The Alternative

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Dear Reader,
This issue of the Newsletter is on Law – and its intended effect of order. Probably every society has had law; usually the law is said to be of divine origin. Otherwise, people would be inclined to disregard the law when it is inconvenient for them. The U.S. Constitution functions as a quasi-divine document. There are also many "unwritten laws" which are called "norms" or customs that are crucial for order. People are often surprised when someone acts unethically or in a way opposed to society's interests but has not broken a law.

Possibly the most important person in the history of Western law is Cicero. His three kinds of law were cited by almost every moralist from the first to the seventeenth century. Cicero's three laws were natural law, civil law, and the law of nations. His natural law was of divine origin because he said nature was a divine being.

Christian writers adopted "natural law" while trying to change the meaning of "natural" from a divine being to human nature (as determined by divine activity). It is not clear that they ever succeeded. Catholic bishops speak about "natural law" as if its meaning is self-evident. A 2014 questionnaire, widely distributed to Catholics, found "natural law" to be unintelligible to most respondents.

The Supreme Court in July ruled that Trump's financial records must be turned over to the proper authorities. Legal commentators hailed the 7-2 rulings as showing that the president is not "above the law." He might not be above the law, but he will almost surely avoid needing to obey the law. His lawyers will continue to challenge the law as they have for the last three years. If you have the money to tie up the courts, the process can go on almost indefinitely. The day after the Supreme Court ruled that no one is above the law, Trump commuted the sentence of Roger Stone on the basis (as Stone said) that he did not squeal on Trump. No law was violated.

A THEORY OF UNITED STATES LAW
By Gabriel Moran

Discussions of law in the United States, which are usually about rights, take place between two groups: those who believe in "natural rights" and those who believe in "human rights." People who are called "conservative" these days are in favor of natural rights; people who are today's liberals favor human rights.

The conservatives who defend natural rights have elaborate theories to justify their position. That can include complicated historical arguments and dense philosophical theories, and most of all, a theory of language. The liberals who defend human rights have almost no theory and little history. They just work from the assumption that not only are human beings important but that human beings are diverse.

Secretary of State Mike Pompeo almost gave away the game in June 2019 when he announced the formation of a "Commission on Unalienable Rights" to study whether human rights conflict with "our unalienable rights of life, liberty and the pursuit of happiness." The response of most people was: "What in the world is this guy talking about"? But he was actually in danger of letting the truth slip out.

Pompeo did not say that these two sets of rights might be in conflict. His concern was that human rights were doing damage to natural rights. *Translation:*" I fear the liberals are winning." His Commission was therefore charged with "reforms of human rights discourse where it has departed from the nation's founding principles of natural law and natural rights." That statement makes no logical or historical sense.

People in the United States who idolize natural rights – "our unalienable rights" – take their cue from Thomas Jefferson's preamble to the Declaration of Independence (as if that were part of the government). Jefferson made the astounding claim that the rights are "self-evident." His immediate source was the British philosopher John Locke, who had listed these rights as life, liberty, and property. Jefferson changed the third one to "the pursuit of happiness" but that quickly became equivalent to get as much property as you can for your happiness.

Where did Locke and Jefferson get these "self-evident" truths from? From the Christian middle ages. The church during its first millennium taught moral precepts that came from the Bible as influenced by Greek, Roman, Persian, and other sources. A writer named Gratian, in 1140 C.E. gathered together the

fragments of a Christian code of conduct. What the collection showed was that there were contrary views on almost everything. Gratian listed these contrasting views in a document known as the *Decretum*. Commentaries on the *Decretum* became the Catholic Church's Code of Canon Law. At the center of the discussion was a concept called "natural law," whose most obvious source was Cicero. There are no references in the Hebrew Bible or the Gospels to "natural" or "natural law." St. Paul, writing in Greek, inserted "natural" into the New Testament, but not "natural law."

The medieval canonists assumed, as had Cicero, that there is a human nature and therefore a law or laws that follow from human nature. They were especially interested in the duties or obligations that are natural to every human being. A corollary of law and duty was "right" which first had an "objective" meaning of doing what is good. In the later middle ages, "right" migrated from its objective meaning to include a "subjective" meaning, that is, if the law specifies that someone has a duty, someone else has a right. This dual Latin meaning of "right" survives in the English language. The medieval term *jus naturale* can be translated either as "natural law" or "natural right." Someone can do right or have a right.

As the idea of right emerged, there was a distinction made between alienable and unalienable rights. The latter category referred to rights that could not be alienated or given up, even by oneself. The most obvious such right was "life" so that murder including self-murder (later called suicide) was against natural law.

"Liberty' was almost as important as life. To be a human being was to have *libertas"* of the will, to act without coercion. The canonists had in mind St. Augustine, the first great psychologist, who analyzed human choice. Unfortunately, *libertas* had a much longer political meaning in Roman history to distinguish free men from slaves. From the British American colonies to the United States of America today, "liberty" is the most celebrated ideal, but it is an ideal compatible with some people being treated as slaves.

