thomas, superintended his education and secured him a place at Charterhouse.[1] His brother-in-law glowingly described the youthful Blackstone as assiduously dedicated to his studies and a favourite of all his masters, becoming head of the school at the age of fifteen. That same year he matriculated at Pembroke College in Oxford, where he was unanimously elected to one of Lady Holford's functions for Charterhouse scholars. Upon the conclusion of his illustrious career at Oxford, Blackstone attended Middle Temple.

After his graduation from Middle Temple, Blackstone practised law in London for several years without great success.[2] He was disinclined toward public speaking and longed to return to academia. Some time after being elected a fellow to All Souls, he began giving lectures at Oxford on the law of England. His lectures were an immediate success and he was later elected to the Vinerian Chair at Oxford.[3]

Blackstone's success in academic spheres eventually brought him back to practice of the law and he became quite successful and wealthy. In 1761 he was elected to the House of Commons. This same year he married Sarah Clitherow, the sister of his biographer, with whom he would spend nineteen happy years and had nine children.[4] After nine years as a member of the House of Commons, Blackstone became a judge. His *Commentaries on the Law of England*, by far the greatest success in his legal career, was published during his judicial career between 1765 and 1769. He continued to serve as a judge on the King's Bench until chronic health problems such as gout and congestion resulted in his death on February 14, 1780.[5] The year 2010 marks the 240th anniversary of Blackstone's death. The reflection in this essay on the importance of his natural law views for purposes of transcending the limitations of postmodern and

1 Clitherow, 1828: Preface ix.

2 William Blackstone's reputation in Victorian England was not esteemed. He was described in *Re Goodman's Trust*, (1881) 17 Ch. D. 266, 296 as "the somewhat indiscriminate eulogist of every peculiarity and anomaly in our system of laws". As time passed, however, lawyers became warmer admirers of Blackstone because of his *Commentaries*. See Holdsworth, 1932 and Hanbury, 1950.

3 Jones, 1973: xii-xxii.

4 Clitherow, 1828: xiv-xvi.

5 Clitherow, 1828: xix.

relativist legal doctrines represents one form of homage for Blackstone's natural law legacy.

2. Blackstone's natural law

2.1 The origins and purposes of natural law

Blackstone's philosophical views on the created nature of the universe and of mankind led him to contemplate the origin and nature of laws. He accepted that God as a rational and wise Creator had imputed to reality, upon its formation, a natural order affecting all things contained therein. Realising that the universe was endowed with certain immutable physical laws, to which all matter was required to submit, Blackstone concluded that similarly there exist moral laws inherent in nature.[6]

This natural moral law governs what actions any creature ought to perform. As with the physical laws laid down for the cosmos, assent to the natural law is not a matter of volition, for it is "a rule of action dictated by some Superior Being, and in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed...".[7] Humans stand in exception to this constraint, although not in exception to the laws themselves. Man,[8] "a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior".[9]

But why should any human obey the natural law if created in a manner so as to not be compulsorily subject to it? God created man with the freedom to conduct himself in all parts of his life and this free will is the enabling cause behind man's ability to contravene the natural law. God also endowed man with the faculty of reason in order that he might discover the natural law.[10] After discerning the purport of those laws, is man under

6 Although Blackstone was the first to apply natural law to the laws of England, natural law has its roots in the writings of Aquinas. Though there were hints at natural law theory in the ancient world, such as in the writings of Aristotle, it began in earnest with Aquinas. He was the first to formulate a group of ideas systematic enough to be called a theory. Centuries later, Grotius expounded on this theory. His works are of particular interest because he "removed natural law from the jurisdiction of the moral theologian … and made its theory the responsibility of lawyers and philosophers". Schneewind , 1998: 82. See also Finnis, 1998 and Schneewind, 1993: 53–74.

7 1 William Blackstone, *Commentaries* 39 (hereafter "1 Comm.")

8 For the purposes of this paper, use of the word "man" or "mankind," as well as the corresponding personal pronouns, indicates a discussion of the human race as a whole, inclusive the female gender.

9 1 Comm. 39.

10 1 Comm. 39-40.

any obligation to conform to them? "A being, independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct."[11] Being wholly dependent on the Creator for even his very existence, man is thus obliged to discern and obey all laws laid down by Him.

