Abstract

Common Law and Natural Law:
A Case Study:
The Changing Shape of American Legal Education
from the Puritans to the Legal Realists

Andrew Charles Forsyth

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"Common law," first-year law students might tell us, is law made by judges. "Natural law," say its proponents, is higher law grounded not in the acts of human lawmakers (judges, for example), but instead in human reason, nature, or the mind or will of God. Few today think one has anything to do with the other. But this was not always so. This study argues that, from colonial America through the nineteenth century, the common-law tradition was articulated, even constituted, by reference to the theological and philosophical tradition of natural law, not least in the changing landscape of American legal education.

Telling this story counters the standard view that common law is essentially positivistic—detached from moral considerations—and adds to recent work on the history of the natural-law tradition, which has hitherto concentrated on philosophy and theology, not the law of rules and cases, crimes and contracts. But telling this story does not merely show unexplored links between two bounded traditions of law (common and natural). Rather, it also shows that the contemporary understanding of the terms "common law" and "natural law" must change in order to account for the American experience of the concepts' interrelationship. Such change raises possibilities for Christian and other normative engagements of the common-law tradition, and offers new resources for interdisciplinary conversations on law and religion.

The study proceeds in two parts. PART I analyzes the two primary sources for natural-law thinking in American common law (CHAPTERS 1 and 2). PART II evaluates the uptake and interpretation of these sources in American professional legal education through the nineteenth and early twentieth centuries (CHAPTERS 3, 4, and 5).

CHAPTER 1 considers early American colleges and their broader intellectual cultures, Puritan and Revolutionary. The colleges were a source of natural-law reasoning in America, and a site for its negotiation with common law. The chapter argues: first, that attending to this history provides distinctive new ways of talking about law; second, that the natural law of early America differs significantly from today's most prominent accounts; and, third, that any contemporary embrace of a natural-law understanding of common law has not just legal, but theological and moral, consequences.

CHAPTER 2 examines the other significant source: the American reception of William Blackstone's *Commentaries on the Laws of England*. Blackstone ordered and organized common law. That he did so using natural-law principles shaped Americans' assumptions that common law accords with reason. The chapter argues: first, that a natural-law account of common-law has consequences for how to structure, justify, and critique a body of law; second, that Blackstone's natural law differs from today's familiar theological accounts; and, third, that Blackstone's natural law is "modest," partially assuaging a fear that natural law places human law beyond criticism.

CHAPTER 3 shows how Blackstone's *Commentaries* served as the primary educational basis for the new professional law schools, such as Harvard Law School under Joseph Story, but also that natural law quickly receded from instruction, as it was subsumed into various common-law doctrines. Natural law, then, was historicized and

relativized, at least in relationship to common law. This chapter argues: first, that Story's writings distinctively relate reason and history; second, that Story's natural law permeates the common law, even while its decisiveness diminishes; and, third, that Story suggests what Christian reflection can add to natural-law accounts of common law.

CHAPTER 4 explores Christopher Columbus Langdell's late-nineteenth century establishment of "legal science" and introduction of the "case method," whereby precedent governed the common law. The chapter argues: first, that Langdell offers an inductionist account of natural law; second, that the question of justification haunts induction; and, third, that Langdell prompts consideration of *for whom*, and *on what basis*, any account of law is justified.

CHAPTER 5 investigates two fundamental breaks with the natural-law tradition: first, Oliver Wendell Holmes, Jr.'s skeptical treatment of law's nature, and even morality itself; and second, the American legal realists' vision of common law as secular, indeterminate, and non-objective. The chapter argues: first, that Holmes and the realists influentially shaped American legal education; second, that contemporary proponents of natural-law treatments of the common law must meet the challenges raised by Holmes and the realists; and, third, that employing immanent critique clarifies that, while Langdell's legal science is vulnerable to realist criticism, many accounts of natural law are more robust.

The EPILOGUE returns to the standard depictions of "common law" and natural law," now shown as distorted, and explores new possibilities for natural-law treatments of common law.

Common Law and Natural Law: A Case Study: The Changing Shape of American Legal Education from the Puritans to the Legal Realists

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[1] *Trans.* To own or recognize with gratitude, or as an obligation (a gift, a service rendered, etc.).

buoyed my spirits. Ryan Darr has been my closest colleague. I admire him greatly. Brad East, Ross McCullough, and Olivia Stewart Lester—who read my completed manuscript—are cherished co-travellers from September 2011. I usually forget that it took another year for Laura Carlson to join us.

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A Note on Citation and Spelling

Citation in this study broadly follows the recommendations of the 16th edition of *The Chicago Manual of Style*. However, legal documents and publications are cited according to the 20th edition of *The Bluebook: A Uniform System of Citation*.

In the quotation of cited materials, original spellings, punctuations, and formats are retained, except where doing so would impede easy reading. British variants of words, for instance, are not rendered into American style, nor shown with "(sic)."

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"Common law," first-year law students might tell us, is law made by judges. "Natural law," say its proponents, is higher law grounded not in the acts of human lawmakers (judges, for example), but instead in human reason, nature, or the mind or will of God. Few today think one has anything to do with the other. But this was not always so. As we will see, from colonial America through the nineteenth century, the common-law tradition was articulated, even constituted, by reference to natural law, not least in legal education.

Telling this story counters the standard view that common law is essentially positivistic—detached from moral considerations—and adds to recent work on the history of the natural-law tradition, which has hitherto concentrated on philosophy and theology, not the law of rules and cases, crimes and contracts. But telling this story does not merely show links between two bounded traditions of law (common and natural). Rather, in addition, it shows that the contemporary understanding of the terms "common law" and "natural law" must change in order to account for the American experience of the concepts' interrelationship.

1. The Nature of this Study

The most straightforward contribution of this study is to offer a fuller narrative and a better account than currently available of the changing ways in which common law in America has related to natural-law discourse.[1] It does so by taking as a case study the

[1] It is, therefore, partly a work in intellectual history. The discipline of intellectual history draws on many methods and frequently overlaps with other disciplines, but its primary focus is the study of ideas and intellectual life, and not solely as a means to

influence of natural-law thinking on the development of American legal education.[2] As such, it demonstrates that the common law in America is not the positivistic, value-neutral system that its contemporary proponents seem to claim.

1.1. The Neglect of Natural Law in Legal History

While the role of natural law in the unfolding story of the common law is generally acknowledged by legal historians, only a few articles or chapters directly address this topic, and those few articles and chapters are concerned more with a particular time and setting than with tracing a developing narrative.[3] How can we account for this relative paucity in legal scholarship?

First, most legal scholarship retains some relationship to the practice of the courts, and it would now be highly unorthodox to make appeals to natural law when arguing a case. This is not only because common-law practice calls for appeals to existing binding

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understand some further phenomena. Quentin Skinner, J. G. A. Pocock, Stefan Collini and others give brief thoughts on the nature of intellectual history in "What is Intellectual History?" *History Today* 35, no. 10 (October 1985). For a more recent discussion, see Peter Gordon, "What is Intellectual History?" (2007, revised 2009), accessed March 1, 2017, available at: http://sydney.edu.au/intellectual-history/documents/gordon-intellectual-history.pdf.

[2] It will be clear already that this study is concerned with elite forms of discourse. For good or for ill, however, law has consequences for everyone in a political community. It is an understatement to note that what white educated male elites thought about law and morality had implications for everyone in America, most particularly, perhaps, those who by race, class, or gender were excluded from debate, and who, accordingly, are virtually absent from our written historical record.

[3] A recent exception is R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015). In contrast, David Ibbetson, for example, is concerned with the eighteenth century, and Norman Doe's attention is on the fifteenth: *Natural Law and Common Law,* 5 Edin. L. Rev. 1 (2001); *Natural Law and the Common Law*; *Fundamental Authority in Late Medieval English Law*. Cambridge: Cambridge University Press, 1990.

precedents, but because such appeals are now usually understood in the terms of legal positivism, in which the validity of a particular legal rule is determined merely by its identification as emanating from a conventionally-recognized, authoritative, institutional source.

Second, through the twentieth century, U.S. legal education was predominantly influenced by legal realism and its various successors (the topic of CHAPTER 5). These approaches often focus on the role of societal and political influence on judicial decisions. Judges have been, accordingly, understood more as active legislators from the bench, and less as acknowledgers or discoverers of preexisting rules within the common law.

Third, what interest there has been in natural law has usually been funneled into the discussion of the U.S. Constitution as higher law or based upon higher law, and not to the broader details of common law.[4]

Fourth, where legal scholars have opined on the role of natural law, their attention has primarily focused on whether natural law was used in the past to invalidate statutes or executive actions via judicial review. Thus, other purposes for which we might appeal to natural-law discourse—as a source for common law or a ground of its authority, say, or as a means to criticize, if not invalidate, laws—have been dismissed or, more often, unaddressed.[5]

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[4] See, e.g., Edward Corwin, *The "Higher Law" Background of American Constitutional Law* (Ithaca, NY: Great Seal Books, 1955).

[5] This is even true of otherwise excellent legal scholarship that engages the work of theologians and philosophers. See, e.g., Pauline Westerman's *The Disintegration of Natural Law* (New York: Brill, 2004), which primarily assesses the validity of natural-law theories on the basis of their contemporary legal utility: "Aquinas's theory of natural

1.2. Treating Natural Law's History in Ethics and Theology

Legal uses of natural law have suffered neglect by scholars. But the same is not true of *philosophical* and *theological* treatments. Recent years have witnessed a flowering of interest in the history of natural-law reflection in philosophy and theology. In the study of the history of ethics, for example, J. B. Schneewind and Knud Haakonssen have traced the development of natural-law traditions in modern philosophy, and we also find more focused studies on the influence of natural law on foundational figures in western thought, including on figures not immediately classed as natural lawyers, such as John Locke.[6]

In moral theology we see renewed attention to the broader terrain of natural-law reflection, such as Jean Porter's work on medieval scholasticism beyond the figure of Thomas Aquinas.[7] This retrieval has also included uncovering natural-law narratives in traditions commonly thought hostile to appeals to nature. We find recent examples of Lutheran reappraisals of natural law, for instance, and most notably a series of studies on Reformed natural law.[8] Completing this picture, recent reevaluations of the work of

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law is of little practical significance. To maintain that positive law is in agreement with natural law does not guarantee that it is a just system of law," 73.

[6] J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996); John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises on Government,"* (London: Cambridge University Press, 1969).

[7] See, for example, her *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids, MI: Eerdmans, 1999).

[8] See, for example, *Natural Law: A Lutheran Reappraisal*, ed. Robert Baker and Ronald Ehlke (Saint Louis: Concordia, 2011); Stephen J. Grabill, *Rediscovering the*

figures seemingly hostile to natural-law reflection have opened room for ecumenical engagements of the natural-law tradition.[9] Telling a story of American common law's relationship to natural law, then, also contributes to the body of recent work on the history of natural-law discourse in ethics and theology.

1.3. Prosecuting the Case for Natural Law

This study charts one way that natural-law thinking has influenced the development of American law. What this study does not do, however, is to directly argue for the adoption of a natural-law worldview, in American law or elsewhere. Natural law has its detractors and opponents across disciplines and topics. Some philosophers reject wholesale the idea that the goodness of actions relates to claims about human nature and flourishing.[10] Some lawyers see no need to talk of law beyond the social fact of its

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Natural Law in Reformed Theological Ethics (Grand Rapids, MI: Eerdmans, 2006); David VanDrunen, *Natural Law and the Two Kingdoms: A Study in the Development of Reformed Social Thought* (Grand Rapids, MI: Eerdmans, 2011).

[9] Neil Arner for instance makes the case that theological voluntarism and natural-law theory are not mutually exclusive. See his "Theological Voluntarism and the Natural Law: The Integrated Moral Theories of John Duns Scotus, John Calvin, and Samuel Pufendorf" (PhD dissertation, Yale, 2013), UMI 3535259.

See Nigel Biggar, *The Hastening that Waits: Karl Barth's Ethics* (Oxford: Clarendon Press, 1993); John Webster, *Barth* (London: Continuum, 2004); Gerald McKenny, *The Analogy of Grace: Karl Barth's Moral Theology* (New York: Oxford University Press, 2010); Matthew Rose, *Ethics with Barth: God, Metaphysics, and Morals* (Burlington, VT: Ashgate, 2010). John Bowlin more straightforwardly suggests that Barth simply did not understand Thomas Aquinas sufficiently for his criticisms to properly govern contemporary protestant theology: "Contemporary Protestant Thomism," in *Aquinas as Authority: A Collection of Studies Presented at the Second Conference of the Thomas Insituut te Utrecht, December 14–16, 2000*, ed. Paul van Geest, Harm Goris, and Carlo Leget (Leuven: Peeters, 2002).

[10] Proponents call this the *is-ought problem* or *naturalistic fallacy.*

existence.[11] Some theologians dismiss natural law for a perceived lack of emphasis on the authority of God's will and commands.[12] The five chapters that follow do not attempt to convince them otherwise. This study proceeds, instead, from the view that natural-law arguments can be made, and it offers an account of the nature and utility of appeals to natural law through the history of American legal education.

This study, moreover, will not convince many contemporary advocates of natural law—including in the legal academy—that what we find in American common law's recourse to natural law is worth their attention. That is so because this study does not appeal to or incorporate a pre-determined standard for "natural law." It does not take for granted, for instance, that Thomistic natural law is correct, and judge all other expressions against it.[13] Instead, this study leaves open the possibility that those attracted to the natural-law tradition might gain a better understanding of what natural law means—at least as it pertains to judgments on human law—if the history of its American engagement by common law is given due attention.

[11] This is one definition of legal positivism. See, H. L. A. Hart, "Positivism and the Separation of Law and Morals," in *Essays in Jurisprudence and Philosophy*, 49–87 (Oxford: Clarendon, 1983). (This first appeared in the *Harvard Law Review* in 1958.)

[12] It is not too strong to affirm, that "[t]wentieth-century Protestant theology began with Karl Barth's attack upon every assertion of natural access to God." John Bowlin, "Contemporary Protestant Thomism," in *Aquinas as Authority,* ed. Paul van Geest, Harm Goris, and Carlo Leget, 235–51 (Leuven, Belgium: Peeters, 2002), 235.

[13] Mark Murphy, for instance, has suggested that to claim a place in the Christian tradition of natural law, any would-be account must engage Thomas Aquinas's central claims. See, "The Natural Law Tradition in Ethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward Zalta, last modified September 27, 2011, https://plato.stanford.edu/entries/natural-law-ethics.

1.4. The Contribution to Religious Ethics and Law and Religion Scholarship

This study also raises questions for religious ethics.[14] One set of questions concerns method. The interrelations of common law and natural law suggest that—under

[14] The scholarly fields of religious ethics and Christian ethics have long treated issues of law. In one sense, of course, any scholarship that considers the social world in which we live necessarily implicates law. But particular traditions of "social ethics" speak directly to changing the political order, the law included.