The term human rights did not exist in the middle ages or in the eighteenth century. It makes its appearance in the abolitionist movement early in the nineteenth century. The people, such as Frederick Douglass, who used the term were probably unaware that they were coining a new term, but they knew what they were demanding: To be treated as human beings.

Likewise, with the women's conference in Seneca Falls in 1848 that also used "human rights. Sarah Grimké said: "I know of no men's rights or women's rights

but only of human rights." Neither women nor former slaves had the power to change political language. In fact, "rights" language, which was mostly used by rich people and slavers in the nineteenth century was taken to be the enemy of progressive movements.

When the United Nations was founded after the atrocity of World War, part II, a bill of human rights was promised. There was only a hazy idea that something called "human rights" might be different in kind from natural rights. Franklin Roosevelt had been successful in including more people in life, liberty, and the pursuit of happiness. But in his 1944 State of the Union Address, FDR said that we needed a "second bill of rights" for economic and social needs.

Eleanor Roosevelt, who chaired the committee to produce the UN's bill of rights was told by the U.S. State Department: "Forget about it. Stick to making a harmless declaration." She followed that advice while saying that she was interested in fulfilling Franklin's wish for the addition of economic/social rights to political rights. The result was a messy collection of rights under the grandiose title, "A Universal Declaration of Human Rights." A philosophers group that was supposed to explain all of this was headed by Jacques Maritain who rather candidly said: "We agree on these rights, just don't ask us why."

This "Universal Declaration" initially had a very limited effect. Twenty years later the UN produced two "covenants" that spelled out the political rights in one covenant and the economic/social rights in the second. That division of rights indicated that they were still trying to add to "natural rights." Contrary to what Pompeo said in a July 2020 speech, no U.S. president included human rights in government policies until Jimmy Carter. Carter took the idea of human rights seriously and wanted to start treating people south of Texas as fellow human beings, much to the horror and ridicule of Henry Kissinger.

Carter was probably influenced by Martin Luther King Jr.'s gradual realization that he was fighting not only for "civil rights," however important they are. Toward the end of his life, especially as King linked race to poverty and to militarism, he started using the term human rights. King and Carter seemed to fail in their efforts but "human rights" took off in the following decades. The term is often used innocuously by authoritarian governments, but enough meaning comes through to have an effect. People all over the world have now heard of "human rights" and they are demanding to be treated as human beings.

To go back to the starting point of this essay, the conflict in the U.S. is between natural rights (as filtered through the nineteenth century) and human rights, a still developing idea with a shaky philosophical basis but with a powerful emotional punch.

In cases that come before the Supreme Court everyone expects that the nine "politically non-partisan" justices will study the same documents and yet vote according to the liberal or conservative label. It is no secret that Donald Trump and Mitch McConnell made it their top priority to fill the federal courts, including the Supreme Court, with "conservative" judges. What does that mean? They are the people who claim to stick to the text of the Constitution, the Bill of Rights, and the laws of the country. What it also means is that they have a theory of language so they can draw conclusions about words that were written fifty or two hundred years ago. The theories seem naïve but maybe there is some hidden depth to them.

The people who are called liberal on the Supreme Court have theories, too. But what backs their decisions is where we are as a country in bringing all human beings into "we the people." They think all variety of the human should be brought into the realm of human rights. They are not obsessed with "liberty" although they defend a right to liberty in some situations. But the first human right is to be treated as a human being starting with the right not to be murdered or tortured.

The "liberals" on the Court realize that their decisions need the backing of most of the population. They decided that same-sex marriage is legal and that trans-sexual peoples' jobs should be protected when the culture had sufficiently changed to recognize the justice of these issues

When I saw the Bostock decision which guarantees the (human) rights of gay, lesbian, and transgender people, my first thought was: I wonder what was in the mind of Neil Gorsuch who wrote the majority decision? Was he thinking, "I'll show McConnell and Trump that I am not the puppet they think I am."? Probably not. But how does someone interpret the 1964 Civil Rights law to include what the writers never dreamed of including? They didn't even have the distinction in 1964 between sex and gender which makes possible an inclusion of transgender people. Gorsuch's "textualism" allows him to find gay, lesbian, and transgender by looking at the word "sex" even though "sex" without some context has no meaning at all.

What actually happened? My guess is that Gorsuch knows a few gay or transsexual people and realizes that they are human beings who should have the rights proper to a human being.

INVENTING THE POLICE
By Jill Lepore

To police is to maintain law and order but the word derives from *polis* which meant city and it entered the English language meaning government. The police as a civil force charged with deterring crime came to the United States from England and is generally associated with monarchy – "keeping the king's peace" – which makes it surprising that in the antimonarchical United States it got so big so fast. The reason is, mainly, slavery.

