

# The Nature of Law

## An Inquest into the Nature of Man

The law is reason, free from passion.

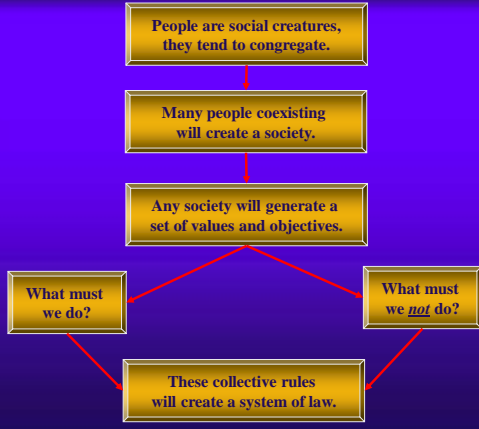
*Aristotle*  
Greek Philosopher (384-322 BCE)

Law is the embodiment of the moral sentiment of the people.

*William Blackstone*  
English jurist and professor (1723-1780)

Morality cannot be legislated, but behaviour can be regulated. Judicial decrees may not change the heart but they can restrain the heartless.

*Martin Luther King Jr.*



Law: Any system of regulations to govern the conduct of the people of a community, society or nation, in response to the need for regularity, consistency and justice based upon collective human experience.

What's this?



What is justice? Does the law always provide justice?

Justice: a legal concept that is characterized by the fair distribution of advantages and burdens; in law, the concept of treating like cases alike and different cases differently.

→ See Al Pacino's famous "Justice for All" speech.

Jurisprudence: n. the entire subject of law, the study of law and legal questions. Technically, jurisprudence means the "science of law."

Jurist: n. although it means any attorney or legal scholar, jurist also popularly refers to a judge.

Authoritative Principles: rules, standards, and values that guide judges when making legal decisions.

The Rule of Law: The condition that exists where law rules above any particular party or person. (i.e. the government must follow the law it makes, the law applies equally to all, and no action can be taken unless authorized by law)

# Natural Law

**Natural Law:** A paradigm that posits the existence of a law whose content is set by nature and that therefore has validity everywhere. (International Encyclopaedia of the Social Sciences)

## par-a-digm:

1. One that serves as a pattern or model.
2. A set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them, especially in an intellectual discipline.

The belief that law has some higher or divine origin.



## Plato (427 – 347 B.C.) Greek Philosopher

Immensely influential ancient Greek philosopher. Plato studied under Socrates, wrote many philosophical dialogues, and founded the Academy in Athens where Aristotle studied. His work is often described as providing the foundation of western philosophy.

**Idealism:** Doctrine that views reality as more cerebral than physical. Thus, reality is more related to the mind than the material world. Derived from “idea” rather than “ideal”; more related to metaphysics than ethics.

Idealism applied to law: Law should reflect certain universal, absolute or eternal truths... even though humans could never fully achieve these truths.

## Aristotle (384-322 B.C.) Greek Philosopher

Aristotle, a student of Plato, is often said to be the father of natural law.

**Rationalism:** The study of nature, guided by human reason, would reveal the true meaning of law.

In other words, we can come to understand God by examining his creation (ie. the natural world - including human nature).

**Observation:**  
Flowers need water.



**Conclusion:**  
Living things need care.



**Application:**  
Law requiring parents to care for children.



What can we deduce about the creator of the earth through examining his creation?

## Aristotle's “Virtue ethics”

According to Aristotle, “virtue” describes how well something does what it is meant to do.

**Example: The virtuous eye is the eye that sees, because eyes are meant to see.**

The virtuous man, therefore, is the man who does what he is meant to do. Thus, happiness is best achieved through leading a virtuous life and doing what man is intended (by God) to do.

## Criticism:

Today, Aristotle is at times criticized for going too far in deriving “laws of the universe” from simple observation and over-stretched reason.”

Today's scientific method assumes that such thinking without sufficient facts is ineffective, and that discerning the validity of one's hypothesis requires far more rigorous experimentation than that which Aristotle used to support his laws.