This obligation is actually to the benefit of man. Natural law, governing man's morality, is not arbitrary, burdensome, or impedimentary to man's best interests. The Creator, being not only omnipotent but also infinitely wise and good, has seen the true needs of man and has only laid down laws founded in justice.[12] These are the immutable laws of good and evil. To these laws the Creator himself conforms, in every way and at all times, and thus is just in expecting man to conform as well. In fact, these laws are so perfectly aligned with the concepts of fairness that they are inseparable from the true happiness of each individual. "For he [the creator] has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter."[13] The natural law was not laid down to constrain man, but rather to provide him with a framework within which he would be able to experience the most fulfilling life.

How is man to discern the natural law? Being a creature of free will, he is able to choose to live as he pleases. However, man also possesses the faculty of reason. In order to apply the natural law to appropriately constrain each individual's freedom, it is necessary to make use of reason to first perceive the natural boundaries of good and evil. As the natural law is perfectly rational and just, reason is all that is necessary to recognise it.[14] However, humans are limited creatures, so each man will discover that his reason is full of ignorance

11 1 Comm. 39.

12 This view echoes both the writings of Grotius and Aquinas on the relation between God and moral law. Grotius's view, known as "voluntarism", holds that merely through volition, God determined the full and exact content of all normative categories such as goodness, evil, and justice. Aquinas' view emphasised divine reason, rather than divine will, as the source of natural law. See Grotius, 1868 and Aquinas, 1997.

13 1 Comm. 40.

14 This is similar to the view of Thomas Aquinas that even the divine will is conditioned by reason. Thus, the natural law provides a non-revelatory moral basis for all human social conduct. While Aquinas held that natural law should be accepted on the basis of divine revelation alone, he also stated that it is possible and desirable to achieve genuine knowledge of them by means of the rigorous application of human reason. See Finnis, 1998. Grotius held similar views that knowledge of the law of nature "proceeds from the essential traits implanted in man". Grotius, 1925: Prol. §12.

and corrupted by his self-love. For this reason, the Creator has reiterated the doctrines of the natural law throughout Scripture. These divinely revealed doctrines "are found upon comparison to be really a part of the original law of nature"[15] and, if man had been perfectly rational, the knowledge of these would have been attainable to him.

Because the natural law is rational and founded in justice, all positive law must conform to it or else be invalid. A law in violation of the natural law is not a law at all. Similarly, valid human enactments draw all their authority, derive all their power to control, from their basis in the natural law. People do not view murder as wrong because their law says so, but because it is inherently wrong according to the natural law which they perceive before ever hearing their nation's law. The human law merely echoes the natural law.[16] However, as the natural law delineates the distinction between good and evil, in many instances all choices in a situation will be in conformity with the natural principles of what is right. It is regarding this great number of indifferent points, in which man is left to his own liberty, that human laws become most important. When it is necessary for the benefit of society to be restrained within certain limits, and yet the natural law is neutral on the issue – for example with import and export laws – it is then that positive law has its greatest force and efficacy.[17]

Although natural law is complete in itself, positive law is essential for a functioning society. Isolated in nature, man would need no other law besides the natural law to govern his actions and distinguish between right and wrong. Indeed no other law could possibly exist, for a law requires some superior to make it. However, man is a social creature not formed to live most happily in isolation. Therefore the laws of each society must establish the boundaries of right and wrong, and those laws must find a way to commend the former and prohibit the latter. Again, though, these human enactments have no force if they are in violation of natural law. The absolute rights which the Creator established, called natural rights, are completely independent of human law, and human law is ancillary to such rights. Life and liberty "need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be invoidable".[18] Quite the opposite, actually – positive law is required to

15 1 Comm. 42.
16 1 Comm. 41.
17 1 Comm. 42.
18 1 Comm. 54.

honour natural rights and has no power to limit them in any way, unless an individual commits an act that amounts to a forfeiture.

In addition to natural law and human law, a third type of law arises through the interaction of societies. As it has not yet been feasible for all of the earth to unite in a single polity, there has necessarily been division into many distinct nations. Although separate, these nations must at times interact with one another, and such interactions require rules to govern them. Thus arises what Blackstone calls "the law of nations", or international law. Natural law is of the utmost importance to international law. Each society, being entirely independent of the others, does not regard any of the others as superior. Therefore, international law cannot be made by any one society, but "depends entirely on the rules of natural law".[19] It is only through the presence of universal concepts of right and wrong, inherent in human nature regardless of culture, that divergent nations are able to agree on rules for their interactions.