However, attention to the details of the common-law legal tradition is rarer. We can see this from a brief survey of leading journals in theology and ethics. Modern Theology has 11 articles with "law" in the title. These treat the natural-law tradition and "law and spirit." The International Journal of Systematic Theology has three articles: one on Luther's use of the law, one on "the law of Christ," and one on Biblical natural law. The Scottish Journal of Theology has several articles on Biblical law, Jewish law, Law and Gospel, the meaning of law in Calvin's thought, and the legal status of the churches. Still, maybe only a discussion of William Stacy Johnson's book *A Time to Embrace: Same-Gender Relationships in Religion, Law, and Politics* directly engages law as a conversation partner with theology. *Scottish Journal of Theology* 62, no. 1 (2009): 53–90.

The Journal of the American Academic of Religion includes a 1965 report on a seminar on ethical problems conducted by Southern Methodist University's law and theology faculties. *Journal of the American Academy of Religion* 33, no. 3 (1965): 241–60. More recent articles include treatments of specific First Amendment cases, and offer analyses of the religious histories of legal concepts such as marriage, or suggest that in considering difficult issues of law, "secular" courts cannot help but stray into theological determinations. E.g., Erin Runions, "Empire's Allure: Babylon and the Exception to Law in Two Conservative Discourses," *Journal of the American Academy of Religion* 77, no. 3 (2009): 680–711; William E. Smith, III, "Bigamy, Religion, and the Law: The Sister Wives at Court," *Journal of the American Academy of Religion* 84, no. 4 (2016): 1110–44; Andrew Ventimiglia, "A Market in Prophecy: Secularism, Law, and the Economy of American Religious Publishing," *Journal of the American Academy of Religion* (forthcoming in 2017).

The journal Political Theology surprisingly only has six articles where "law" is a keyword. There are many articles, however, that touch upon questions involving the law. These consider religion in the public square, human rights, sovereignty, the place of Shari'ah, justice and political issues, specific policy issues (gambling, refugees), and how to be a citizen as a Christian. The only sustained treatment of law, however, is a feature reviewing William J. Stuntz's *The Collapse of American Criminal Justice*. Charles Mathewes, indeed, notes the moralism in American speech on criminal justice, and argues that it "cries out for engaging by Christian ethicists and scholars of political theology." "Guest Editorial. Justice in this World," *Political Theology* 16, no. 3 (2015): 264–66. Mark Storslee suggests that Stuntz models a "theological account of law and institutional design," which is "cognizant of sin," yet "steeped in genuine hope." "Reading Legal History as Political Theology," *Political Theology* 16, no. 3 (2015): 279–

83. Luke Bretherton suggests that what is missing from Stuntz's account is a theological vision that would present a clear *telos* for the criminal justice system. "Democracy and the Criminal Justice System," *Political Theology* 16, no. 3 (2015): 273–78.

We can say more about the journal Studies in Christian Ethics. Of around 550 substantive pieces (articles but also responses to authors, and so forth), the following actively consider law: The titles of 26 include "natural law"; a further 13 mention "just war"; many touch on biomedical issues (including 12 on euthanasia); and 22 consider "rights." Perhaps only *seven*, however, treat human law as a prime topic or potential interlocutor. It is helpful to see the *five* styles of engagement each of these articles undertakes.

First, an article might report on a legal view on a subject that matters to Christians and Christian ethics. This is true of Maureen Mulholland's "Sexuality and the Mentally Handicapped: The Law's Reponses," *Studies in Christian Ethics* 4, no. 2 (1991): 53–63. Mulholland, a legal academic, gives a brief treatment of Christianity's contribution to the law—the nature of the human being and the importance of the individual—but the remainder of the article simply reports the law as it stands.

Second, an article might recognize a state of affairs as important for theological ethics. Thus Nigel Biggar relies on a distinction between natural or moral rights and positive rights (granted by the state and enforced through law) to provide his account of Christian responses to torture. Nigel Biggar, "Individual Rights versus Common Security? Christian Moral Reasoning about Torture," *Studies in Christian Ethics* 27, no. 1 (2014): 3–20.

Third, an article may bring Christian categories and judgments to bear on the law. These closely resemble the many more articles in Christian ethics that consider and critique public policy in Christian terms. Of this type we find Andrew Sknotnicki's "How is Justice Restored?" This treats the major arguments for restorative justice and analyses and critiques them from perspectives drawn from Christian ethics. *Studies in Christian Ethics* 19, no. 2 (2006): 187–204. Likewise, if for striking different effect, J. Daryl Charles employs the Christian tradition to support the death penalty, "Outrageous Atrocity or Moral Imperative?: The Ethics of Capital Punishment," *Studies in Christian Ethics* 6, no. 2 (1993): 1–14.

Fourth, an article may suggest that theology has a *contribution* to make to public policy and the law. For Charles Mathewes, this may well be "indirect and long-term," gained through the formation of "practices, habits, consciences, and worldviews" inculcated by the churches, which theology seeks to inform. Although theology may also "cast[] its own light," or employ its "special idiom" on debates of the day. "Response to the Work of Professor Steiker," *Studies in Christian Ethics* 27, no. 3 (2014): 334–39. This is the approach, too, of Duncan Forrester. In a post-Christian, if not post-secular, Britain, theology can be "modest, disturbing and constructive—offering, but not imposing, insights, values and convictions." These Forrester hopes "may be tested and accepted as 'public truth.'" "Punishment and Prisons in a Morally Fragmented Society," *Studies in Christian Ethics* 6, no. 2 (1993): 15–30.

Fifth, and finally, law may help theology. David McIllroy begins his article in the assessment mode of Charles and Skotnicki: Christians can look to the rule of law, and appreciate and affirm the ways in which it fulfills Christian ends of law. The rule of law,

for instance, protects citizens against violence, and enables them to pursue the good as responsible agents. But McIllroy also offers an argument about the character of God. With Thomas Aquinas as his interlocutor, McIllroy suggests that God has a "law-like nature," and explains the consequences. He thus suggests that our consideration of law and theology can help illuminate *theology*, as much as judge law. "How is the Rule of Law a Limit on Power?" *Studies in Christian Ethics* 29, no. 1 (2016): 34–50.

The Journal of Religious Ethics has 13 articles with law in the title. Five treat natural law, others engage Islamic law, the law of people, international law and the just war tradition, law and Gospel (in Barth, Luther and Calvin), and Jewish ethics and law. Two articles take a different approach. First, in "Between Examples and Doctrine: Contract Law and Common Morality," Cathleen Kaveny presents American contract law as a "tradition," which involves the mutual interpretation of rules and facts. She suggests that ethicists might find the common-law tradition to be a non-religiously divisive source of moral reflection; *Journal of Religious Ethics* 33, no. 4 (2005): 669–95. Second, Jonathan Rothchild considers the rule of pardon or clemency in the justice system. He combines discussion of contemporary American legal practice with an analysis of clemency in theological and legal "remorse" and "atonement" theories, and considers the role of pardons alongside felony disenfranchisement. "Dispenser of the Mercy of the Government: Pardons, Justice, and Felony Disenfranchisement," *Journal of Religious Ethics* 39, no. 1 (2011): 48–70. Kaveny, we see, commends legal reasoning to religious ethics. Rothchild examines a legal practice through the lens of Christian theology, but seeks integration rather than one-way judgment.

Finally, we turn to the Journal of the Society of Christian Ethics. 39 articles have "law" in their title or list of keywords. Of these, a number consider natural law as a moral theory, Jewish law, marriage, euthanasia, and political liberalism. In 1981, however, there is a report from the Society's "Task Force on Law and Ethics," together with a note on recent literature in the field. James F. Bresnahan, "Task Force Report: The Task Force on Law and Ethics, 1976–81," *Annual of the Society of Christian Ethics* 1 (1981): 237–41; James F. Bresnahan, "A Note on Recent Literature: Religion and Law in a New Perspective," *Annual of the Society of Christian Ethics* 1 (1981): 243–58. There are articles, moreover, that consider the ways in which sexual harassment law is important for Christian ethics, and others that treat restorative justice. These use Christian ethics to evaluate legal practices. Similarly, if more expansively, Joel James Shuman tackles the place of religion in public life by proposing a Christian understanding of law; "Ethics, Liberalism, and the Law: Toward a Christian Consideration of the Morality of Civil Law in Liberal Policies," *Journal of the Society of Christian Ethics* 23, no. 2 (2003): 37–53. Once again Cathleen Kaveny and Jonathan Rothchild provide an alternative model. Kaveny investigates the legal theory for obscenity law. But her purpose is not restricted to offering a theological judgment on the law. Instead, she aims to offer a better account to everyone of the law itself. That is to say, Christian normative analysis of law can better explain the law than the current liberal account. "Obscenity, Communal Values, and the Law: Joel Feinberg and the Failure of Liberalism," *Annual of the Society of Christian Ethics* 9 (1989): 93–112. Jonathan Rothchild's articles on juvenile justice and torture analyze legal sources alongside philosophical and theological sources. As with Kaveny, he seeks to better interpret the law through reading it alongside, and implicated by,

certain circumstances, at least—common law can function as a form of natural-law-inflected casuistry. The chapters that follow, therefore, make available to ethicists new resources to engage the common-law tradition as a conversation partner for broadly natural-law accounts of public life. This study, then, is partly an act of historical retrieval.[15] Its chapters, in other words, seek to show that current assumptions about the nature of common law, natural law, and their relationship can be altered, even upended, by careful attention to history. And, as we will see, new questions can be asked when historical figures and issues are given proper, fuller consideration: for the historical often helps to define the central questions of the normative, and vice versa.[16]

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ethical sources. "Childhood without Life, Life without Childhood: Theological and Legal Critiques of Current Juvenile Justice Policies," *Journal of the Society of Christian Ethics* 33, no. 1 (2013): 124–57; "Moral Consensus, The Rule of Law, and The Practice of Torture," *Journal of the Society of Christian Ethics* 26, no. 2 (2006): 125–56.

One outlier of significant interest is Robert W. Tuttle's article "Paul Ramsey and the Common Law Tradition." Tuttle suggests that Ramsey includes "common law" as a form of moral reasoning in his *Nine Modern Moralists* (1962), and that there are five areas of overlap between Ramsey's thought and the common-law tradition. These are: the authority of tradition; practice-oriented moral reasoning; the relationship between particular judgments and fundamental law; institutional autonomy; and—in Ramsey's own work—a use of the common law's substantive norms. *Annual of the Society of Christian Ethics* 16 (1996): 171–201.

[15] See, Charles Taylor, "Philosophy and Its History," in *Philosophy in History: Essays on the Historiography of Philosophy,* ed. Richard Rorty, J. B. Schneewind, and Quentin Skinner, 17–30 (New York: Cambridge University Press, 1984).

[16] See, Jennifer Herdt, "Religious Ethics, History, and the Rise of Modern Moral Philosophy: Focus Introduction," *Journal of Religious Ethics* 28, no. 2 (2000): 167–88; and Jean Porter, "Mere History: The Place of Historical Studies in Theological Ethics," *Journal of Religious Ethics* 25, no. 3 (1997): 103–26.

For a recent argument for why historians should embrace forms of "presentism," see Miri Rubin, "Presentism's Useful Anachronisms," *Past & Present* 234, no. 1 (2017): 236–44.

By giving attention, moreover, to the normative possibilities of engaging the common-law tradition, this study also seeks common cause with current interdisciplinary conversations between law and normative Christian thought.[17] This is one facet of a flourishing field in law and religion, which offers wide-ranging treatments of "the religious dimensions of law, the legal dimensions of religion, and the interaction of legal and religious ideas and institutions."[18]

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[17] See, e.g., John Witte, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007); Michael Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford: Oxford University Press, 1997); and Cathleen Kaveny, *Law's Virtues* (Washington, DC: Georgetown University Press, 2012). In her most recent work, Kaveny suggests that, while recent years have seen strong work from lawyers engaging theological questions, there is need and opportunity for scholars in religious ethics to view the American legal tradition as a conversation partner. See her forthcoming *Ethics at the Edge of the Law: Christian Ethics and the American Legal Tradition* (New York: Oxford University Press, forthcoming).

Outside of discussion of the First Amendment to the U.S. Constitution and some Catholic journals, religious arguments are infrequently treated in "mainstream" legal scholarship. A search of the top law reviews, for instance, makes this clear. A search reveals that Harvard Law Review has published only fifteen articles on religion over its 130-year history. These consider the First Amendment issues and constitutional interpretation of religion more generally, but not the role of religion or religious thought in other aspects of the law. Yale Law Journal, likewise, has 14 articles. Stanford Law Review has three. Columbia Law Review has seven.

David A. Skeel, Jr. and William J. Stuntz have explained the lack of specifically Christian scholarship in the legal academy and make a case for Christian legal scholarship in a brief set of articles: David A. Skeel, Jr., *The Unbearable Lightness of Christian Scholarship*, 57 Emory L.J. 1471 (2008); William J. Stuntz, *Review: Christian Legal Theory*, 116 Harv. L. Rev. 1707 (2003); David A. Skeel, Jr. and William J. Stuntz, *Christianity and the (Modest) Rule of Law*, 8 J. Const. L. 809 (2006).

[18] John Witte, Jr., "The Interdisciplinary Growth of Law and Religion," in *The Confluence of Law and Religion: Interdisciplinary Reflections on the Work of Norman Doe*, ed. Frank Cranmer, Mark Hill, Celia Kenny, and Russell Sandberg, 247–61 (Cambridge: Cambridge University Press, 2016), 247. See also his earlier "The Study of Law and Religion in the United States: An Interim Report," *Ecclesiastical Law Journal* 14 (2012): 327–54; and "Law and Religion: The Challenges of Christian Jurisprudence." 2 U. St. Thomas L.J. 439 (2005).

2. Initial Definitions

We might rightly worry that, in a broad-ranging study covering hundreds of years, the words that are central to our study will change their meaning. If this is so, then attempting to pin down definitions outside of a particular context will be either futile or inaccurate. On the other hand, if the varied meanings attributed over the centuries to "common law" or "natural law" have no relationship, this study is merely semantic. We would not capture a meaningful tradition of thought when we traced the relationship between "common law" and "natural law."

What are we to do? Certainly, we would do well to consider uses of "common law" and "natural law" as existing in "family resemblance" rather than one-to-one correspondence.[19] But we can say more. In one respect, the issue is less pressing than it might initially seem. The narrative of the five chapters, however expansive, holds

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Earlier examples of this kind of survey are: Bresnahan, "Religion and Law in a New Perspective"; Howard J. Vogel, "A Survey and Commentary on the New Literature in Law and Religion," *Journal of Law and Religion* 1, no. 1 (1983): 79–169.

Witte suggests that there are *nine* current directions in the field of Law and Religion: (1) religious freedom including the religion clauses of the First Amendment of the U.S. Constitution; (2) the study of internal religious systems, such as canon law, either normatively or sociologically; (3) documenting the contribution of religious ideas and practices in "secular" legal systems; (4) religious contributions to particular topics, such as human rights; (5) the relations of law, religion, and family life; (6) natural-law theory; (7) theological work on legal ethics, tensions between religious convictions and professional duties; (8) the epistemological question of whether there are rightly religious arguments in legal discourse; and (9) the relationship between religious and legal interpretation and hermeneutics.

This current study is an example of the third (documenting the contribution of religious ideas and practices in "secular" legal systems) and the sixth (natural-law theory).