## Cicero (106-43 B.C.) Roman Philosopher

“Law is the mind and reason of intelligent man, the standard by which justice and injustice are measured.”

However, civil or human laws should be set aside if, in the minds of wise men, they contradict the laws of nature. Thus, it would be permissible for citizens to withdraw their support from a government that enacted “evil” laws.

**Justinian (born 483, reign 527-565 A.D.)  
Roman Emperor**



A Roman Emperor and philosopher who had the privilege of influencing the law. He believed law could be divided into 1) universal laws of nature, and 2) civil laws. **Natural law, in Justinian's view, ensured that people were born free. Therefore laws that permitted slavery were a violation of natural law.** Justinian therefore reformed a large number of Roman laws.

In 528 Justinian appointed a commission to make a new collection of imperial constitutions. The result was to gather together Roman law into one code, known as the Justinian Code, which was divided into four parts:


1. **The Institutes** served as a textbook in law for students and lawyers.
2. **The Digest** was a casebook covering many trials and decisions.
3. **The Codex** was a collection of statutes and principles, and
4. **The Novels** contained new proposed laws.

This legal code became the foundation of law in most western European countries.



**Would it be possible to defend slavery from a natural law perspective?**

**St. Thomas Aquinas (1225-1274 AD)  
Dominican Monk (Christian Theologian)**



Law is the mirror of the natural world order made known to humans via their own reasoning and divine revelation through Christian prophets.

**Eternal** → **Natural** → **Human**


**Positive Law**

Positive Law: Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society

(Black's Law Dictionary, 5th Edition, 1979, West Publishing Co.)

Law that is based upon human reason and authority.

**Thomas Hobbes (1588-1679 AD)  
English Political Philosopher**



Obedience of human law is the only way to protect man from his own natural selfishness and brutality.

*Natural law was simply used to support the authority and maintain the power of tyrants.*

**Thomas Hobbes' Social Contract Theory**

Hobbes felt that government is an artificial creature brought about by the voluntary association of the governed citizens. To Hobbes, man's nature does not require a governing state, however, a better life would be assured through the existence of an outside governing state.

Although Hobbes' believed it was unnatural for man to put himself under the control of others, he nonetheless felt that it was rational to have a government.

*This is unlike the theories of Plato and Aristotle in that they taught that governments came about because there exists a social instinct in man to gather together under powerful councils, it was natural for man to put himself under government.*

Hobbes felt that once power is conferred to the state, then people should not purport to exert any control over the state.

## Social Contract Theory

The idea of a social contract is premised on the notion that an individual's liberty and property are better secured if we band ourselves together than if we are left alone, each to our own devices.

Given a choice, a typical person would:

- give up certain of his rights in exchange for peace and security, and
- put himself under government and follow its rules, fairly made and fairly enforced.

This arrangement is in the nature of a contract - an exchange:

Citizens provide obedience and compliance  
in exchange for  
greater security and liberty



How might social contract theory explain the existence of gangs?

## John Locke (1632 - 1704)

English philosopher, academic and medical researcher, government official, economic writer, opposition political activist, and finally a revolutionary.

According to Locke (often referred to as "The philosopher of freedom") God created man and we are, in effect, God's property; "... whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any subordination among us, that may authorize us to destroy one another; as if we were made for one another's uses, as the inferior ranks of creatures are for our's." Thus, murder and suicide violate the divine purpose.

Locke is a well-known empiricist, as is indicated by his infamous view that we are all born a "tabula rasa" (blank slate), upon which our experience writes our nature.

## John Locke's perspective on Social Contract Theory

"The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property." He qualifies his theory of a Social Contract by pointing out that "...men when they enter into society give up ... liberty of a kind; yet it being only with an intention in every one the better to preserve himself, his liberty and property..." the power conferred "...can never be supposed to extend farther than the common good, but is obliged to secure everyone's property..."