2.2 The natural rights of persons

2.2.1 Absolute and relative rights

Blackstone begins his discourse on the rights of persons by distinguishing between absolute rights and relative rights. Absolute rights are inviolable and inherent in being human. They derive from natural law and pertain to each person as an individual, and are also known as natural rights. The broadest concept of a natural right is man's natural liberty: the right to live as he pleases. Although human laws do not have the authority to abridge natural rights, when a man joins a society, he must necessarily choose to restrict certain liberties he would have enjoyed living without human interaction, if he is to live harmoniously within other people.[20] The rights which are incidental to becoming a member of society and voluntarily limiting one's freedom are called relative rights. The term "rights" as Blackstone uses it encompasses both the rights belonging to a citizen, which is the commonly understood definition of "rights", as well as the rights due from every citizen, commonly known as "civil duties".[21]

19 1 Comm. 43.

20 A similar view is expressed by Grotius that a people may give their rights to a ruler in exchange for a peaceful and stable society. Grotius' view differs in that he takes the argument further, arguing that it should be lawful for a people to voluntarily transfer all their rights to a ruler, retaining none themselves (Grotius, 1925:I.4.2.1).

21 1 Comm. 119. Grotius first expressed this distinction between rights as powers or faculties which humans possessed, on one hand, or duties which they owed, on the other (Finnis, 1980:209).

2.2.2 Civil liberty

It is only within the sphere of relative civil duties that human law has any concern. Although a man acts detrimentally toward himself by violating natural law in privacy, as in Blackstone's examples of drunkenness in one's own home or lying about one's affairs, there is no negative effect on society. A man may have as many private vices as he pleases, and though he does not live in accord with natural law, human laws have no business correcting him. However, if these vices are made public, as with public drunkenness or slandering another person, it becomes the business of society to regulate these actions for the benefit of the public. Blackstone notes that public drunkenness would seem to primarily affect the intoxicated individual, but because society must now interact with the inebriated man it may make laws restricting such behaviour.[22]

It is clear then that living in a society requires a man to give up certain liberties. One generally cannot wander about inebriated or unclothed when living in a collective of other people. Natural liberty, the type of freedom man would enjoy living alone in nature, allows man to act however he sees fit without any restraint but that of natural law. Civil liberty consequentially is natural liberty constrained by human laws for the advancement of the public good. "The law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind. But every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, nobility, or a popular assembly, is a degree of tyranny."[23] Prudently framed laws will therefore be synchronized with the concept of liberty, but laws constraining individuals in private matters or in areas of "mere indifference" are laws destructive of liberty. Each nation must find the delicate balance between promoting civil liberty and inappropriately restricting natural liberty.

2.2.3 Absolute individual rights

There are three rights which Blackstone identifies that no person should be required to abridge for the benefit of joining a society. These are the right to personal security, the right to personal liberty, and the right to private property. These rights are so fundamental to human existence that they are absolute.[24]

22 1 Comm. 120.
23 1 Comm. 122.
24 1 Comm. 125.

The right to personal security is comprised of a "person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation".[25] Life, being the primary gift of God the Creator, is man's most fundamental possession deserving protection. As limbs and a body are needed to protect that life, man also has the right to freedom from mayhem or other bodily damage. A nation's laws must be structured in a way that allows an individual to protect and defend himself, granting men the subsidiary rights to self-defence and privacy, as well as the right to possess arms for use in defence. The latter, though not an absolute right, must be a public allowance within due restrictions to support the natural right to self-preservation and resistance when the laws of society prove insufficient to restrain violence.[26]

The right to personal liberty is the right of each citizen to his maximum civil liberty, as his natural liberty must be curtailed only to the extent necessary for the harmonious functioning of society. This personal liberty includes the right to travel where one pleases, the right to change situations through one's own labour, and the right to freedom from unjust confinement or imprisonment.[27] A man is free to choose his own lifestyle, his own employment, with whom he will associate, his own domicile: all of these fall within the personal liberty that is the absolute right of every person.