[19] See, Ludwig Wittgenstein *Philosophische Untersuchungen/ Philosophical Investigations*, trans. G. E. M. Anscombe, P. M. S. Hacker and Joachim Schulte, rev. 4th ed. (Malden, MA: Wiley-Blackwell, 2009), §67.

together a recognizable tradition: American reflection on the law. Our challenge, then, is to fairly treat "common law" and "natural law" as they appear in the sources, rather than against their standard meaning today. For a major claim of this study is that showing the engagement of common law and natural law will challenge our hitherto-standard definitions, at least as they pertain to legal education and practice.

Nonetheless, some clarifications will be helpful. "Common law" in this study is most often used in its broadest sense. It refers to the *system of laws* in England and United States where laws (whether seemingly originating in a constitution, statutes, orders, or cases) are developed through their interpretation by judges, and developed by judicial decisions in individual cases. This broader meaning of common law also includes the institutions, procedures, and conventions that allow for the functioning of a system of case law. For instance, common-law jurisdictions typically function with adversarial court proceedings—where lawyers prosecute and defend, and a judge impartially determines the law—and use a jury to determine facts in a case.[20] Institutions, procedures, and conventions such as these distinguish England and the United States from jurisdictions where laws more directly follow from the patterns set by Roman law: the Roman Catholic Church with its canon law, for example, and continental Europe's

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[20] What the widespread disappearance of trials and juries means for the common-law system is much debated. For basic background, see: Patricia Lee Refo, *The Vanishing Trial*, 30 Litig. Online 2 (2004).

Refo notes that "[i]n 1962, there were 5,802 civil trials in the federal courts and 5,097 criminal trials, for a total of 10,899. In 1985, total federal trials had risen to 12,529. By 2002, however, trials had dropped to 4,569 civil trials and 3,574 criminal trials. Thus, our federal courts actually tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame. In 1962, 11.5 percent of federal civil cases were disposed of by trial. By 2002, that figure had plummeted to 1.8 percent." *Vanishing Trial*, 2.

various civilian systems, where court proceedings are not adversarial but rather inquisitorial.[21]

"Common law" also has narrower meanings. The most important for our purposes is that it refers to the particular body of laws formed, most proximately, by the reasoned judgments of courts. In other words, certain areas of the law—generally those finding their roots in England—have been primarily formed and developed by case law, and not by statute or constitution. Conventionally, for example, contract, torts, and property are common law subjects; taxation, securities regulation, and bankruptcy are not. The law in these common-law areas is best—or perhaps only—identified, then, by reading the legal opinions written by judges, not the statutes enacted by legislatures.[22]

These definitions of common law are fairly uncontroversial. But their easy familiarity—at least to lawyers—is more obscuring than illuminative of certain historical aspects of the common-law tradition. For far from the creation of judges, we will see that, through most of the time period covered in this study, common law was understood as deeper rooted: the *custom of the people* perhaps, or even nothing less than *common reason*. The common law was to be interpreted by judges, yes, but *found*, not created, in

[21] In inquisitorial systems, judges typically play an active role in the collection of evidence and interrogation of witnesses. See, Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd ed., trans. Tony Weir (Oxford: Clarendon, 1988).

[22] Almost all of the figures treated in the study understand the broadest meaning through the narrower: in other words, they treat case law as primary, and statutes as secondary, to the logic of the legal system. Today, statutes and regulations have far more prominence, although these too require interpretation through the courts.

interpretation.[23] Indeed, sharing the same intellectual worlds as theologians and philosophers, it was "wholly orthodox" for judges and jurists to treat natural law as one of the common law's principal sources.[24]

What do we mean, then, by "natural law"? At its core, it is a law distinguishable from positive human law. It proceeds from or is grounded in—variously—the mind or will of God, nature, or human reason. As we will see throughout this study, in a broadly-shared western Christian tradition of moral reflection, "natural law" is often understood as a universal morality naturally accessible to all rational people.[25] At other times, however, "natural law" has a more specific meaning; it exists within a specific moral tradition: "modern natural law," for instance (CHAPTER 1, §4). In common-law legal practice today, however, and in Anglophone legal philosophy, "natural law" may simply refer to any approach that treats law as necessarily having a connection to morality. This meaning is essentially the converse of "legal positivism," which is often defined, minimally, as the contention that law has no necessary connection with morality.[26]

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[23] See Gerald Postema, "Philosophy of the Common Law," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro, 588–623 (Oxford: Oxford University Press, 2004).

[24] David Ibbetson, "Natural Law," in *The Oxford International Encyclopedia of Legal History* (New York: Oxford University Press, 2009).

[25] For one proposal of how to identify this, see Jean Porter, "A Tradition of Civility: The Natural Law as a Tradition of Moral Inquiry," *Scottish Journal of Theology* 56, no. 1 (2003): 27–48.

[26] See, Hart, "Positivism and the Separation of Law and Morals," 54.

3. A Natural-Law History of American Legal Education

Through five chapters we will consider the history of the interrelationship of American common law and natural law, using the development of American legal education as our case study. In PART I, we treat the primary sources of natural-law thinking in American common law: collegiate education (CHAPTER 1), and William Blackstone's *Commentaries on the Laws of England* (CHAPTER 2). In PART II, we consider the uptake and interpretation of these sources in American professional legal education, reviewing the sweep of legal education through the nineteenth and early twentieth centuries (CHAPTERS 3, 4, 5).

3.1. Chapter 1. Law and the American College

The first chapter examines the American college as both a source for natural-law thinking in America and a site of its negotiation with common law. More specifically, it considers the Colonial colleges and their Revolutionary or Republican successors, analyzing the colleges' distinctive accounts of natural law and reason and the consequences of those accounts for the colleges' curriculums.

In addition to recovering this narrative, CHAPTER 1 argues, first, that the history of American higher education provides us with distinctive ways of talking about law. The varied natural-law traditions of the Puritans and the early Republic—unlike the majority of today's discourses—do not isolate discussions of law. Rather, in these eras, questions of law, governance, and authority were explicitly tied to broader questions of morality and politics.

Second, by examining the natural-law reflection of the Puritans and early Republic, CHAPTER 1 offers two discourses on law that differ significantly from better-known Roman Catholic Thomism (of whatever variety). The Puritans adhered to a chastened form of natural law concerned with civilization apart from God's revelation. The Revolutionaries, on the other hand, cast off the Puritans' doubts about the sufficiency of reason for the epistemic optimism of "scientific" modern natural law.

Finally, CHAPTER 1 shows that an embrace of Puritan or modern natural law is not without consequences. The Puritan account, with its suspicion of the reach and reliability of human reason, might assuage a (generally protestant) concern that recourse to natural law insufficiently considers human sin. But, so chastened, it may provide too few benefits. On the other hand, the modern-natural-law approach of the Revolutionary curriculum—particularly when it embraced the self-evident principles of the Common Sense tradition—might suggest a baseline for contemporary discussions of law in pluralistic society, but its corralling of epistemic optimism and Christian commitments is perhaps unstable and theologically flawed.

3.2. Chapter 2. The Early American Reception of Blackstone

The second chapter of PART I turns to the other significant source for American natural law and site for its negotiation with common law: the American reception of William Blackstone's *Commentaries on the Laws of England*. As we will see, Blackstone is responsible for ordering and organizing common law. By giving it a hitherto-unknown structure and order through its principled basis in natural law, Blackstone commended the common law to Americans at a time when both its disorderliness offended the

Enlightenment minds of the builders of the new Republic and its English origin rendered its survival in America uncertain. Concise and comprehensive, Blackstone's *Commentaries* provided a much-needed tool to students and practitioners in the new Republic, and well into the nineteenth century the *Commentaries* remained a prominent guide: shaping the assumptions of generations of Americans that the common law is fundamentally in accord with natural law or reason.

In addition to recovering this narrative, CHAPTER 2 argues, first, that a common-law legal system can be outlined and explained in reference to natural law. This is a significant recovery. For the natural-law reading of common law suggests how American law might exceed the positivistic models of today's legal thinkers. It shows, in other words, how law can relate to broader theological, moral, and political discourse. More particularly, Blackstone offers us examples of how natural-law treatments of common law can speak beyond high-level questions of law's source and authority. Blackstone suggests how natural law might serve to structure a body of law, and justify or critique its specific enactments, defenses, and punishments.

Second, attending to Blackstone's *Commentaries*, we find treatments of natural law that differ from those most generally familiar in theological thought. This is particularly true in the details of how Blackstone presents the interaction of natural law and human law. While Blackstone does indeed follow in the well-worn traditions of thinking that human law might act where natural law does not, or specifying the details of broad natural-law principles, he also suggests—against the grain—that natural law can be overridden by other considerations. Human laws may deviate from natural law, but only when lawmakers and citizens can justify that decision.

Third, Blackstone's treatment of natural law has a certain modesty, resulting partly from his belief that human reason is weakened by sin. Modern positivist critics of natural law suggest that natural law places human law beyond criticism. We will see, however, that in Blackstone's account human responsibility and accountability remain; human courts must make decisions, and be judged for them. Natural law, then, is a standard with which to explain and stabilize human laws, but also a standard against which human laws are rendered contingent and revisable.

3.3. Chapter 3. 1817. The Rise of the Law School: Joseph Story, Common Law, and the Subsumption of Natural Law

The third chapter begins PART II's historical sweep through professional legal education in America and its changing recourse to natural law. Blackstone's *Commentaries* served as the primary educational basis for both new "proprietary schools" and, from 1817, university law schools. Yet natural law quickly receded from instruction in the law schools. This was true even in the teaching and writings of U.S. Supreme Court Justice Joseph Story, a champion of natural-law reasoning in the common law. As American common law was worked out in the early nineteenth century, natural law was subsumed into its details, including in Story's own treatises. In ways confusing, then, to both natural law's contemporary champions and its positivist opponents, Story's treatment of natural law is exemplary of the ways in which natural law can be historicized and relativized, at least in its relationship to common law.

In addition to recovering this narrative, CHAPTER 3 argues, first, that Story's writings offer one model of the relationship of reason to history. Any natural-law account

of common law, after all, must explain how natural law—traditionally understood as timelessly applying to all people and all places[27]—can relate to the historically-bound development of common law. In Story's telling, while "history" is not the same as "reason," it is nevertheless through history that reason is revealed. The customs of a people, he says, function as the seedbed of positive law. We come to know what the law is by "finding" it through the determination of cases. Indeed, even the rights we claim have particular lineages, notwithstanding their applicability to all human beings.

Second, Story's attention to how natural law operates in the details of a particular legal system challenges natural-law accounts of human law, which solely emphasize natural law as either the source of laws or an external judgment upon them. As true for Blackstone, Story's account expands the sites of natural law's influence, even as he suggests that natural law might not have the final word in adjudication. Instead, natural law provides legal principles for common law, such as the idea of natural justice. Natural law, moreover, can act as an internal yardstick. Without determining the content of a law, in other words, natural law might indicate when a law is insufficiently close to an ideal of justice. Or sometimes natural law works in combination with positive law: giving force to fundamental tenets of morality, not least concerning crime and punishment, but only as defined and enacted by positive law.

Third, Story speaks to what Christian reflection can add to natural-law treatments of common law. Christian faith, he says, better illustrates the moral life. And it provides motivating reasons to follow moral law, for God holds together virtue and happiness in

[27] Traditionally, natural law has been understood as the same for all people (at least in its general principles, if not the conclusions that proceed therefrom). See, e.g., Thomas Aquinas, *Summa Theologiæ*, I-II, q. 94, art. 4–5.

ways purely secular accounts cannot. We might worry, however, that Christian illustration and motivation fail to interrogate the *content* of law. Yet there is a spirit of critique in Story's use of natural law. Seemingly despite himself, he suggests that natural law may condemn as well as support common law.

3.4. Chapter 4. 1870. The Modern Law School: Christopher Columbus Langdell's Legal Science as Perpetuation and Rejection of Natural Law

This second chapter of PART II continues the treatment of professional legal education begun in CHAPTER 3, and the uptake and interpretation of the collegiate and Blackstonian natural-law sources discussed in PART I. Its focus is the late-nineteenth century reformation of university law schools begun by Christopher Columbus Langdell.

By the mid-nineteenth century, the job of training elite lawyers had fallen in large measure to university law schools. These law schools remained deeply indebted to Joseph Story and, ultimately, to Blackstone. But university law schools failed to meet the promise of high scholarship—including philosophical analysis of the common law—that law's inclusion as a university discipline had suggested. In 1870, however, law schools' professional orientation and natural-law assumptions were forever changed by reforms initiated at Harvard by Christopher Columbus Langdell. In time, these reforms set the standard for all American university legal education, with significant consequences for the relationship of common law to natural law. The loci of these shifts were Langdell's development of the *case method,* which challenged the rules and maxims of earlier teaching, and his vision of law as a *legal science*, the standards and practices of which were shaped by the nineteenth-century approach to the natural sciences.

Some commentators treat Langdell's turn to the natural sciences as continuous with Blackstone and Story's understanding of law as a science. Others herald or bemoan Langdell as a nascent legal positivist. Langdell's later critics, however, have often insufficiently distinguished his legal science from earlier natural-law treatments of law or later positivist accounts. There were significant differences. To be sure, Langdell affirmed that the sole source of common law is the positive law of judges and legislators, not morality or even custom—as natural-law-inflected treatments of common law had maintained—and that precedent in the law, in the end, must rule over reason. And yet, Langdell retained a commitment to principle in the law, and to the legal system's *internal* coherence.

In addition to recovering this narrative, CHAPTER 4 argues, first, that if Langdell is meaningfully classed as a natural lawyer, he offers an *inductionist* natural law: a vision of law where more general laws or principles are formed by inference from the decisions of particular legal cases. This approach is distinct from prominent forms of the natural-law tradition that work *deductively*: that is, by applying *a priori* principles to particulars. In turning to induction, then, Langdell uses a model that more closely matches the logic of common law. Langdell, therefore, may provide a helpful example of the profits and pitfalls of an approach that more closely fits natural-law analysis to the actual practice of the American legal system.

Second, considering Langdell and his reforms, we find that the question of justification haunts induction. What is it about a legal case that makes its rules or principles worthy of following? Langdell provides few answers. He assumes that the content of common law is principled, yet he offers little or no argument for why this

might be so. This is different both to Story, who suggests that history—and thus the refinement of case law—works out reason, and the legal realists of CHAPTER 5, who turn to standards external from the law. Langdell can only offer a contingent reply: in American common law—*it so happens*—reason and precedent come together. Those attracted to an inductivist account of natural law, therefore, will need to think carefully about what exactly they expect to find in the process of induction. Contemporary Christian proponents of natural-law readings of common law, for instance, will hesitate to affirm as "natural law" all that they find in developed case law.

Third, this question of justification is a reminder that contemporary proponents of natural law must repeatedly ask *for whom* any account of natural law is justifiable. Langdell's audience was convinced by law's reference to the natural sciences. This provided its legitimacy. His was an age when the power of the scientific method promised progress in all aspects of life. Following in the mainstream of the natural-law tradition, Langdell assumed too that all reasonable people would see the truths of his legal science. Contemporary American proponents of natural law, though, cannot take this for granted. They do not find a public square with shared epistemological understandings, let alone normative visions. Their questions, then, become: Who will be moved by a natural-law account of common law? What shared assumptions are necessary for agreement?

