

LIBERTY AND RIGHTS IN THE NATURAL LAW TRADITION

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Liberty and Law: The Idea of Permissive Natural Law, 1100–1800 by Brian Tierney (Washington, DC: Catholic University of America Press, 2014)

Protections for liberty and human rights developed long before liberalism became a recognizable political ideology. Brian Tierney has spent his long and distinguished career unearthing and explaining the political, legal, and theological developments that formed a tradition of liberty, a tradition that stretches back to the Middle Ages. His reconstruction of medieval understandings of the nature of God’s creation and the implications of that nature for human dignity and the social and political order have been crucial to decades of work questioning contemporary platitudes about modern philosophers’ role in “creating” the language of rights. Committed to a Whig understanding of history that sees earlier forms primarily as precursors of later developments, Tierney nonetheless has provided crucial support to those seeking to dispel destructive caricatures of the medieval “age of faith” as one hostile to limited government and ordered liberty. In showing the influence that conceptions of consent, rights, and autonomy played in medieval thought and practice, he has done much to resuscitate our understanding of natural law’s role in supporting the dignity of the person and the development of constitutional government.

Tierney opens his latest book with a relatively simple distinction—though one he notes has been largely lost in contemporary debates: law may be preceptive, requiring and forbidding certain acts, or it may be permissive, leaving individual persons with the choice whether to take such actions. Modern political theorists are fond of drawing a different distinction, that between the “ancient view,” attributed most commonly to Aristotle, according to which what the law does not command it forbids, and the “modern view,” generally traced to Thomas Hobbes, that the law merely sets boundaries to our conduct, like hedges on the sides of a road. These are both caricatures of political thinking. The first gives exaggerated importance to a single aspect of Aristotle’s thought, for the distinction between slave and free includes within itself a recognition of individual freedom of action. The second attributes to Hobbes an originality that is not his; Hobbes merely brought into the recognized canon of political thought concepts long entrenched in the Western tradition, concepts at the heart of the development of rights and the practice of ordered liberty.

Tierney finds the roots of permissive natural law in the ancient world. Specifically, he points to Cicero, who referred to wisdom as “the knowledge of what is good, what is evil, and what is neither good nor evil.” Whereas

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some critics have claimed that natural law is a kind of legal code dictating every aspect of human behavior, with regimes based therein seeking to regulate all of human life, the facts were quite different, particularly during the Christian era. While it certainly is true, as Tierney points out, that for Christians natural law is a kind of force planted within us impelling us to do good and avoid evil, this law does not require or support a vision of human law as enforcing moral perfection. This is particularly true given natural law's primary concern with sin, which, as Peter Abelard explained, often is a matter of intention rather than of the act itself. Thus, killing may not be murder or even a sin if, for example, it is done by accident or in self-defense. Recognition of this moral fact made it relatively simple for Christian thinkers to pick up on Cicero's distinction and recognize that many things are morally "indifferent" in that they are neither good nor evil in and of themselves.

Tierney sets forth the arguments of a variety of medieval figures according to whom the realm of indifferent things permitted by natural law leaves a broad area of free choice. Within this realm some actions may be more fitting than others, but the state has no intrinsic right to control them through human law. The question this raises, and which has been at issue for centuries, is whether such indifferent things are somehow sacrosanct and not to be regulated at all, or whether the state has a duty to regulate them for the common good. The answer, not surprisingly, has varied over time and in relation to particular "indifferent" things.

In general terms, the medieval answer to this quandary was a call for the exercise of prudence. Things indifferent in and of themselves may end up mattering to a society. Thus, for example, after it was established that private property was permitted by natu-

ral law (despite biblical references to holding property in common), there was no question but that forms of ownership and use should be regulated for the public good. What regulations would be best for a given people was a question left to those whose duty it was to read the differing needs of differing peoples and societies.

An act's being termed "permitted" was not the end of the inquiry. The needs of society and in particular the duty to foster virtue in the people required political deliberation. The medieval thinker Ivo, for example, developed an influential four-fold classification of law including precepts and prohibitions, but also admonitions and indulgences—that is, the condoning of lesser offenses for the sake of the common good. Perhaps the most famous use of this kind of logic was undertaken without the language of permissive natural law; Augustine, followed by Aquinas, recommended against any attempt to wipe out the practice of prostitution because it would fail even as it harmed a variety of other, necessary social institutions.

Tierney notes the tensions created in the realm of permissions between natural and human law. While natural law may urge us to great virtue (e.g., giving all we have to the poor), human law cannot play this role without denying human dignity and undermining civil peace. Although medieval thinkers thus recognized that common ownership was required when man was in a state of innocence, they also recognized that to attempt to hold property in common, given man's fallen state, would lead to violence and tyranny. More generally, they accepted the necessity of utilitarian and consequentialist arguments in determining what human laws would be best in dealing with actions permitted by natural law, and even in dealing with lesser sins—though not, of course, excusing or permitting intrinsically evil acts

such as murder, even where such acts might be socially useful.