The third absolute right, the right to private property, entails the right to use and dispose of one's assets with freedom. This includes immovable physical property, chattels, and intangible property such as intellectual property. Because this right is absolute, a government may not seize private property from an individual citizen, not even for the greater public good. In the case of building a public road, for example, a government may require the land of some of its citizens that lies in the planned path of that road. The government may not coerce the property owners into forfeiting their land. Rather, because private property is an absolute right, the individual owners of the land must be compensated fully if they are compelled to give up their land.

2.2.4 Relational rights

In addition to absolute individual rights, the natural law proscribes certain relational rights as well. It is logical that the natural boundary of right and

25 1 Comm. 125.
26 1 Comm. 139.
27 1 Comm. 130.

wrong would have implications for interpersonal interactions. Blackstone identified several of the most prominent relations in private life and described appropriate parameters for each according to the laws of nature.

The first relationship analysed under the lens of natural law is that of master and servant. This relationship, taken in its broadest sense, covers any economic relation between a superior and a subordinate. Because of a natural respect for human dignity and the right to protection of body, all servants should be free from unnecessary harm or humiliation at the hand of their master, and free from unnecessary exposure to danger in the course of their work. Natural principles of equality also dictate that subordinates must be justly compensated for their labour.

Most importantly, natural law forbids slavery as an acceptable form of servitude, in which the master retains unlimited, unchecked power over all aspects of the slave's life and future. Common justifications for slavery do not hold up under the scrutiny of natural law. A common method of acquiring another person as a slave was to enslave a people conquered in war. The justification was that the prevailing nation had spared the lives of the unfortunate conquered people, and therefore those individuals owed them their lives. However, natural law dictates an absolute right to life, and therefore a man has no right to kill his enemy unless to preserve his own life. Blackstone continues that "war is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners, but merely to disable them from doing harm to us".[28] The other common justification for slavery is that a man has sold himself to another, or that a master has paid full value for his slave and thus owns him justly. However every sale requires a price, a *quid pro quo*. The buyer must pay to the seller an equivalent value of the goods sold: "but what equivalent can be given for life and liberty"?[29] Natural law therefore requires that servitude be restricted to contractual relationships and denies any man the right to own a slave.

Another common relation in private life is that of husband and wife. Blackstone's study of spousal rights is brief, as his *Commentaries* focus more on various aspects of the civil establishment. He notes, however, that the civil institution of marriage is required for the purpose of protecting the children that the union of man and woman tends to produce. Man and woman were clearly formed by the Creator with distinct

28 1 Comm. 411.
29 1 Comm. 411-12.

biologies such that only a woman can bear children. She is, as a result, naturally bound and bonded to children in a way that a man is not. Considering the "principal end and design of establishing the contract of marriage … being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong", Blackstone writes, then, that "the establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children". Therefore marital rights are not rights in the sense of privileges belonging to the couple. Marital rights are rights in the sense of a duty owed to the couple's children to care for them properly, creating the natural obligation of the father to unite permanently with the mother that they might best accomplish this purpose.

It flows naturally from the discussion on marital rights that the laws of nature also govern the parent-child relationship. "The duty of parents to provide for the maintenance of their children is a principle of natural law; an obligation … laid on them not only by nature herself, but by their own proper act, in bringing them into the world … Children will have a perfect right of receiving maintenance from their parents."[30] Parents thus voluntarily assume the obligation of ensuring the welfare of their offspring. Oftentimes, the parental duty to protect their children is so deeply engrained in them by the law of nature that it requires "rather a check than a spur" from human enactments.[31] The laws of nature do not merely require a parent just to meet a child's basic physical needs, but to take all possible steps to provide opportunities for their child to have a meaningful place in society. This includes providing an education for children appropriate to the culture and skills they will need to know as adults, and is, according to Blackstone, of far greater importance than any of the other duties. For what good do parents do their children if they bring them into the world and yet do not prepare them to function as part of it?

A reciprocal duty arises in relations between parent and child based on natural principles of justice. Parents must protect, nourish, and educate their children in the helpless state of infancy. The child assumes duties toward his parent as well. "For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honour and reverence ever after."[32] Additionally, as parents provide for their

30 1 Comm. 435.
31 1 Comm. 438.
32 1 Comm. 441.

children when they are dependant infants, so children must provide for their elderly parents. The natural principle of retribution necessitates that parents, who provide for their offspring an education so that they might prosper, ought to be supported by the fruits of that education if they stand in need. Thus the laws of nature ensure that all humans in their most dependent states, at the beginning and end of their lives, will be cared for as the beneficiaries of compassion.