3.5. Chapter 5. 1881, 1930. Common Law's Breaks with Natural Law: Oliver Wendell Holmes, Jr., and the American Legal Realists

This final chapter concludes our treatment of nineteenth- and early-twentieth-century professional legal education in the United States. It attempts to make sense of two fundamental breaks with the natural-law tradition. The first is the skeptical treatment of law's nature, and even morality itself, in the thought of Oliver Wendell Holmes, Jr., one of the most significant jurists in American history. The second is the American legal realists' vision of common law as secular, indeterminate, and non-objective.

Both Holmes and the legal realists rejected Langdell's idea that the law is principled and coherent: legal rules—however well wrought in reason or pedigreed by precedent—underdetermine the decisions in actual judicial cases. Instead, legislative might or social convention, said Holmes, or sociological or psychological factors, said the realists, ultimately determines a judge's decision. Whatever artificial doctrine holds together the law, the "reality" of law is what the courts *do*; to speak of law, they claim, is just to speak of the *consequences* of judicial decisions. Talk of "morality" or "values" in the law is thus a distraction. Gone, it would seem, is the common law's connection to natural law, in whatever form.

In addition to recovering this narrative, CHAPTER 5 argues, first, that Holmes and the realists remain influential in shaping American legal education. The details of the realists' thought may now be a matter of historical interest, but their skeptical spirit animates the ways law students are taught and legal academics think, and, therefore, requires our engagement.

Second, contemporary proponents of natural-law treatments of the common law must meet the challenges raised by Holmes and the realists. Unlike the thought of Story, or even Langdell, the thought of Holmes and the realists cannot easily be embraced by those who believe that common law relates to human reason and rightly furthers the flourishing of human life in society, however minimally. One response is to provide a more convincing account of the nature and purpose of human law. CHAPTER 5 suggests, however, that historical and conceptual investigation of natural-law treatments of the common law can also engage in immanent critique of Holmes and the realists, identifying the contradictions and ideological biases of their thought in relation to what came before and after them. The end of the chapter begins that work.

3.6. Epilogue

In a short epilogue, we return to the standard depictions of "common law" and natural law." The EPILOGUE argues that this study's attention to common law and natural law in American legal education—not least the details of their frequent, if varied, interrelations—shows that the standard depiction is distorted. When this distortion is recognized, new possibilities arise to relate common law and natural law. This may enrich public debate, add new resources to legal and theological scholarship, and—for those committed—a new scope and acuity to natural-law accounts of common law.

PART I

SOURCES

CHAPTER 1

LAW AND THE AMERICAN COLLEGE

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Prospect

If natural law is to be invoked today to explain and critique American law, then its proponents—Christian and otherwise—will do well to understand the history of American higher education, and, particularly, the question of *whether or not*—and *how*, indeed, and *why*—"law" (natural and common) was taught. This first chapter, accordingly, considers the American college as a source for natural-law thinking in America, and a site of its negotiation with common law. More specifically, this chapter offers a typological treatment of two essential moments in the development of American education: the *Colonial* colleges (in §2 and §3), and their *Revolutionary or Republican* successors (in §4). Discussion of these two moments proceeds roughly in parallel: in each, treatments of natural law (§2.1., §4.1.) and reason (§2.2., §4.2.) precede assessments of the colleges (§3.1., §4.3.) and their curriculums (§3.2., §4.4.–6.). CHAPTER 1 is the first of two chapters (PART I) that consider sources for natural-law reasoning in America. In PART II, we will turn to the outworking and interpretation of these sources in professional legal education.

What do we learn from the history of the American college? At least three things can be said at the outset. First, and most basically, when we attend to this history we recover distinctive ways of talking about law. We recover, that is, ways for explaining and critiquing law not solely conformed to "law" as a profession. As we will see, law was discussed within a broader theological, moral, and political discourse. In their earliest years, American colleges taught ethics, law, and government in the natural-law tradition. This is an unfamiliar story: obscured from our vision by the nineteenth-century creation

of the university law school (CHAPTERS 3 and 4) and the twentieth-century split of law and morality in legal education (CHAPTER 5).

The colleges, true, did not offer a professional education in the practice of law. Instead, they provided an education for leadership: In the colonial period, colleges sought to form students' whole character in proper love of God and neighbor. And with the Revolutionary war, colleges sought to inculcate good citizenship (necessary, they believed, for the flourishing of the new Republic). The history of American higher education, then, offers us visions of "teaching law" that are not exhausted by the requirements of contemporary legal practice or the conventions of today's law schools.[1]

Second, when we attend to the history of American collegiate education we find natural-law discourses significantly different from today's dominant theological models. We find, that is: a Puritan natural law (§2.1.); and "modern natural law" as received in America (§4.1.). Beyond specialist circles, most scholars are unfamiliar with these discourses. Indeed, most Christian theologians and ethicists are remarkably unfamiliar with *any* natural-law theory beyond the established position of the Roman Catholic magisterium.[2] And yet there are a variety of (Christian) natural law positions, each with

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[1] American law does receive analysis today in relationship with the social sciences (see, CHAPTER 5). Such approaches, however, rarely treat "law" as itself a normative discourse. Legal philosophy, of course, does treat law as a normative discourse, but often for narrow purposes.

[2] The "New Natural Law" is the best-known natural-law approach in contemporary legal scholarship. See, Germain Grisez, Joseph Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 Am. J. Juris. 99 (1987).

In certain circles of Christian ethics, Jean Porter's contemporary Wittgensteinian scholasticism is influential too. See, e.g., her *Natural and Divine Law: Reclaiming the Tradition for Christian Ethics* (Grand Rapids, MI: Eerdmans, 1994), and *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids, MI: Eerdmans, 2005).

particular theological strengths and weaknesses and—importantly for our task—differing self-understandings of their scope and applicability in pluralistic society.

Nonetheless, whatever the changing views of the purpose of education or even the meaning of natural law, we will see that from the beginnings of Harvard College (1636) through the foundation of the University of Virginia (1819), Americans shared an understanding—mostly taken for granted—that rationality and morality go together, and that human laws accordingly derive their authority from their correspondence with the moral order (§2.3). Since this was so, college instruction seemingly inextricably encompassed ethics, law, and government: to ask *what we know* and *how we should live well* was to seek too the just ordering of society and its institutions.

Third, however, CHAPTER 1 shows that any embrace of Puritan or modern natural law has consequences. Both accounts of natural law, for instance, presume a "unity of truth" (§2.2, §4.2). They mostly treat "nature" as descriptive *and* normative (in ways rejected by most secular moralists today). Contemporary Christians, in other words, might wish to adopt one account or another, but would only do so responsibly if they recognize that its assumptions are *not*—as the Puritans and Revolutionaries took for granted—broadly shared.[3] The wholesale embrace of a natural-law account, then, does not offer an uncontested entry point into political and cultural debate.

There are, moreover, explicitly theological consequences. The versions of natural law offered by Puritans and Revolutionaries do not speak to eternal law, as such, or the economy of salvation. Theirs is a limited vision. To adopt one or the other, then, is a

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[3] Some secular moral realists, of course, who take for granted objective value in the universe. For an example from legal and political philosophy, see: Ronald Dworkin, *Religion Without God* (Cambridge, MA: Harvard University Press, 2013).

"protestant" act of a kind. But what variety of protestant is determined by further choice, for Puritan natural law and modern natural law differ in their understanding of the scope and reliability of human knowledge. The Puritans, we will see, insisted on human moral incapacity apart from God's redeeming grace. The Revolutionaries had confidence in human instincts as generative of moral norms. If one or other of CHAPTER 1's accounts of "law" prove appealing, therefore, its thoughtful adoption (or adaption) will commit us to a broader moral theory (with all the consequences that follow).

1. Law and the American College[4]

To ask *whether* (and if so, *how* and *why*) American colleges taught law risks our participation in a semantic exercise. "Law" means so many things, that finding something recognizably law-like in the histories of American colleges can hardly count as evidence for much. We need to know, then, what exactly we are looking for. The answer, for this current enterprise, as the INTRODUCTION has outlined, is *common law*. But common law, we also noted, is a complex term. Nonetheless, at a minimum, we can answer that the "law" we are looking for in the teaching of American colleges is the body of rules, and corresponding institutions, that early Americans recognized as binding on their action *as subjects* of a particular political community.

[4] Surveys of the history of the American college include: Frederick Rudolph, *The American College and University, A History* (New York: Knopf, 1961); Laurence R. Veysey, *The Emergence of the American University* (Chicago: University of Chicago, 1965), and John R. Thelin, *A History of American Higher Education* (Baltimore: Johns Hopkins University Press, 2004).

For most legal scholars and historians of education, however, investigating the place of common law in America's colleges merits a swift resolution: for if *teaching in law* is taken to mean *teaching the necessary means to enter the legal profession* then looking to the colleges will yield little of value. Until the twentieth century, entry to the legal profession came through apprenticing with a senior practitioner and passing bar examinations; college, therefore, played little formal role in producing lawyers.[5]

Accordingly, most contemporary scholars have seen little continuity between the traditions of American collegiate study of the law and the now-standard graduate teaching of lawyers.[6] This is a mistake. True, from the standard viewpoint of contemporary legal scholars, a viewpoint formed within a general commitment to legal positivism—the separation of law and morality—teaching to cultivate citizens' virtue, where law is an admixture of moral philosophy or the study of good governance, is not

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[5] Although some bar organizations gave preferential treatment to college graduates: some counties reduced the length of college graduates' apprenticeships, for instance. And in 1771, Suffolk County in Massachusetts, at least, required would-be lawyers to have a college education in order to be admitted to the bar. Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States* (New York: Carnegie Foundation for the Advancement of Teaching, 1921), 112–13.

Robert Stevens suggests that the profession's support for college education partly accounts for American collegiate study of the law: *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 4.

[6] John Thelin comments "[a] college might have had a professor who delivered lectures on law, but the subject was combined with such topics as 'police,' a field that was most likely a forerunner to what is known today as political science and public administration"; History, 31. Or as Alfred Reed notes: study of the law "resembled what we should now term government and jurisprudence rather than law, and were still only partially differentiated from ethics and philosophy"; *Training*, 135.

properly legal study.[7] But this just begs the question of the nature of law. In some distinction to this now-standard positivist view, significant traditions of American collegiate study of law represented and perpetuated two ideas about law that positivism does not: first, that discussion of law cannot be avoided when political morality is considered; and, second, that the study of the law, far from exhausted by study for its practice, should begin with philosophical reflection, broadly conducted within the terms of the natural-law tradition. This model of collegiate study of the law made sense as part of an education intended to inculcate character or good citizenship.

2. The Colonial Curriculum

SUMMARY: The colleges founded before the American Revolution taught ethics, law, and government to form pious and energetic men for leadership in the colonies. As schools of the Protestant reformation they inculcated a collegiate way of life aimed at forming ministers of religion and civil leaders for the colonies. That they did so within a particular natural-law framework resulted from the refracting of their Old World intellectual heritage through their self-understanding of a New World mission. Not that the Puritans, or other colonists, necessarily took active steps to inculcate a natural-law vision of the society. It simply formed the background assumptions of the age. And yet, the particular rigors and anxieties of the New England Puritans—and their outsized impact on American education—did foster a particular vision of natural law in the colleges. In the colonial curriculum, natural law accorded with Scripture and the best of antiquity, and was focused on civil affairs. Natural law offered an account of the authority of the civil law, and, increasingly in time, arguments for the veracity of Christian revelation.

Before we can ask about the place of common law and natural law in the life and teachings of American colleges, some words are needed on the broader intellectual landscape. In the first section, therefore, I ask: Of what where the Puritans speaking when

[7] This is true even of contemporary "activist" approaches to law, which treat law as a tool for achieving purposes determined beyond the law proper.

they talked about "natural law"? In section 2, I ask more basically still, what was "reason" to the Puritans? While in section 3, I ask what the Puritans understood by civil law and government.

2.1. Puritan Natural Law

As is well known, the Puritan[8] colonists of the Massachusetts Bay Company founded a college in 1636.[9] Its founding was animated by promise and anxiety: the desire to "advance learning and perpetuate it to posterity," and the dread of leaving "an illiterate ministry to the churches, when our present ministers shall lie in the dust."[10] The truth, as

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[8] In line with current scholarly conventions, the use of a capital "P" in "Puritans" refers to the particular group of settlers in New England, while using a lower-case "p" for "puritans" refers to the sometimes amorphous set of individuals and protestant groups who shared a reforming spirit within the English church. The use of a capital "P" emphasizes that the New England Puritans were a distinct group (despite scholarly disagreement as to whether this group was a haggard collection of refugees—their identity forged in their shared expulsion from the Old World—or a self-consciously utopian band). See: John Coffey and Paul Chang-Ha Lim, ed., *The Cambridge Companion to Puritanism* (Cambridge: Cambridge University Press, 2008); and Stephen Foster, *The Long Argument: English Puritanism and the Shaping of New England Culture, 1570–1700* (Chapel Hill: University of North Carolina Press, 1991). Historical trends in the study of New England Puritans are well-captured by: Michael McGiffert, "American Puritan Studies in the 1960's," *William and Mary Quarterly* 27, no.1 (1970): 36–67; David Hall, "On Common Ground: The Coherence of American Puritan Studies," *William and Mary Quarterly* 44, no. 2 (1987): 193–229; and Charles Cohen, "The Post-Puritan Paradigm of Early American Religious History," *William and Mary Quarterly* 54, no. 4 (1997): 695–722.

[9] The outsize influence of the New England colleges in the history of American higher education accounts for the shorter treatment given to the earliest colleges of the middle colonies and the south.

[10] The quotations are from "New Englands First Fruits" in *The Eliot Tracts: With Letters from John Eliot to Thomas Thorowgood and Richard Baxter*, ed. Michael Clark (Westport, CT: Praeger, 2003), 55–78.

Published in London, and edited—and likely composed—by Thomas Weld and Hugh Peter, *New Englands First Fruits* informs its readers about the climate, products,

they understood it, was to be furthered and systematically transmitted to the generations who would follow them. And this same truth, they thought, would be the seedbed of piety for those who would lead them in the worship of God.

Prominent among the colonists were men educated at Cambridge University and particularly its puritan-leaning institutions, such as Emmanuel College. Following his death in 1638, and bequest of money and books, the new college in Cambridge, Massachusetts, was named for Emmanuel graduate the Reverend John Harvard (b. 1607). The Puritans of both these Cambridges, and their contemporaries, took for granted a connection between rationality and morality: The human ability to form valid judgments by use of intellectual powers, they thought, is intimately tied to how to live rightly and well.[11]

This connection between is and ought has grounded most expressions of natural law—a universal morality accessible to all rational persons—that proved a broad mainstream of Western moral thought until modernity.[12] In their views of the connection of reason and morals, at least, the New World Puritans did not deviate from the thinking of the Europe they fled.

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and religion of New England, and offers a description of Harvard College. It likely served as publicity or fundraising material.

[11] The connection of rationality and morality was their *common sense.* What we might also call: the organized body of considered knowledge, "common sense as a cultural system." See, Clifford Geertz, *The Antioch Review* 33, no. 1 (1975): 5–26.

[12] Some contemporary expressions of "natural law" seek to avoid the connection between *is* and *ought*. The "New Natural Lawyers," for instance, speak of "basic goods" that are "self-evident" rather than deduced from facts about nature. See, Germain Grisez, Joseph Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 Am. J. Legal Hist. 99 (1987).