Someone had to invent the police: the ancient Greek *polis* had to become the modern police. In *The Human Condition*, Hannah Arendt wrote: "To be political, to live in a *polis,* meant that everything was decided through words and persuasion and not through force and violence. In the *polis*, men argued and debated under a rule of law. Outside the *polis*, men dominated women, children, servants, and slaves, under a rule of force." Kings asserted a rule of force over their subjects on the idea that their kingdom was their household.

The American Revolution toppled the power of the king over his people – "in America the law is king," wrote Thomas Paine, but not the power of a man over his family. The power of the police has its origin in that kind of power. Under the rule of law; people are equals; under the rule of the police we are not. We are more like the women, children, servants, and slaves in ancient Greece. One way to think about "Abolish the police" is that now that all of us have finally clawed our way into the *polis,* the police are obsolete.

But are they? The crisis in policing is the culmination of a thousand other failures – failures of education, social services, public health, gun regulation, criminal justice, and economic development. The debate about policing has to do with all the money that's spent paying heavily armed agents of the state to do things that they aren't trained to do and that other institutions would do better.

The governing of slavery was not a rule of law; it was a rule of police. In 1661 Barbados passed its first slave rule that decreed: "Negroes and other slaves are wholly unqualified to be governed by the Law…of our Nations." It devised a set of rules "for the good regulating and ordering of them." In 1680, Virginia adopted similar measures, known as slave codes.

In 1829 a black abolitionist, David Walker, published "An Appeal to the Coloured Citizens of the World," which terrified southern slaveowners. The governor of North Carolina wrote to his state's senators, "I beg you will lay this matter before the police of your town and invite their prompt attention to the necessity of arresting the circulation of the book." By "police" he meant slave patrols. In response to Walker's *Appeal,* North Carolina formed a statewide "patrol committee."

Unlike their British counterparts, American police carried guns, initially their own. American police carried guns because Americans carried guns. Americans became vigilantes, especially likely to kill indigenous people, and to lynch people of color. Between 1840 and 1920, mobs, vigilantes, and law officers, including the Texas Rangers, lynched 500 Mexicans and Mexican Americans, and killed thousands more. A San Francisco vigilance committee established in 1851 arrested, tried, and hanged people; it boasted a membership in the thousands. A Los Angeles vigilance committee targeted and lynched Chinese immigrants.

Today Trump is not the king; the law is king. The police are not the king's men; they are public servants. Out of the stillness of the shutdown, the voices of protest have roared like summer thunder. An overwhelming majority of Americans support major reforms in American policing. Those changes won't address plenty of bigger crises, not least because the problem of policing can't be solved without addressing the problem of guns. But this much is clear: the polis has changed, and the police will have to change, too.

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THE COLOR OF LAW
By Richard Rothstein

The Color of Law is concerned with consistent government policy that was employed in the mid-twentieth century to enforce residential racial segregation. There were many specific government actions that prevented African Americans and whites from living among one another, and I categorize them as "unconstitutional." In doing so, I reject the view that an action is not unconstitutional until the Supreme Court says so. Few Americans think that racial segregation in schools was constitutional before 1954, when the Supreme Court prohibited it. Rather, segregation was always unconstitutional, although a misguided Supreme Court majority failed to recognize this.

Yet even if we came to a nationally shared recognition that government policy has created an unconstitutional system of residential segregation, it does not follow that litigation can remedy this situation. Although most African Americans have suffered under this system, they cannot identify with the specificity a court case requires, that is, the particular point at which they were victimized.

For example, many African American World War II veterans did not apply for government-guaranteed mortgages for suburban purchases because they knew that the Veterans Administration would reject them on account of their race, so applications were pointless.

Those veterans then did not gain wealth from home equity appreciation as did white veterans, and their descendants then could not inherit that wealth as did white veterans' descendants. With less inherited wealth, African Americans today are generally less able to attend good colleges.

If one of those African American descendants now learned that the reason his or her grandparents were forced to rent apartments in overcrowded urban areas was that the federal government unconstitutionally and unlawfully prohibited banks from lending to African Americans, the grandchild would not have the standing to file a lawsuit; nor would he or she be able to name a particular party from whom damages could be recovered.

There is generally no *judicial* remedy for a policy that the Supreme Court wrongheadedly approved. But this does not mean that there is no constitutionally required remedy for such violations. It is up to the people, through our elected representatives, to enforce our Constitution by implementing the remedy.

By failing to recognize that we now live with the severe, enduring effects of segregation, we avoid confronting our constitutional obligation to reverse it. If I am right that we continue to have segregation, then desegregation is not just a desirable policy; it is a constitutional as well as a moral obligation that we are required to fulfill. "Let bygones be bygones" is not a legitimate approach if we wish to call ourselves a constitutional democracy.

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