2.2.5 Rights, duties and natural law

Blackstone viewed the natural law as springing from the rational will of the Creator of this universe, founded in justice and inherent in nature for the benefit of man. Man is able to discover it through reason, and divine revelation supplements our quest to understand natural law because no man possesses perfect rationality. These laws of nature establish the complete contents and boundaries of the universal categories of good and evil and, although man has the free will to live as he pleases, all men should seek to conform their behaviour to these laws. The natural law governs every aspect of life, both private and public; however, human laws have the authority only to address public violations of natural law, which are violations with negative social implications, or matters on which the natural law is neutral. Certain things are untouchable by positive law: absolute natural rights inherent in every individual. In social contexts, such rights on behalf of one party translate into a duty belonging to the other party, and thus natural law governs social interactions as well. Natural law, essential to the workings of our created universe, is no less real than the physical laws of nature and has implications for every aspect of human life.

3. The development of Blackstone's natural law views – potential or passé

The influence of Blackstone's *Commentaries* on jurisprudential development is clear, but what is the future role of natural law theory and of Blackstone's writings in an enlightened, relativistic world? Has our self-empowered, self-determined society moved past the point where natural law is relevant to legal philosophy? Enlightenment theories of human perfectibility, the utilitarianism of modernity, and postmodern relativism have permeated academic and legal spheres, leaving natural law less room to define rights and values than it used to enjoy. This philosophical shift was exemplified by the United States Supreme Court, when, in a case regarding abortion, they stated that "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. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State".[33] If this statement indeed holds true in jurisprudence, then natural law cannot delineate moral boundaries or inalienable human rights, as this is the territory of each individual's personal choice. Courts have not fully embraced such unadulterated relativism, yet neither do they any longer wholeheartedly purport natural law principles as justification for legal principles.

3.1 The United States: judges as interpreters or activists

In American jurisprudence, this philosophical dichotomy has produced differing views on roles which the judiciary should fulfil, views which are competing to shape the scope of judicial power. Such jurisprudential differences are largely the result of tension between traditional natural law and modern cultural relativism. There are those who advocate judicial restraint and those in favour of judicial activism, and there are those whose constitutional interpretive theories require strict interpretation and those who believe in a living Constitution. Usually the two sets of ideas are interrelated, as one of the oldest tenets of judicial restraint is strict construction, and because a living Constitution unbound by the "dead hand" of the framers allows more room for judicial policymaking.[34] Restraint and activism are more than simply activist judges making law and restrained judges interpreting documents, but involve a choice between competing principles revealed in differing interpretations of general phrases in the Constitution.[35] Although there is a spectrum of viewpoints on judicial power, strongly held philosophical beliefs tend to polarize opinions toward one extreme or the other. This is not to say that every judge holding postmodern philosophical beliefs is an activist, and not every judge exercising restraint embraces natural law, but there is a correlation.

Particularly, the opinions of conservative natural law legal philosophers and their more relativistic legal counterparts diverge on the extent to

33 *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), at 851. Here, the Supreme Court held that abortion in every trimester is legal, subject to narrow limitations based on a state's limited interest in potential life during late pregnancy, because the foetus is a being falling outside the fuzzy definition of "human" as put forth by the Court and because "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society". *Id.*, at 699.

34 Chappel, 1997:34.

35 Wolf, 1997:2.

which American common law should develop, if at all.[36] Conservative jurists advocate the historical role of interpreter prescribed to the judiciary in the United States Constitution. The Constitution requires judges to construe the meaning of federal and state constitutions, legislative acts, and treaties when deciding the outcome of cases.[37] This view is supported through other historical sources as well. Alexander Hamilton, in defending a Constitution that granted life-tenured judges the power to nullify laws enacted by elected legislatures, assured worried citizens through the *Federalist Papers* that there was little risk of this, as the judiciary has "neither force nor will but merely judgment".[38] Judicial power was further delineated by the Supreme Court itself in the famous case *Marbury v. Madison* when they defined judicial review, stating that "it is emphatically the province and duty of the judicial department to say what the law is", not to create the law, but to clarify it.[39] Despite such definitions, the boundary between interpretation and lawmaking is not always clear, and the extent to which judges are authorised to construct law through their judgements is sharply debated.