2.1.1. Hidden from the Record

That the Puritans shared the common understanding of their time, however, has repeatedly been hidden from the record. In brief, this is because the most influential theological and historical framings of the Puritans have obscured their natural law Weltanschauung. Systematic and classificatory work in theology, for instance, has often placed the Puritans among those Protestants who can be recognized as distinctive to Roman Catholics precisely on account of their presumed suspicion of natural law. In particular, the Puritans are classified in this way when scholars treat natural law as an "extra-biblical" body of morality. This excludes the Puritans, who are known, if for nothing else, for their commitment to the authority of the preached biblical text.

But the Puritans are excluded too from many historians' narratives of natural law. Prominent historians of the American Revolution, for instance, equate "natural law" with "modern natural law"—the thought of John Locke is their usual example—which they understand as providing the founding fathers with a secular grounding for human equality and rights. As such, one convenient result for these historians is that "natural law"—as they conceive it—indicates, and even accounts for, the intellectual breaking point between America's colonial period and its seemingly Enlightenment-inspired revolution. In other words, where natural law is equated solely with its "modern" form, "natural law" is the thought of broadly secular revolutionaries, with the Puritans left as "theocrats" for whom natural law can have no major force.[13]

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[13] For one vigorous recent version of this position, see: Matthew Stewart, *Nature's God: The Heretical Origins of the American Republic* (New York: Norton, 2014).

2.1.2. A Distinctly Puritan Natural Law?

These faulty theological and historical framings, however, fail to place the Puritans in their intellectual world or account for the specific basis, lineage, and scope of their particular understanding of natural law. This becomes clearer when we consider three particular Puritan tendencies in understanding natural law. First, the Puritans emphasized the biblical basis of natural law. While the Puritans self-consciously looked to the early Church as normative—and not traditions of interpretation as, arguably, Roman Catholics—and correspondingly sought to model their civic affairs on the record of the Old and New Testaments, the Christianity they espoused was not separate from the western Christian tradition of natural law. For one, they found in scripture the idea that even those who have not heard God's law are obliged to follow this law and, indeed, have the capacity to do so. In the language of the Geneva Bible:[14]

> For when the Gentiles which have not the Law, do by nature the things *contained* in the Law, they having not the Law, are a Law unto themselves,
> Which show the effect of the Law written in their hearts, their conscience also bearing witness and their thoughts accusing one another, or excusing. (Romans 2:14–15.)

With many other Christians, moreover, the Puritans' anthropology was formed in their reading of the first chapter of the biblical book of Genesis, and, in particular, its account of human creation in the *image of God*. In accord with a significant line of

[14] Generations of historians have treated the Geneva Bible as the Puritans' standard translation. Bruce Metzger provides a helpful brief introduction to the work: "The Geneva Bible of 1560" *Theology Today* 17, no. 3 (1960): 339–52. However, the Puritans also used the Authorized (that is, King James) version of the Bible. See, Harry Stout, "Word and Order in Colonial New England," in *The Bible in America: Essays in Cultural History*, ed. Nathan Hatch and Mark Noll, 19–37 (New York: Oxford University Press, 1982).

interpretation, the Puritans understood *rationality* as the content of the *imago Dei.* Rationality distinguishes human beings from the rest of creation, they thought, and accounts for the human ability to apprehend natural law.[15] Indeed, with John Calvin, and others in the Reformed tradition of Protestantism to which they cleaved, the Puritans placed particular theological emphasis both on human creation in the image of God, and the corruption or deformation of this image in humanity's fall from original perfection.[16]

The second Puritan natural-law tendency comes from the content and form of the education that their leaders received in Cambridge and elsewhere in Europe. This was an education built on the reemergence of classical learning in the later Middle Ages and, with it, the recovery of the natural law of the Stoics and Roman law. Indeed, Renaissance humanism and its protestant appropriators further strengthened a commitment to careful engagement with the texts and thought of Greece and Rome, alongside the biblical texts.[17] So, while there was no confusion as to the authority or preeminence of the

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[15] As the Geneva Bible renders Genesis 1:27, for example: "Thus God created the man in his image: in the image of God created he him: he created them male and female." See also: Genesis 5:1 and 9:6, 1 Corinthians 11:7, 2 Corinthians 3:18–4:4, Hebrews 2, and James 3:9.

[16] Important discussions of Calvin and natural law include: Susan Schreiner, *The Theater of His Glory: Nature and the Natural Order in the Thought of John Calvin* (Durham, NC: Labyrinth Press, 1991); Brian Gerrish, "The Mirror of God's Goodness: A Key Metaphor in Calvin's View of Man," in *The Old Protestantism and the New: Essays on the Reformation Heritage*, 150–59 (Edinburgh: T. & T. Clark, 1982); Günter Gloede, *Theologia Naturalis Bei Calvin* (Stuttgart: W. Kohlhammer, 1935); Jane Dempsey Douglass, "The Image of God in Humanity: A Comparison of Calvin's Teaching in 1536 and 1559," in *In Honor of John Calvin, 1509–64*, ed. E. J. Furcha, 175–203 (Montreal: Faculty of Religious Studies, McGill University, 1987); Luke Anderson, "The Imago Dei Theme in John Calvin and Bernard of Clairvaux," in *Calvinus Sacrae Scripturae Professor*, ed. Wilhelm Neuser, 178–98 (Grand Rapids, MI: Eerdmans, 1994).

[17] For a general discussion of the place of classical learning in the Renaissance, see: Albert Rabil, Jr., ed. *Renaissance Humanism: Foundations, Forms, and Legacy*

biblical texts over the classical in puritan thought, the lineage of their own *Christian* thought was articulated through the philosophical and rhetorical categories of the classical world, received through the Christian centuries in Augustine and others, and later recast in Christian wresting with the rediscovered corpus of Aristotle.[18] Most educated puritans, therefore, expected the consonance of Christian truth and the best of classical literature. They particularly read the Latin Stoic moralists: Calvin wrote on Seneca, for instance,[19] and the work of Cicero featured in every curriculum. These "wise heathens" were understood as speaking from the remainder of the image of God within them, the law written on their hearts. John Cotton (1585–1652), the leading minister of the first generation of New England Puritans, was but one of many who could say: "Heathen Law-givers, Philosophers, and Poets have expressed the effect of all the Commandments save the tenth."[20] Yet, of course, the influence ran in both directions. It was Christian beliefs that accounted, in the first place, for the very favoring of the Stoics over other ancient schools of philosophy. (For the Stoics, after all, were viewed as

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(Philadelphia: University of Pennsylvania Press, 1988); and Charles Nauert, Jr. *Humanism and the Culture of Renaissance Europe* (Cambridge: Cambridge University Press, 2006).

[18] For discussion of the reception of Aristotle, see: Bernard Dod, "Aristoteles latinus" in *The Cambridge History of the Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600*, ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg, 45–79 (Cambridge: Cambridge University Press, 1988); and C. H. Lohr, "The Medieval Interpretation of Aristotle," in Kretzmann, et al., *Later Medieval Philosophy*, 80–98.

[19] See, Ford Lewis Battles and André Malan Hugo, trans. and ed., *Calvin's Commentary on Seneca's De Clementia* (Leiden, The Netherlands: E. J. Brill, 1969).

[20] *A practical commentary, or, An exposition with observations, reasons, and verses upon the First epistle generall of John* (London: printed by R. I. and E. C. for Thomas Parkhurst, 1656), 234.

monotheistic, devoted to the will of God and God's service, cosmopolitan, and concerned with cultivating a disciplined life.)[21] Likewise, in American teaching of Greek, it was the New Testament and morally improving Hellenistic sources that found favor, rather than amoral tales from the Greek classics.[22]

Third, the scope or domain of natural law for the Puritans was not the economics of salvation, but—as for Calvin and other in the Reformed tradition—civil authority and human sociability. For the Puritans, nature or reason provided no saving knowledge of God as such. Instead, a primary purpose for natural law was the continuation of civilization precisely *apart* from knowledge of God's revealed will. John Calvin had spoken of natural law, for instance, as concerned with "terrestrial matters" (*res terrenae*),

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[21] For discussion of the last point, *askesis* (spiritual exercises), see Pierre Hadot, *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault*, ed. Arnold I. Davidson, trans. Michael Chase (Oxford: Blackwell, 1995). More generally, see also: Brad Inwood, *Reading Seneca: Stoic Philosophy at Rome* (New York: Oxford University Press, 2005), 224–48; Gerald Watson, "The Natural Law and Stoicism," in *Problems in Stoicism*, ed. A. A. Long, 217–36 (London: The Athlone Press, 1971).

There is a vast literature on the reception of Cicero. For a recent example, see: William Altman, ed., *Brill's Companion to the Reception of Cicero* (Leiden, The Netherlands: Brill, 2015).

[22] Benjamin Lord, a 1714 graduate of Yale, noted that "we recited the Greek Testament; knew not Homer, &c."; Franklin Bowditch Dexter, *Biographical Sketches of the Graduates of Yale College with Annals of the College History, October, 1701–May, 1745* (New York: Henry Holt, 1885), 115.

Accordingly, when Caroline Winterer suggests that classicism was "irresistible" to eighteenth-century protestant ministers who "happily reconciled the ethics of the heathens with the morality of Christianity," this does not hold for the Puritans. In the Puritan world, the classics both came along with the Christian worldview—and not as a separate source—and *were selected for reading* as a result of their correspondence with fundamental Christian convictions. *The Culture of Classicism: Ancient Greece and Rome in American Intellectual Life, 1780–1910* (Baltimore, MD: Johns Hopkins University Press, 2002), 14.

where natural law explains why adherence to the second table of the Law[23] is possible for all people.[24] In particular, Calvin was concerned to show that there are God-given norms for the state (*politia*), household management (*oeconomia*), and the mechanical and liberal arts. With his humanist sensibilities and training, Calvin urged an appreciation of sculpture, painting, medicine, the mathematical sciences, Roman law, and so forth, and, regardless of their human source, insisted that these are to be understood as gifts given by God.[25]

Such a distinction between the salvific and the terrestrial, however, is far from neat, and the Puritans accordingly debated the limits of natural law. One long-running controversy was whether or not the Sabbath was mandated by natural law. John Calvin thought not, and likewise Samuel Willard (1640–1707) insisted that where the sacraments and ordinances of the church were concerned the details "must come entirely from Christ; [for] the realm of the church is entirely separate from the realm of nature, and to decide upon its law Christ consulted only His own pleasure."[26] Yet even Willard suggested that

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[23] Referring to Commandments 4–10 of the Ten Commandments, which are seemingly concerned with human relationships rather than human relations with God.

[24] "Institutionis Christianae religionis [1559]" in *Joannis Calvini opera selecta*, ed. Petrus Barth (Monachii: C. Kaiser, 1926–59), 2.2.13. The standard English translation of the 1559 edition is: *Institutes of the Christian Religion: In Two Volumes,* ed. John McNeill and trans. Ford Lewis Battles (Philadelphia: Westminster Press, 1960).

[25] Calvin, *Institutes*, 1.2.14-15; 1.21.12. Irena Backus notes that, surprisingly, and unlike Thomas Aquinas, Calvin does not mention a human instinct to reproduce, rear children, or respond to violence. He does, however, consider at some length humanity's sociable nature and our inclinations to preserve society, not least in civic order and honesty (2.2.13). "Calvin's Conception of Natural and Roman Law," *Calvin Theological Journal* 38 (2003): 7–26.

[26] Samuel Willard, *A Compleat Body of Divinity* (Boston: Printed by B. Green and S. Kneeland for B. Eliot and D. Henchman, 1726), 613.

the light of nature might suggest "a convincing reason of the equity and suitableness" of any sacrament or ordinance.[27] Nature, in other words, might not deduce or demand Sabbath-keeping, but once known through revelation, a day of rest might appear reasonable and well suited to human life.[28]

The Puritans, then, are best viewed within the broader intellectual and social climate of their age. They too adhered to a broad natural-law common sense. Yet in seeking to assuage their particular anxieties, the Puritans renewed an emphasis on the ways in which a natural-law viewpoint can explain the decency in human life apart from God's direct revelation.

2.2. Puritan Reason

Their debates over whether the Sabbath is commended by natural law are a reminder, however, that despite their natural-law worldview, many Puritans retained a hearty suspicion of the operation of reason apart from revelation.[29] In the Puritan

[27] Ibid.

[28] This debate was long-standing. In the generation before Willard, Thomas Shepard (1605–49)—the influential minister of the First Church of Cambridge—suggested that while humanity can know the natural law today, its knowable rules and principles are *not* those "most perfect impressions of the law of nature, in man's first creation and perfection." Shepard's position is an intensification of Willard's in its suggestion that, before the fall, human beings might well have grasped Sabbath-keeping *solely* through natural law. In the primordial past, at least, human beings could truly know God's will apart from revelation; *Theses Sabbaticae: Or, The doctrine of the Sabbath* (London: Printed by T. R. and E. M. for John Rothwell, 1649), thesis, 12, 4.

[29] Perry Miller suggests that "the frequency with which the preachers insisted upon an inherent rationality of man is truly startling"; *The New England Mind: The Seventeenth Century* (Cambridge, MA: Belknap Press of Harvard University, 1984), 184. John Morgan, however, suggests that reason played a far more restricted role: *Godly*

understanding of humanity's fall from original righteousness and fellowship with God, all of human nature is corrupted, including human reason and will.[30] As John Cotton's 1646 children's catechism *Milk for Babes* puts it: "My corrupt nature is empty of Grace, bent upon sinne, and onely unto sinne, and that continually."[31]

And yet, the Puritans continued to insist that if human beings are created in God's image then they image God's rationality, however much this rationality is obscured or defaced by sin.[32] Reason, in fact, remains definitive of what it means to be human. As

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Learning: Puritan Attitudes towards Reason, Learning, and Education, 1560–1640 (New York: Cambridge University Press, 1986).

[30] While this distinguishes the Puritans from Roman Catholic thought, the extent to which Puritans differed with other Protestants including those in the English church is disputed. Distinctions are often exaggerated in retrospect. See, Dewey Wallace, Jr., *Puritans and Predestination: Grace in English Protestant Theology, 1525–1695* (Chapel Hill: University of North Carolina Press, 1982). For the classic Roman Catholic position forged at the Council of Trent, see: Giuseppe Alberigo, ed., *The Oecumenical Councils of the Roman Catholic Church From Trent to Vatican II (1545–1965)* (Turnhout, Belgium: Brepols, 2010). John O'Malley provides an excellent overview of the Council: *Trent: What Happened at the Council* (Cambridge, MA: Belknap Press of Harvard University, 2013).

[31] John Cotton (1585–1652), *Milk for Babes. Drawn Out of the Breasts of Both Testaments. Chiefly, for the Spirituall Nourishment of Boston Babes in Either England: But May Be of Like Use for Any Children* (London: Printed by J. Coe for Henry Overton, 1646), 2. This was reprinted many times on both sides of the Atlantic, and at least eight editions from the seventeenth century are known. Sometime between 1690 and 1701 it was first incorporated into *The New-England Primer,* and it remained an essential component of that work and thereby an integral part of American religious education for the next 150 years.

[32] The identification of *Imago* with human rationality is pervasive in the Christian West until the twentieth century.