One reason permissive natural law is given less attention than it deserves by historians is that Aquinas excluded it from his own theory. Tierney has written repeatedly against what he sees as an overemphasis on Aquinas's writings in characterizations of medieval thought. Nevertheless, he recognizes the necessity of confronting Thomistic natural law and does so in this context by emphasizing the role of prudence. Through careful textual analysis, Tierney makes a convincing argument that Aquinas saw the diversity of peoples and societies as requiring those in positions of leadership to exercise prudence in making a variety of choices within the very broad contours established by natural law. Within the realm of acts not evil in themselves, peoples, for Aquinas, should be free to shape their own lives and societies. He made no reference to permissive natural law, then, but used a broad conception of prudence to establish the same general grounds for limited government and freedom of action.

Later developments in Western thought brought out potential conflicts between the two sides of permissive natural law. On one side, the idea of a permissive natural law might be used to defend natural rights, in essence declaring that indifferent things should be off-limits to the state, potentially even imposing duties on individuals to respect "choices" within the realm of indifference. On the other hand, permissive natural law might be seen as leaving the bulk of human life open and liable to regulation by the state for any end deemed good or even indifferent. In Protestant thought in particular, there came a time when things "indifferent," for example in the liturgy, might be considered best left to particular congregations, or, as with the Anglican

establishment, subject to political control in the name of peace and good order, whatever the impact on individual conscience.

These developments bring to the fore the quintessentially political question of "Who decides?" The general view throughout the medieval era had been that authority resides in the community, usually represented by the monarch and various orders such as the English lords and commons. The early modern era, in which theories of divine right gained prominence, was at war with this earlier, more pluralist conception and especially its inclusion of an independent Church hierarchy.

In retrospect it is unsurprising that it was in this political context that the early modern philosophical school of Salamanca, especially as represented by Isidor and Suarez, developed something akin to modern rights theory. These thinkers showed how the granting of a permission often also bestows on a person a right—such as an athlete's right to pursue a prize, entailing that he be allowed to compete. At this stage the protections of individual rights become central to natural law thinking. From here modern thinkers took, in secularized form, much of the language of republican government. It was, for example, Suarez who most powerfully emphasized that men are naturally free persons who form government by consent.

The possibilities of legal positivism were not far off at this point. The English jurist John Selden argued that an important freedom given by permissive natural law was people's power to oblige themselves in contracts and in political communities. People had the right to form the government of their choice, but having exercised this choice in the far past, they now had an obligation to obey the existing government's officers and the laws those officers promulgated. This lent to human law an authoritative character that thinkers like

Samuel von Pufendorf would expand. For Pufendorf, law determined the very quality of human acts, essentially turning *legal* and *moral* into synonyms. In Tierney's view this marked the beginning of the end for permissive natural law because it reduced natural law itself to merely that which exists in order to impose obligation. Nevertheless, Tierney recognizes that for some early moderns, natural law still served the role of staking out a realm for permissive conduct.

Even where it continued, permissive natural law was transformed. For some early moderns, identification of law with morality made it possible to see the legislator as both thoroughly authoritative and omniscient. And this made (and continues to make) law pervasive to the point of crowding out other social institutions as it demands, forbids, or allows all acts, leaving no area of life to be unregulated. The result, which Tierney leaves unanalyzed, is a system in which natural rights come to "trump" prudence and common sense, in which individuals are forced by the state to respect whatever currently is conceived to be an important permissive act, hence a "right." Illogical contemporary arguments from the presumption of autonomy, in which each of us is deemed to have "rights" to everything necessary for commodious living, were proposed already by the early modern

philosopher Christian Wolff. The tendency of such thinking to fall into incoherence in attempting to balance competing goods was apparent from its beginnings.

According to Tierney, the natural law tradition came to a rather ignominious end with Kant. The latter's false belief that we are purely creatures of reason and free will, with no other human attributes, led him to construct a geometry of morals and law he thought could bind persons to its inhuman imperatives. After Kant, writes Tierney, we entered the age of revolutionary ideologies and of utilitarianism. If anything is left of natural law thinking, in his view, it is contemporary argumentation concerning natural or "human" rights. Certainly this desiccated discourse, rooted in nothing more than empty assertions of abstract dignity and serving as cover for ideological prejudices of the moment, is all that is tolerated in mainstream academia, where Tierney dwells. Still, there are many who work to maintain the tradition in which law is seen not just as a fetter but as a basis for liberty, setting out an entire realm of "permissions" ranging from that which is tolerated lest worse happen, to that which is approved as a right. Despite his skepticism regarding the continuing vitality of this tradition, Tierney, in works such as this, has done much to clarify and enrich it. †