The eventual outcomes of such debates will change the manner in which Blackstone's legacy continues to shape legal progress in America. His future role would differ if the common law were to shift from being simply interpretive to an evolving institution. Because Blackstone's natural law theory was largely influential in the development of the founding documents of America, strict constructionists cite him with deference in discerning the original meaning and intent of the Constitution. Developmentalists, advocating for more judicial power in dispensing justice, cite Blackstone as authority as well, although not often in reference to his natural law theories. Blackstone's legal views, taken out of the philosophical natural law context in which they are grounded, still provide guidance to judges advocating differing legal philosophies.

Although Blackstone has been cited thousands of times by American courts, citations to his *Commentaries* fall with ever increasing frequency in the dissents of major court decisions as "originalist" judges try to reprimand their activist peers for "legislating from the bench". In the recent landmark case *Roper v. Simmons*, the Supreme Court held that it

36 Forte, 1998:179.
37 U.S. Constitution, Article III Section 2.
38 The Federalist No. 78, p 465 (C. Rossiter ed. 1961)
39 *Marbury v. Madison*, 5 U.S. 137 (1803), at 177.

was in violation of the cruel and unusual punishments clause of the Eighth Amendment to impose capital punishment upon minors, and therefore unconstitutional.[40] This holding essentially created a new law in the United States through broad constitutional interpretation. In response to this decision, Justice Scalia cited Blackstone, writing in his dissent that "the Court ignores entirely the threshold inquiry in determining whether a particular punishment complies with the Eighth Amendment ... At the time the Eighth Amendment was adopted, the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14."[41] Justice Scalia, known for his conservative constitutional interpretive theories, appealed to the traditions in Blackstone's day as a means of clarifying the Constitution, while the majority appealed to supposedly modern, enlightened notions of justice.

Although Blackstone's views are currently more typically associated with conservative notions of the judiciary, his natural law theory is important legal groundwork for jurists across the political spectrum. Not only were the laws of nature essential to the founding fathers of America, but natural law is essential to the preservation of fundamental human rights today and in the future. It is for this reason that they are often called "natural rights". Legal theories which allow man to define his own duties and rights tread on dangerous ground, and the various strains of postmodernism currently dominating philosophical thought allot this easily-abused power to the individual. "If there is a common denominator to all these postmodernisms, it is that of a crisis in representation: a deeply felt loss of faith in our ability to represent the real, in the widest sense."[42] Natural law, on the other hand, appeals to an authority outside of the individual, also external to government, to define moral truths and human rights. In this way, no political institution following natural legal principles can abridge the rights of the people for some other benefit.

3.2 England and South Africa: shaping and developing jurisprudence

Because natural law is a safeguard of human rights, Blackstone's views are essential to the development of common law in countries such as England and South Africa where judges have much more discretion in

40 *Roper v. Simmons*, 543 U.S. 551 (2005).
41 *Id.*, at 609 (Justice Scalia dissenting, Footnote 1), citing 4 Comm. 23-24.
42 Bertens, 1995:11.

defining civil freedoms through the law. For centuries in the legal development of England, courts were the only law-making bodies, and common law jurisprudence continues to develop through English case law. The South African judiciary is possibly vested with similar power. In the current South African Constitution, the courts have been given "the inherent power … to develop the common law, taking into account the interests of justice".[43] The power of the judiciary to make or repeal laws, to interpret the meaning of the Constitution, or to define civil liberties is tempered only by the bounds of justice.

This reveals a philosophical question: what constitutes justice? What rubric can a judge use as guidance in determining the boundaries of such a lofty concept? The best standard by which to judge whether a thing comports with the "interests of justice" is a moral paradigm created by an individual removed from any conflict of interest that could arise in deciding what constitutes justice. For such a standard of justice to be, in reality, just, the standard-creating individual would necessarily need to be just himself and to understand all possible implications of applying the standard. Additionally, justice would require this standard to apply equally to all people in all circumstances at all times, although the results of its application would inevitably vary.