Thomas Hooker (1586–1647) put it: "A man is a living creature indued with a reasonable soul: and every living creature indued with a reasonable soul, is a man."[33]

We find, therefore, that even when defending the primacy of revelation, Puritans turned to reason. In a 1785 election sermon to the Connecticut General Assembly, Samuel Wales (1748–94) commended "a divine and supernatural influence" as necessary for "true religion," but added that this view itself was "clearly taught in divine revelation and perfectly consonant to the dictates of reason. It has been taught even by heathen philosophers, such as Socrates and Plato, Cicero and Seneca."[34] For there to be true religion, he says, there must be recognition of revelation apart from reason, and yet it is both from revelation and reason that this is known to be true.

If no Puritan denied that after the Fall human beings still possess a "remainder" of God's image,[35] they nonetheless disputed what this entailed for postlapsarian human

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[33] *A Survey of the Summe of Church-Discipline*, Part I: Ecclesiastical Policie Defined (London: Printed by A.M. for John Bellamy, 1648), 44.

Such was John Cotton's confidence both in "an essential wisdome in us, namely, our Reason which is natural" and this reason's being the "same nature" as our very selves, that his chosen analogy for God's Trinitarian life was reason: Christ "who is the reason and wisdome of the Father.... is of the same nature with him"; *A practical commentary, or, An exposition with observations, reasons, and verses upon the First epistle generall of John* (London: printed by R. I. and E. C. for Thomas Parkhurst, 1656), 8.

[34] Samuel Wales, *The dangers of our national prosperity; and the way to avoid them. A sermon, preached before the General Assembly of the state of Connecticut, at Hartford, May 12th, 1785* (Hartford, CT: Printed by Barlow & Babcock., M,DCC,LXXXV [1785]), 26. Political Sermons of the American Founding Era, 1730–1805, ed. Ellis Sandoz, 2nd ed. (Indianapolis, ID: Liberty Fund, 1998), 835–64.

[35] The majority view in the Christian West has understood the Image of God to be possessed by all human beings. However, Christians today, howeer, disagree as to whether the Image of God is, indeed, possessed—an inherent capacity (such as reason)—or a bestowed worth (resulting from God's redemptive love). The latter view has gained traction as Christian thinkers wish to argue that human beings with severe impairments—

beings' ability to grasp the tenets of God's law. The view of William Ames (1576–1633), an influential figure for the first and second generation of New England Puritans, is instructive.[36] In Ames's account—as too in Wales's view of "true religion"—reason and revelation are neither unrelated or, ultimately, in conflict. They both point to the same body of principles: "the moral law of God revealed through Moses is completely the same with that which is said to be inscribed in the hearts of men."[37] Human access to the moral law is possible through the conscience, where *synderesis*—habitual knowledge of basic moral principles—is the "light of nature" given to humanity by God in order to know God.[38] Synderesis guarantees knowledge of basic moral principles, even if conscience errs in its interpretation of these principles or in the application of moral principles to facts. In Ames's account, moreover, God's moral law—preeminently known

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cognitive disabilities from birth, say, or obtained through injuries or Alzheimer's disease—possess human rights or dignity on account simply of their being human.

[36] Cotton Mather called Ames "that *profound*, that *sublime*, that *subtil*, that *irrefragable*—yea, that *angelic doctor*"; *Magnalia Christi Americana* (Hartford, CT: S. Andrus and Son, 1853), Book 3, 236. *Magnalia* was first published in 1702. And see Keith Sprunger, "William Ames and the Settlement of Massachusetts Bay," *New England Quarterly* 39, no. 1 (1966): 66–79.

[37] William Ames, *Philosophemata* (Cambridge: Printed by Roger Daniels, 1646), 108–9. The translation is Perry Miller's: *New England Mind*, 196. James Gustafson sees this position as in continuity with Calvin: *Protestant and Roman Catholic Ethics: Prospects for Rapprochement* (Chicago: University of Chicago, 1978), 165n37.

[38] See, Lee Gibbs, "The Puritan Natural Law Theory of William Ames," *Harvard Theological Review* 64, no. 1 (1971): 37–57.

in the Ten Commandments—is also rightly termed "natural law" because through humans' "*natural* conscience" its principles can be intuited.[39]

And yet Ames insists that this natural law is only partially grasped. The human mind, in his telling—whether regenerated by God's grace or in its "natural" state—does, indeed, possess conscience, and this provides human access to the moral law of God. But, after the Fall, human beings only have access to "some relics of the law" akin to "some dim aged picture," which only the "voice and power of God" can "renew[] as with a fresh pencil."[40]

In Ames's account: it is only in the "written law of God," then, that one can find "true right practical reason [*recta ratio practica*], pure and complete in all its parts."[41] In this judgment, Ames and many puritans shared the broad consensus of the age. In his later writings John Locke too would simultaneously affirm the *reasonableness of Christianity* yet argue that human beings need a divine law-giver, for "'tis too hard a task for unassisted Reason, to establish Morality in all its parts upon its foundations; with a

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[39] My emphasis. This illustrates what Perry Miller takes to be the Puritans' "perverse tendency to make revelation natural and redemption rational," *New England Mind*, 187.

[40] See Julia Ipgrave's discussion in her *Adam in Seventeenth-Century Political Writing in England and New England* (Abingdon, England: Routledge, 2017).

[41] William Ames, *Conscience with the power and cases thereof, divided into five bookes* (London: Printed by E.G. for I. Rothwell, T. Slater, L. Blacklock, 1643), V.I.28, 108. See also, J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (New York: Cambridge University Press, 1998), 63–64n8.

clear and convincing light."[42] In Scripture, the puritans and Locke say alike: we see face-to-face what reason glimpses only through a glass, darkly.

2.3. Puritan Civil Law

But how did the New England Puritans' understandings of natural law and reason fit with their understanding of the *civil law*?[43] In other words: How did their understanding of the nature of that law, which governed their lives as colonists and subjects, relate to their understanding of the law to which they were bound as Christians? The Puritans sought a better understanding of the world, and thought that such reflection cultivated proper personal piety and morality. Indeed, in the Puritan mind, seeking knowledge and cultivating character were frequently one and the same pursuit. (Hence

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[42] *The Reasonableness of Christianity: As Delivered in the Scriptures*, ed. John Higgins-Biddle (New York: Clarendon Press, 1999), chapter XIV, 148.

In a reply of March 30, 1696 to William Molyneux's request that he write a treatise on morality, Locke wrote: "But the Gospel contains so perfect a body of Ethicks, that reason may be excused from that enquiry, since she may find man's duty clearer and easier in revelation than in herself"; *Reasonableness*, ed. Higgins-Biddle, 148n3.

In his *Essay Concerning Human Understanding*, Locke suggests that "*Reason* is natural *Revelation*, whereby the eternal Father of Light, and Fountain of all Knowledge communicates to Mankind that portion of Truth, which he has laid within the reach of their natural Faculties: *Revelation* is natural *Reason* enlarged by a new set of Discoveries communicated by GOD immediately, which *Reason* vouches the Truth of, by the Testimony and Proofs it gives, that they come from GOD. So that he that takes away *Reason*, to make way for *Revelation*, puts out the Light of both, and does much the same, as if he would persuade a Man to put out his Eyes the better to receive the remote Light of an invisible Star by a Telescope"; *An Essay Concerning Human Understanding*, ed. Peter H. Nidditch (Oxford: Clarendon Press, 1975), 4.19.4, 698.

[43] The term "civil law" has many meanings (from Roman law and its successors to law concerned with private relations, and thus distinct from criminal law.) I use "civil law" here to mean the laws applicable to the Puritans as members of a particular political community, which can be distinguished—to some extent at least—from the laws applicable to them as church members.

the importance of what might seem to us arcane disputes on the boundaries of natural law and human reason.) As we will see, this same pursuit of knowledge and character likewise implicated Puritan views of life together, in society, under civil law.[44]

It is perhaps unsurprising then that natural law was the assumed backdrop for discussion of civil law. While most often natural law was taken for granted by the Puritans, circumstances sometimes warranted a more explicit consideration of its relationship to the civil law. In his treatise on conscience, for example, William Ames, when talking of law, declared: "This civil law [*jus hoc civile*] in as much as it is right [*rectum*] is derived from the law of nature [*jure naturale*]; for that is not law which is not just and right."[45]

Explicit consideration of natural law, however, was not restricted to scholarly treatises. Natural law was the justification too for elements of the Puritans' civil legal system: both its overall jurisprudential rationale and the laws that governed daily living. The 1647 *Lawes and Libertyes of Massachusetts*—which functioned as something of a constitution for the colony—begins with a preamble, which, in part, offers justifications for the content of the various laws and liberties thereafter enumerated.[46] As with any constitutional or "constitution-like" document, the question of *authority* is central to

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[44] And, of course, the Puritans had a different understanding of what constituted "public" and "private" than our own.

[45] Ames, *Conscience*, V.I.22, 105; Gibbs, "Puritan Natural Law," 48–49.

[46] *Laws and Liberties of Massachusetts: Reprinted from the Copy of the 1648 Edition in the Henry E. Huntington Library* (Cambridge, MA: Harvard University Press, 1929).

Lawes and Libertyes. The preamble identifies a problem, however.[47] What is the status of the colony's laws vis-à-vis the law of God known in the Scriptures? The Puritans had a particular troublesome answer in mind. Distinguishing the "Lawes of God" from the "laws of men," the preamble suggests, can be a "snare to many" if so distinguishing the two suggests either that civil law does not possess authority or that the civil law's authority is different to God's. Accordingly, the preamble thereafter offers a clear if variegated account of "civil Authoritie."

In the first place, the preamble offers a bald *genealogical* account of authority. If the *source* of a law possesses proper authority then the law itself must possess authority. "[W]hen the Authoritie is of God and that in way of an Ordinance *Rom. 13.1.* ... [a civil law] is mediately a law of God, and that in way of an Ordinance which all are to submit unto and that for conscience sake." The preamble suggests, in other words, that the Puritans' civil laws come from God, even if they are promulgated through the mediation of human actors. When traceable to the command of One with proper authority, then, the law itself has authority and must be followed.

The law is to be followed, however, not out of fear or self-interest. Laws are not merely commands backed up by credible threats.[48] Instead, in the Puritans' telling, *if God is the source of law's authority*, the law is properly followed out of conscience.[49] In this

[47] It is unclear whether this problem was a live issue in the colony or if its discussion was a means to consider a perennial question.

[48] This is the basic positivist account of laws offered by John Austin (1790–1859). See his 1832 *The Providence of Jurisprudence Determined*, ed. Wilfred E. Rumble (Cambridge: Cambridge University Press, 1995).

[49] "Conscience" here is the capacity to know good and right, *and* a determination of what is good and right. God is its author.

light, the preamble's reference to the New Testament book of Romans offers a familiar proof-text for civil power: "Let every soul be subject unto the higher powers: for there is no power but of God: and the powers that be, are ordained of God." As the marginal notes of the Geneva Bible explains this:

> Now he [the Apostle Paul] showeth severally, what subjects owe to their Magistrates, to wit, obedience: From which he showeth that no man is free: and in such sort that it is not only due to the highest Magistrate himself, but also even to the basest, which hath any office under him.[50]

The preamble's treatment of civil authority, however, also includes a more *substantive* account of legal authority, which, while interwoven with the genealogical account, stands in some tension to it. A civil law is a law of God, and thus to be submitted to, where "the administration of it is according to deductions, and rules gathered from the word of God, and the clear light of nature in civil nations." The preamble, in effect, invites the reader to understand the laws that follow in *Lawes and Libertyes* as drawn from Scripture and the natural law. The laws of Massachusetts—given their basis in the natural law—should, therefore, agree with the laws of other civilized nations. Laws might have authority, then, because of their genealogy—their pedigree directly or mediately from God—but also because of their substantial resemblance to the moral authority of the Bible and natural law.

Finally, the preface suggests that "surely there is no humane law that tendeth to the common good" that is not, by mediation, a law of God; laws that lead to the community's flourishing are from God. In part, this is a pious attribution of all good

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[50] For a contemporary treatment of civil authority in the Reformed tradition that attempts to pull away from the implications of acquiescence to established civil power, whatever its seeming merits, see Nicholas Wolterstorff, *The Mighty and the Almighty: An Essay in Political Theology* (New York: Cambridge University Press, 2012).

things to God. Yet, in part, it is also a proclamation that the laws outlined in the *Lawes and Libertyes of Massachusetts* will readily be comprehended as civilized and communally effective. When Increase Mather condemned drunkenness, for example, he appealed not only to the written word of God, but suggested that "the very Light of Nature condemns this practice. Drunkards sin… against that light and law which is written in their Consciences."[51] *Lawes and Libertyes* operates with the assumption that colonists should be able to readily comprehend both the utility of, and the reasons behind, the laws to which they are subject.

It is not necessary, however, to think of this emphasis on the correspondence of God's, nature's, and society's laws as something peculiar to New England Puritans. In the history of English common law, influential voices had long accounted for the authority of human laws in their correspondence with nature.[52] The Puritans' *explicit* treatment of natural law in their civil law, however, was distinctive. It was the result, first, of the *newness* of the New World's laws and procedures. In England, such laws and procedures had already undergone centuries of accumulation and refinement.[53] Second,

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[51] Increase Mather, *Wo to drunkards. Two sermons testifying against the sin of drunkenness: wherein the wofulness of that evil, and the mistery of all that are addicted to it, is discovered from the word of God* (Cambridge, MA: Printed by Marmaduke Johnson, and sold by Edmund Ranger, bookbinder in Boston, 1673).

[52] See, Richard Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 Ave Maria L. Rev. 1 (2005): 1–22.

[53] While Francis Bacon (1561–1626), to take a prominent counterpoint, expressed the view that English law must be in conformity with nature and reason, his attention was on middle axioms (rules generalized from specific cases), which provided, in his view, the premises by which new cases might properly be decided. The "maxims" Bacon identified, nonetheless, were simultaneously generalizations from cases *and* "general dictates of reason" or "conclusions of reason," and he expected, therefore, that "for the most part nearly the same rules [will be] found in the civil laws of different states; except

and more concretely, it was a result of the Puritans' adoption of simplified legal procedures.[54] By design there was to be little need for lawyers in the New World. For the earliest Puritans, the *practice* of law was highly suspect: a legerdemain that they could mostly exclude.[55] Individuals were to represent themselves before magistrates. What this Puritan suspicion of legal practice indicates, however, was not the lack of civil law's

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perhaps that they may sometimes vary with reference to the forms of constitutions." See, Paul Kocher, "Francis Bacon on the Science of Jurisprudence," *Journal of the History of Ideas* 18, no. 1 (1957): 3–26, 10.

[54] See, Scott Gerber, *Law and Religion in Colonial Connecticut*, 55 Am. J. Legal Hist. 142 (2015).