Thus, citizens can better secure their liberty and property by giving up a little of each to a central authority.

However, Locke also clearly felt that there should be limits placed on the power of the state.

Locke believed that it is natural for some people to accumulate more wealth than others, as we are free to generate wealth when we apply our effort (mental or physical) to the natural resources available around us (i.e. carve an oar, grow a crop, develop a business).

Locke believed the sole purpose of the state was to protect individuals against those who might interfere with their freedom.

Thus, the state should certainly not interfere with the personal freedoms of its citizens.

For this reason, Locke was a strong advocate for constitutional law, as a constitution defines the relationship between the state and its citizens, and generally outlines the state's rights, responsibilities, and limits on power.

## Jean-Jacques Rousseau (1712-1778)

Genevan philosopher of the Enlightenment era, author (*Julie*, *Emile*), composer.

Rousseau asserted that man is neither inherently good nor bad *when in the state of nature* (the condition that exists outside of civilization), but is corrupted by society.

A common interpretation of his novel *Julie* is that Rousseau values the ethics of authenticity over rational morality. Thus, people should only conform with society when such conformity is consistent with the "secret principles" which constitute their core identity. Rousseau believed that to act inauthentic is self-destructive.

Rousseau asserts that society is artificial and that the development of society (and especially social interdependence) has been detrimental to human beings.

According to Rousseau, society's negative influence on man centers on the fact that *amour de soi* (a positive self-love), is transformed into *amour-propre* (pride).

**Amour de soi** describes the human instinct for self-preservation combined with the human power of reason.

In contrast, the artificial **amour-propre** inspires man to compare himself to others, inspiring the fear, envy, and petty jealousy that would encourage men to take pleasure in the pain or misfortune of others.

Rousseau's *The Social Contract*, 1762, begins with the dramatic opening lines, "Man is born free, and everywhere he is in chains. One man thinks himself the master of others, but remains more of a slave than they are."

Rousseau suggests that human beings left their natural condition for the benefits achieved through cooperation. As societies developed, man came to be in competition with each other while at the same time becoming dependent on each other. Such a paradox threatened both man's survival and freedom. In addition, the societal construct of private property developed. Both these things required that humans adopt institutions of law.

Thus, by joining together under a social contract individuals learned to preserve themselves and remain free. Submitting to the general will of the people prevented individuals from becoming subordinate to the wills of others while also increasing the likelihood that people will obey laws that they themselves collectively authored.



### Jeremy Bentham (1748-1832 AD)

English philosopher and jurist

**Utilitarianism:** Humans are motivated to seek pleasure and avoid pain. Thus, law should seek to produce the greatest happiness for the greatest number of people.

A system of law has the following requirements:

- i) authoritative body,
- ii) legal commands,
- iii) an imposed duty or obedience, and
- iv) enforcement through penalties.

### John Austin (1790-1859 AD)

English philosopher and jurist

**Legal Positivism:** asserts that it is both possible and valuable to have a morally neutral theory of law.

The three *basic* points of Austin's theory of law are as follows:

- i) the law is a set of commands issued by an "uncommanded" commander (aka the sovereign);
- ii) such commands are backed by sanctions (i.e. penalties); and
- iii) a sovereign is anyone who is habitually obeyed by the people.

*Natural law is too subjective and would lead to anarchy. Only positive law could provide an objective standard for human conduct.*

Human Condition: We want what we want and we want it now!

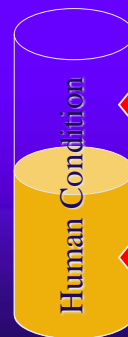
How should the law respond to the human condition?

### Thomas Hobbes

Law should oppose human nature and protect us from our selfish inclinations.

### Jeremy Bentham

Law should work with human nature in order to maximize human happiness.



Human Condition: We want happiness.

*How should the law achieve happiness?*



**Aristotle**

Ask what God wants the law to be, then achieve happiness by following the law and living a righteous life.

**Austin**

Ask what would make humans happy, then create laws to achieve these ends.