Such a notion of justice, permanent and perfect and universal, is found in natural law. There, moral notions of fairness, rights, and duties arise not out of human contemplation but out of a natural order as engrained in creation as the immutable physical laws. Natural law is also an appropriate place to seek a standard of justice because it advocates that "at the deepest levels, there is no conflict between the individual good and the common good",[44] thus seeking good with the continuity that utilitarian and relativistic standards lack. Although Blackstone's notion of natural law was founded in his religious convictions and is most strongly supported by the idea of a benevolent Creator, natural law can appeal to an increasingly secular culture as well. The theory does not preclude non-religious individuals from discovering the natural order, and one can establish the validity of natural order without invoking religious doctrine.[45]

In assessing the usefulness of natural law for the development of human law, it is necessary to understand how natural law functions as a basis for

43 1996 Constitution of the Republic of South Africa, Section 173.
44 Forte, 1998:364.
45 Forte, 1998:364.

moral understanding and also the extent to which positive law requires such moral knowledge.[46] The basis of moral understanding in the laws of nature is the universal definition of good inherent in natural order, and from this flow the fundamental human rights to life, protection, liberty, and property.[47] If protection of these rights is the source of a government's power to govern, then natural law is absolutely required by human law.

It is argued, however, that because of lack of public consensus on natural law notions of morality regarding topics such as abortion, homosexuality, euthanasia, it cannot be useful as a modern legal theory regarding specific breakdowns of moral truths. To force a citizen to abide by specifics of a moral code not of their own choosing would be oppressive. Even the more general precepts of natural law – that human nature is universal, that moral truth can be discovered by human reason, and that such moral truths are objectives – are hotly contested by cultural relativism of many varieties.[48] To address this argument, one must return to the concept of an authoritative standard of justice. Can such a standard possibly be defined by public consensus, by laws enacted through a popularly elected legislature, or even by an individual? Oppressive, racist institutions such as slavery have had majority approval, yet were morally reprehensible. The actions of many genocidal regimes have been sanctioned by law, and yet were no less wicked for all their legal approval. An individual's notion of personal gain may cause him to take advantage of others, and those trodden on will inevitably complain of unfairness. If the concept of justice that defines good positive law can be determined by any of these human notions, then these previous examples could not be declared unjust, for each one of them had some means of human approval. In essence, recognising injustice at all, appeals to a higher standard of right and wrong that transcends the grievous situation. An injured party looks at inequality and recognises that something about the situation is not right. Justice, though it did not occur, is known through natural law.[49] Thus, judicial policymaking which requires civil institutions and individual citizens to adhere to natural law, the provider of an absolute standard of right and wrong, safeguards individual liberty rather than hampering it.

Natural law has the added benefit of social regulation through intertwining duty and right. As Blackstone wrote, "the rights of persons … are of two

46 Forte, 1998:365.
47 1 Comm. 125.
48 Forte, 1998:368.
49 Lewis, 1940:23.

sorts; first, such as are due from every citizen, which are usually called civil duties; and, secondly, such as belong to him, which is the more popular acceptation of rights or jura".[50] However, right and duty are more than simply two subclasses of rights; duty and right are correlative concepts. The right to life necessitates a duty to not kill, and a duty to not steal implies a right to property. Therefore in all ways one man's right creates duties for his fellow men, and he similarly has the duty to respect that same right in his neighbours.[51] Thus natural law generates a duty-based system of rights where each person must be aware of and respect the rights of others. This contrasts sharply with relativistic theories of human rights which empower each individual to define and seek his own benefits. Because human nature is much more effectively curbed from within than from external compulsions, a judiciary advocating a natural system of rights acts much more beneficially for the harmony of their society than one advocating relative moral values.

Social institutions will differ across cultures, and the application of natural law will vary. However, in the interest of preserving human rights, common law in all its developing forms must be shaped by the overarching laws of nature, or else risk succumbing to human failures. Especially in countries such as South Africa and England where common law jurisprudence develops through the decisions of judges guided by their legal philosophies, natural law is as important today as it was at its founding, and will maintain its importance in the future. For this reason it is of utmost importance to teach Blackstone and natural law. Philosophies are learned in academia and applied by those in power who were so educated. Without natural law guiding jurisprudential development, it risks succumbing to moral subjection and losing the ability to protect the natural rights of all people.

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50 I Comm. 119.
51 Rosmini, 1993:420.

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