[55] Cumbersome forms of English procedure were likewise discarded in the New World. In Plymouth, for instance, deeds of land did not require to be signed or sealed, but rather simply acknowledged by a magistrate who made a record. These minimal procedures in place, there was only one lawyer resident in the Massachusetts Bay Colony in 1640: Thomas Lechford came to Boston from Lincoln's Inn in London in 1638, stayed three years, and then returned. See, Angela Fernandez, *Record-Keeping and Other Troublemaking: Thomas Lechford and Law Reform in Colonial Massachusetts*, 23 Law & Hist. Rev. 235 (2005). For discussions of "puritan jurisprudence," see: Gail Sussman Marcus, "'Due Executive of the Generall Rules of Righteousnesse': Criminal Procedure in New Haven Town and Colony, 1638–1658" in *Saints and Revolutionaries: Essays on Early American History*, ed. David Hall, John Murrin, and Thad Tate, 99–137 (New York: Norton, 1984); *The Many Legalities of Early America*, ed. Christopher Tomlins and Bruce Mann (Chapel Hill, University of North Carolina Press, 2001); and George Haskins, *Law and Authority in Early Massachusetts: A Study in Tradition and Design* (New York: Macmillan, 1960).

The Plymouth Colony had no lawyers for many years. The dislike of lawyers in the New World is sometimes attributed to the legal persecution of puritans in England. In time, too, lawyers were associated with the unpopular royal government in the colonies. A Plymouth law of 1671 did authorize the employment of an attorney, but an ideal of individual representation remained, such that any attorney had to pledge neither to deceive the court nor "darken the case"; *The Generall Laws and Liberties of New-Plimouth Colony: Revised and Published by Order of the General Court in June 1671* (Cambridge, MA: Printed by Samuel Green, 1672), Chapter IV. Actions. 15.

"15. Liberty is granted by this Court to any person, to improve one or two Attornies to help him in his Pleas; provided they be persons of good repute, and such as the Court shall approve; and the said Attornies are required, as to be faithful to their Clyent, so also to avoid fraudulent pleas that may have attendency to mislead the Court or darken the case."

importance, but that its importance merited broad engagement by all of society. Law—and with it, governance—were not to be the preserve of a professional class, but all in a society committed to a disciplined way of living. Third, the Puritans' explicit reference to their civil law's relationship to natural law also served as a reference point, and justification, for the community they were building. In responding to attacks, real and perceived, from inside and outside their nascent community, natural law was at hand to justify their practices.[56]

3. The Colonial Colleges

Having briefly considered the Puritans' understanding of natural law, reason, and civil law, we can now turn to America's earliest colleges. What place, if any, did these colleges make for discussion of natural law and civil law?

Founded before the Revolution, the colonial colleges were small in scale but, as one of the few institutions in the British New World, exercised considerable influence on their broader communities.[57] This influence was not solely social and economic. Training

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[56] When attacked, the Puritans pulled upon all resources to hand, natural law included. In his influential *Vindication of the Government of New-England Churches*, for instance, John Wise (1652–1725) offers arguments from "*Antiquity*; The *Light of Nature*; *Holy Scripture*; and from the *Noble* and *Excellent Nature* of the *Constitution* itself. And lastly form the *Providence of God* dignifying of it"; John Wise, *A Vindication of the Government of New England Churches (1717): A Facsimile Reproduction with an introduction by Perry Miller* (Gainesville, FL: Scholars' Facsimiles & Reprints, 1958), 3. For more information, see: Thomas Johnston, Jr. "John Wise: Early American Political Thinker," *Early American Literature Newsletter* 3, no. 1 (1968): 30–40.

[57] For a brief recent treatment, see: Roger L. Geiger, *The History of American Higher Education: Learning and Culture from the Founding to World War II* (Princeton, NJ: Princeton University Press, 2016), 1–90.

ministers of religion and other leaders in the colonies, the colleges influenced the developing *thought world* of the new colonies.[58]

These fledging colleges taught law. As we will see, what counted as "law" for the colonists differs from today's standard usages. But nonetheless there are sufficient overlaps and family resemblances between "law" then and now to say that the colonial colleges taught law. This has been significantly underappreciated.

Legal scholars are partly to blame. Their attention has often focused on the 1817 beginnings of the university graduate law school as a defined, separate institution, and the continuities or discontinuities between its practices and today's. The colonial colleges, therefore, receive short shrift. And likewise the broad dominance of legal positivism in the imagination of twentieth-century legal scholarship has helped to mask approaches to law that do not begin with the assumption that law is separate from morality.

But historians of education too have helped render American collegiate study of law invisible. This, in part, has been the result of their broadly shared understanding that antebellum American colleges "failed." Through much of the twentieth century, historians of education viewed the colonial college as an "obstacle" to the development of higher education in America. Early colleges were portrayed as small, parochial, sectarian, and fixed—even fixated—on a narrow curriculum involving rote learning of dead languages. The colonial college, accordingly, stood as the "virtual antithesis" of the

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[58] See, J. David Hoeveler, *Creating the American Mind: Intellect and Politics in the Colonial Colleges* (Lanham, MD: Rowman & Littlefield, 2002).

twentieth-century secular, science-driven, Research University they admired, and so merited only a particular kind of historical interest.[59]

To the twentieth-century historians of education, simply pointing to demographics made their case that nothing much of use happened in the colonial colleges. Students were younger than today, they noted, with the median age at Harvard from 1673 to 1707 hovering between fifteen and sixteen years old.[60] And the tone of student life was more "aristocratic… than popular," even as poorer, older students also attended who desired to enter the professions.[61] The focus in the colonial colleges was not, however, as twentieth-

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[59] For example, R. Freeman Butts's *The College Charts its Course* (New York: McGraw-Hill, 1939) is premised on the triumph of the elective system. For a historiography of twentieth-century treatment of the colleges, see: Roger Geiger, "Introduction: New Themes in the History of Nineteenth-Century Colleges," in *The American College in the Nineteenth Century*, ed. Roger Geiger (Nashville: Vanderbilt University Press, 2000).

[60] Iran Cassim Mohsenin, "Note on Age Structure of College Students," *History of Education Quarterly* 23, no. 4 (1983): 491–98.

In the seventeenth century, students were admitted to college not on age, as such, but based on competency, not least in Latin, the language of instruction, knowledge of which was required and assumed, rather than taught. Their basic reading and writing skills were reliant on the books brought from England: psalter, "Testament," and Bible; a horn book, *A. B. C.*, Primer, *Book of Civilitie*, and spelling book; Edwin Dexter, *A History of Education in the United States* (New York: Macmillan, 1904).

By 1685, books were printed in New England, with *The Protestant Teacher for Children* among the first. Sometimes between 1687 and 1690 came the *New England Primer*, which was the most widely used book in America until some time later than 1783, when Webster's *American Spelling* Book was published. See: Gillian Avery, *Origins and English Predecessors of the New England Primer* (Worcester, MA: American Antiquarian Society, 2000); and Henry Perkinson, "The Role of Religion in American Education: An Historical Interpretation," *Paedagogica Historica* 5, no. 1 (1965): 109–21.

[61] Theodore Crane, *The Colleges and the Public, 1787–1862* (New York: Teachers College, Columbia University, 1963), 8. With the increased prominence of social history from the 1970s onward, the consensus of the scholarship today is that colleges reflected their surroundings.

century critics wished, the development of new knowledge, but what Cotton Mather called the "collegiate way of living."[62] Ideally, this was a disciplined life of study, chapel, living and eating together with peers and tutors.[63] Formation was at its heart: the development of faith and character in young men, primarily to form an elite for leadership in the community.[64] The colleges sought to develop in students a *"lively faith in Christ"*[65] and strong character, but they inculcated habits for social advancement too: the refinement of writing and speaking to the standards of the day, social graces, and the ability to get along (and ahead) in the world.

3.1. The Roots of the American College

The intellectual and social background that fostered this vision of collegiate education had predecessors in the Old World, but it took a particularly American form. Scholarly debates continue as to the particular genealogies of the colonial colleges, but it is fairest to say perhaps that they built upon various models: the early presidents and

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[62] *Magnalia Christi Americana* (Hartford, CT: S. Andrus and Son, 1853), Book IV, §2, 10.

[63] In practice, there was frequent disorder (the interpretation of which divides the history of higher education from the 1970s onward and earlier scholarship).

[64] To these fundamental policies it held steadfastly and without essential change for nearly 200 years. See, John Brubacher and Willis Rudy, *Higher Education in Transition: A History of American Colleges and Universities, 1636–1968* (New York, Harper & Row, 1968), 23–24.

[65] A century later, a 1754 newspaper advertisement for King's College (later Columbia) announced that "The chief thing that is aimed at in this College is to teach and engage the Children to *know God in Jesus Christ*, and to love and serve him in all *Sobriety*, *Godliness*, and *Righteousness* of life, *with a perfect heart, and a willing mind*"; New York Gazette. June 3, 1752.

tutors worked with what they knew, and with what was doable given the social and economic circumstances they inhabited. But also—and this is often overlooked—they sought for the colleges what they imagined to be true and best. Whatever their intention, however, the earliest educational leaders could not help but be innovators—they founded new institutions, wrote governance documents, and determined curriculums—yet they inhabited, and *wanted to inhabit*, the same thought world as European protestants.

The British universities were the closest models for the colleges. Many of the founding personalities of Harvard were graduates of Emmanuel College, Cambridge, and other puritan colleges of that university.[66] If Harvard became an inspiration for subsequent colonial colleges, they followed Cambridge at a remove.[67]

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[66] Samuel Eliot Morison, *The Founding of Harvard College* (Cambridge, MA: Harvard University Press, 1935). Appendix D is a list of "English University Men who Emigrated to New England before 1646."

[67] Elbert Willis, *The Growth of American Higher Education: Liberal, Professional and Technical* (Philadelphia: Dorrance, 1936), 158.

There were, of course, other streams of influence. For instance: Myles Cooper (1735–85), the second president of King's College (later Columbia), was a student and, later, chaplain at The Queen's College, Oxford, and brought to the presidency and its new curriculum something of England's older university.

Presbyterian Scots had influence in upper New York, eastern New Jersey, North Carolina, and Georgia, but among the colonial colleges only the College of New Jersey (later Princeton) was founded as a Presbyterian institution. Scots also played significant roles at William and Mary and in Pennsylvania. See, George Pryde, *The Scottish Universities and the Colleges of Colonial America* (Glasgow: Jackson, Son & Company, 1957).

Nonetheless, there was common ground between Presbyterians of the middle colonies and the New England Congregationalists. As George Pryde puts it: they shared "the same conjunction of material poverty and educational aspiration, the same passion for a learned and dedicated ministry, the same evangelistic fervour that verged on self-righteousness and intolerance"; ibid, 3.

Different from the English models of Oxford and Cambridge, Scottish universities were located in the chief towns of a province, cared little about distinctions between "college" and "university," found ways of including poor boys among their number,

British political subjects that they were—in law and mostly in mindset[68]—Americans looked to Cambridge, Oxford, and the Scottish universities as their models well into the eighteenth century. In preparing to lead Yale, Thomas Clap borrowed histories of the English universities, and sought information from Americans who held their degrees. When he sought a new charter for Yale in 1745, he first gave careful attention to the governance and administration of Oxford and Cambridge.[69]

What unified the colonial colleges with the puritan colleges of Oxford and Cambridge, and aligned them in part with the Scottish universities and English dissenters' academies, was their mission as New World "schools of the reformation."[70]

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and—as too the dissenters' academies in England—taught divinity in the arts curriculum; ibid., 4; Willis, *Growth*, 158.

[68] Whether and how Americans viewed themselves as British, and in relation to what other ideals, remains a topic of significant interest. For the often forgotten losing side in the Revolutionary era and the importance of local, over national, identity, see: William Nelson, *The American Tory* (Oxford: Clarendon, 1961); Maya Jasanof, *Liberty's Exiles: American Loyalists in the Revolutionary World* (New York: Knopf, 2011); and Gregory Knouff, *The Soldiers' Revolution: Pennsylvanians in Arms and the Forging of Early American Identity* (University Park: Pennsylvania State University Press, 2004).

[69] Brubacher and Rudy, *Higher Education*, 3.

[70] The American colleges were ambiguously secular or ecclesiastical: they were concerned with ministerial education, but with their external boards, they were not self-governing *collegium scholasticum* made up of divines. Neither were they akin to municipal grammar schools or the *gymnasium illustre*, for their focus was on the whole of the colony. Jurgen Herbst, *From Crisis to Crisis: American College Government, 1639–1819* (Cambridge, MA: Harvard University Press, 1982), 5. See, also, in particular, 1–62.

For the influence of the English dissenting academics, see: David Humphrey, "Colonial Colleges and English Dissenting Academies: A Study in Transatlantic Culture," *History of Education Quarterly* 12, no. 2 (1972): 184–97. For the Protestant arts college model following the 1560 Scottish reformation, see: Steven Reid, *Humanism and Calvinism: Andrew Melville and the Universities of Scotland, 1560–1625* (Burlington, VT: Ashgate, 2011).

The colonists brought their traditions of classical learning, shared throughout Europe, but put these traditions into practice to defend the reformed faith. Classical learning, in other words, was sifted for its utility to form pious and useful subjects and forge a godly commonwealth.

3.1.1. Vocational Purpose

The colonial colleges, then, had a vocational purpose.[71] In part this reflected the governance structure of the early American colleges, which—following the Scottish universities over Oxford and Cambridge[72]—placed the control of the college not in the hands of its teachers, but an external board of prominent clergy and laymen: men, that is to say, who generally favored education for public professions over "pure learning."[73] Foremost in their mission was to educate clergy. The 1643 pamphlet *New Englands First Fruit* recounts the founding of Harvard College as tied to the colonists' desire for

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[71] The ideal of the "liberal arts" college as an institution pursuing academic enquiry as an end in itself, or perhaps formative of students' general habits of inquiry—"mental discipline"—is anachronistic for the colonial period. The famous "Yale Report" of 1828, which rejected elective courses in favor of a core curriculum based on the classics for the purpose of forming well-rounded graduates with the capacities for further study on their own initiative was *neo*-traditionalistic. It was a conscious articulation of a desired framework created when the givenness of academic practices were challenged. It re-presented aspects of the "classical" curriculum, but without the eminently practical orientation of the earliest American colleges.

[72] Personality as much as policy played a role in making this so. John Blair at William and Mary, for example, was a graduate of the Marischal College in Aberdeen, and Edinburgh University. William Smith, who planned much of the curriculum at King's College and the College of Philadelphia studied at the University of Aberdeen. John Witherspoon was an Edinburgh graduate.

[73] Brubacher and Rudy, *Higher Education*, 4. The Charter of William and Mary suggests an institution akin to the Scottish "unicollege": a degree-granting college, with an external governing board; A. Bailey Cutts, "Educational Influence of Aberdeen in 17th Century Virginia," *William and Mary Quarterly* 15, no. 4 (1935): 229–49.

educated ministers.[74] Likewise, the founding motivation for Yale and the College of New Jersey was straightforwardly to train up literate clergy.[75] As late as 1753, indeed, the General Assembly of Connecticut resolved in respect to Yale that "one principal end proposed in erecting the college was to supply the churches in this Colony with a learned, pious and orthodox ministry."[76]

But from the start, the colleges' concern was also to produce educated orthodox laymen to lead the government and the churches (a necessity, given congregational polity). The College of New Jersey responded to the need for "a competent number of men of letters" for "the bench, the bar, and seats of legislation," fearing that the competencies required were "seldom the spontaneous growth of nature, unimproved by education."[77]

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[74] Clark, *Eliot Tracts*, 55–78. The historicity of the pamphlet is mixed. It was likely written as publicity material to encourage donations, and we might think, therefore, that its emphases were an attempt to find a sympathetic audience.

[75] As Samuel Blair put it: "Religious societies were annually formed, in various places; and had they long continued vacant, or been supplied with an ignorant illiterate clergy, Christianity itself, in a course of years, might have become extinct among them"; *An Account of the College of New Jersey* (Woodbridge, NJ: James Parker, 1764), 5–7.

[76] Quoted in Benjamin Trumbull, *A Complete History of Connecticut, Civil and Ecclesiastical*, vol. 2. New Haven, CT: Maltby, Goldsmith, and Samuel Wadsworth, 1815.

[77] Blair, *Account of the College of New Jersey*, 5–7.

3.2. The Colonial Curriculum[78]

Harvard followed the puritan colleges of Cambridge, and thus brought to the New World a *scholastic* curriculum.[79] This was the "logical, systematic, and largely Aristotelian" enterprise, taught by lecture, disputation, and declamation.[80] Henry Dunster, a graduate of Magdalene College, Cambridge, introduced a curriculum at Harvard that essentially followed the Cambridge model: "Primus annus Rhetoricam docebit, secundus et teritus Dialecticam, quartus adiungat Philosophiam."[81] (The first year will teach rhetoric; the second and third, dialectic, the fourth will add philosophy.)[82]

In a 1779 letter to Yale's President Stiles, a graduate of 1714 remembered Yale's curriculum this way:

> Books of the Languages and Sciences recited in my Day were Tully and Virgil, but without any Notes; Burgersdicius and Ramus's *Logick*, also Heerebord's *Set Logic*, &c.; Pierson's manuscript of Physicks, which I have no copy of. We recited the Greek Testament; knew not Homer, &c.; recited the Psalms in Hebrew. . . We recited Ames' *Medulla* on Saturdays, and also his *Cases of*

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[78] For a general history, see: Louis Franklin Snow, *The College Curriculum in the United States* (New York: Teachers College, Columbia University, 1907).

[79] Morison, *Founding of Harvard College.*

[80] William Costello, *The Scholastic Curriculum at Early Seventeenth-Century Cambridge* (Cambridge, MA: Harvard University Press, 1958). At Oxford and Cambridge, the arts courses began with grammar out of Prisican and Donatus, logic out of Aristotle and Boethius, rhetoric out of Aristotle, Cicero, and Boethius, geometry out of Euclid, astronomy out of Ptolemy, and the three philosophies (natural, moral, and mental) out of Aristotle.

[81] Snow, *The College Curriculum in the United States*, 23.

[82] In his history of the university, Josiah Quincy (1772–1864), president of Harvard from 1829 to 1845, suggests that the principles of education that Dunster established did not materially change through the seventeenth century; *History of Harvard University* (Cambridge, MA: Josiah Owen, 1840).

Conscience sometimes; the two upper classes used to dispute syllogistically twice or thrice a week."[83]

Students focused on the arts. In the vocabulary of scholasticism and the colonial colleges, the *arts* were the branches of study concerned with action.[84] (The *sciences* were concerned with abstract knowledge.)[85] *Rhetoric,* then, was the art of expression according to established principles of *eloquentia*. Students studied Greek and Latin orators, historians, and poets to gain precepts of *ars dicendi*, and wrote in imitation of their voices. The aim was to form a well-rounded Latin style, although English orations were studied too. What Dunster called "dialectic" is *logic*, which taught students the very patterns of what was understood to constitute proper thinking.[86] Again, this had an active aim: students studied to hone their abilities of apprehension, judgment, and the linking of

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[83] Benjamin Lord's letter of May 28th, 1779 in Dexter, *Biographical Sketches*, 115–16.

In 1753, the Yale Corporation reaffirmed its commitment to ordering the College's doctrine, discipline, and mode of worship "according to the Assembly's Catechism, Dr. Ames's Medulla, and Cases of Conscience"; "At a Meeting of the President and Fellows of Yale-College, November 21, 1753" in Thomas Clap, *The Annals or History of Yale-College, in New Haven, In the Colony of Connecticut, From the First Founding thereof, in the Year 1700, to the Year 1766* (New Haven, CT: Printed for John Hotchkiss and B. Mecom, M, DCC, LXVI [1766]).

[84] Costello, *Scholastic Curriculum*, 147.

[85] The sciences included: metaphysics (the study of "being" in general); physics ("being" as qualified); mathematics ("being" as quantified); and cosmology (the being of the geographical world).

[86] Norman Kretzmann and Eleonore Stump, eds. *Logic and the Philosophy of Language*, vol. 1 of *The Cambridge Translations of Medieval Philosophical Texts* (Cambridge: Cambridge University Press, 1988); Alexander Broadie, *Introduction to Medieval Logic* (Oxford: Clarendon, 1993).

judgments in a process of reasoning. Often the forms employed were syllogistic.[87] The purpose was notably practical: students were to learn to sift arguments for fallacies. *Philosophy* was three-fold (natural, moral, and mental), and was taught primarily out of Aristotle. Moral philosophy taught students principles of moral behavior, primarily as those principles were understood to be discoverable by reason from the natural law.

3.2.1. Law in the Curriculum

From the beginnings of American college education, ethics, politics, and law were yoked together for a broad education in character and leadership. At Harvard, lectures on "Ethicks and Politicks" were delivered to second-year students.[88] President Dunster tried to obtain books in law—as well as medicine—so that the school might play a role in professional training.[89] Meanwhile at Yale, President Clap attempted to offer a broad program of preparation for law and other professions, even while emphasizing the priority of ministerial training. He taught a course on "the nature of civil government,"

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[87] A syllogism is a form of argument expressed through two propositions (premises), which contain a common term, and where a third proposition (the conclusion) results necessarily from the other two.

[88] "New Englands First Fruits," in Clark, *Eliot Tracts*. Similar content was thereafter taught throughout the colonies under the names of "Moral Philosophy" or "Natural Law." See: Reed, *Training*, 113; Mark Bailey, *Early Legal Education in the United States: Natural Law Theory and Law as a Moral Science*, 48 J. Legal Edu. 311 (1998).

[89] Robert Lovett, ed., *Publications of the Colonial Society of Massachusetts, vol. XLIX, Documents from the Harvard University Archives, 1638–1750* (Boston: Published for the Society, 1975); "Documents, 1638–1722, Books Printed At Cambridge [January 26, 1655/56]."

"the various kinds of Courts," and "Statute, Common, Civil, Canon, Military and Maritime Laws."[90]

This combination of teaching was something new. It was not the pattern of English education.[91] The colonists had known Oxford and Cambridge universities to teach only Roman and canon law, with study of the common law and Chancery courts solely in the hands of practitioners.[92]

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[90] Clifford K. Shipton, *Biographical Sketches of Those Who Attended Harvard College in the Classes, 1722–1725* (Boston: Massachusetts Historical Society, 1945), 34.

[91] The American ideal of a liberal arts education—so powerful until recently—wrongly dulls present-day surprise that seventeenth– and eighteenth–century colleges taught natural law and principles of government.

[92] London's Inns of Court were the sites of barristers' education, while solicitors and attorneys learned their craft as apprentices. For a brief introduction see chapter 10 "The Legal Profession" in J. H. Baker's *An Introduction to English Legal History* (London: Butterworths LexisNexis, 2002). See also: Wilfrid Prest, *The Inns of Court under Elizabeth I and the Early Stuarts, 1590–1640* (Totowa, NJ: Rowman and Littlefield, 1972); C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth: The "Lower Branch" of the Legal Profession in Early Modern England* (Cambridge: Cambridge University Press, 1986).

As we have seen, the principal university experience of the puritans of Cambridge, Massachusetts, was that of Cambridge, England, where Elizabethan statutes of 1561–71 governed the curriculum. Heavy traces of the medieval trivium (grammar, rhetoric, logic) and quadrivium (arithmetic, geometry, astronomy, music) marked a student's study, albeit alongside some treatment of the three philosophies (natural, moral, mental). See: Costello, *Scholastic Curriculum,* 42–43; Joe Kraus, "The Development of a Curriculum in the Early American Colleges," *History of Education Quarterly* 1, no. 2 (1961): 64–76; John Thelin, *History,* 19.

3.2.2. A Protestant Understanding of Learning

What directed and chastened this broadly scholastic curriculum—which included an emphasis too on classical and "oriental" languages[93]—was a particular understanding of learning, and its relationship to maintaining protestant orthodoxy. In his work on the New England Puritans, Perry Miller popularized the idea of the Puritans' debt to Petrus Ramus (1515–72) and the Ramian belief in *technologia*—the systematic connection between the arts—or *encyclopedia*, the circle of the arts, whereby all field of learning are held together by their correspondence to a divine order, accessible through proper method.[94] Many scholars now doubt any direct links between Puritan teachings and Ramus. Yet, at the least, both Ramus and the Puritans shared a common protestant humanist vision: truth had a unity, which the pursuit of the arts could profitably track; and learning was a means to pursue true happiness grounded in love of God.[95] Ethics, law, and politics—including Clap's treatment of various courts and forms of law—formed part of this curriculum.

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[93] Thwing estimates that philosophy occupied one third of the curriculum, next in importance was Greek, then Hebrew, Chaldaic, and Syriac, then mathematics, with occasional additional teaching in the catechism, history, and botany.

[94] For work on Ramus, see: Mordechai Feingold, Joseph Freedman, and Wolfgang Rother, eds., *The Influence of Peter Ramus: Studies in Sixteenth and Seventeenth Century Philosophy and Sciences* (Basel, Switzerland: Schwabe, 2001); Peter Sharratt, "The Present State of Studies on Ramus," *Studi francesi* 47–48 (1972): 201–13; Peter Sharratt,"Recent Work on Peter Ramus (1970–1986)," *Rhetorica* 5 (1987): 7–58; Peter Sharratt, "Ramus 2000," *Rhetorica* 18, no. 4 (2000): 399–455.

[95] Margo Todd, *Christian Humanism and the Puritan Social Order* (New York: Cambridge University Press, 1987).

4. The Revolutionary or Republican Curriculum

SUMMARY: By the outbreak of the American Revolution, out of a population of two and a half million in America, there were only 5,000 college graduates.[96] And yet, as the colonial colleges had taught the colonial elites, so too college graduates would form an absolute majority at the 1787 Constitutional Convention and in the higher civil service appointments of the early administrations of the new Republic.[97] By the mid-eighteenth century, however, the college curriculum gained a new emphasis: reason as sufficient for true knowledge. Reason took priority over revelation, although in the American colleges this emphasis often functioned to offer additional arguments for the veracity of God's law. As in the colonial colleges, physical and moral laws were understood together. Truth was a unity. As with their colonial forebears, the Revolutionary colleges were vocational in spirit, yet increasingly focused on producing useful citizens rather than pious men. The colleges, in other words, turned from schools of the Reformation into schools of the Republic.

Particularly important in the teaching curriculums of the period was a moral philosophy course, usually taught by the college president, which employed the "common sense" philosophy of universally self-evident principles. This aligned enlightenment ideas with a dissenting protestant spirit. The curriculum shifted too with a changed understanding of the role of the classics and the disputation. In each case, teaching of law and government took priority over logic. Finally, the Revolution occasioned the need for specific teaching in law, and by 1780 the American college gained its first designated professor of law.

We have seen, then, that the colonial American colleges adopted the scholastic curriculum known in the English universities, yet adapted it toward vocational ends. This

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[96] James D. Teller, *A History of American Education* (New York: Macmillan, 1973), 213–14. 3,000 of these men had graduated from the American colleges, while a further 2,000 held degrees from British institutions.

[97] Of the 55 men who attended, 31 were college graduates. James McLachlan, "Classical Names, American Identities: Some Notes on College Students and the Classical Tradition in the 1770s," in *Classical Traditions in Early America*, ed. John W. Eadie, 81–95 (Ann Arbor: Center for the Coordination of Ancient and Modern Studies, 1976), 85.

63% of the higher civil service appointees of John Adams attended college. 52% of Jefferson's appointees were college educated. Sidney H. Aronson, *Status and Kinship in the Higher Civil Service: Standards of Selection in the Administrations of John Adams, Thomas Jefferson, and Andrew Jackson* (Cambridge, MA: Harvard University Press, 1964), 124–25.

collegiate focus on the vocation spans the American colonies' break with Britain. But whereas the colonial colleges sought to form students' whole character in proper love of God and neighbor, we will see that by the Revolutionary war, the colleges' focus was instead the particular aptitudes and virtues that tend toward good citizenship. Before turning again to American colleges and the curriculum, however, we need to attend once more to the broader intellectual landscape. In the first section that follows, therefore, I ask: Of what were "Revolutionary Americans" speaking when they talked about "natural law"? And in section 2, I ask: What were "truth" and "nature" to these new Americans?

4.1. Modern Natural Law

Amid the many changes of the later eighteenth century, the curriculum of American colleges shifted with an embrace of an increasingly dominant strain of natural-law reflection, variously known as "secular," "modern," or "protestant" natural law.[98] Modern natural law promised to base natural law claims on grounds available to all persons: to begin with sense perception, say, or rationally-based moral principles, and not, as in the colonial colleges, with controversial claims, theological or metaphysical.

While scholars trace the methods of modern natural law to the early sixteenth-century School of Salamanca, and even antique Stoicism and Roman law, it was to Hugo Grotius (1583–1645), Samuel Pufendorf (1632–94), and other authors formed in the

[98] Michael Seidler's entry "Pufendorf's Moral and Political Philosophy" in the *Stanford Encyclopedia of Philosophy* provides a good introduction to the historiography of modern natural law; last modified November 3, 2015, https://plato.stanford.edu/entries/pufendorf-moral.

wake of European wars of religion that Americans most directly turned.[99] In the work of Grotius, Pufendorf, and their peers, a deep sense of the destructiveness of European religious disputes, together with shifting views on human rationality, placed *reason* as the common bedrock of humanity, a seeming bulwark amid clashing dogmatisms.

4.1.1. Continuity and Change

There were deep continuities, nonetheless, with the natural-law mindset found, and forged, in the earliest American colleges, and a continued reverence for the classical models of Greece and Rome.[100] Earlier Puritan debates about reason's relative corruption,

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[99] This was the narrative irrespective of whether more recent scholarship is correct or not that the clash of religious views and identities was less important to the conflicts than has hitherto been portrayed. See: Ronald Asch, *The Thirty Years War: The Holy Roman Empire and Europe, 1618–1648* (Basingstoke, UK: Macmillan, 1997); Johannes Burkhardt, *Der Dreißigjährige Krieg* (Frankfurt: Suhrkamp Verlag, 1992); Johannes Arndt, *Der Dreißigjährige Krieg 1618–1648* (Stuttgart: Reclam, 2009); Peter Wilson, *The Thirty Years War: Europe's Tragedy* (Cambridge, MA: Belknap Press of Harvard University, 2009). Wilson also surveys the historiography in his "New Perspectives on the Thirty Years War," *German History* 23 (2005): 237–61. For an argument that a "myth of religious violence" was used to justify the nation-state, see: William Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford: Oxford University Press, 2009).

[100] The role of the orator as public conscience gained prominence through the time of the American Revolution. Cicero was the prime example of this form of statesmanship forged through political and moral science, a training in history, politics, and law; David Robson, *Educating Republicans: The College in the Era of the American Revolution, 1750–1800* (Westport, CT: Greenwood Press), 61.

Latin language acquisition was tied to character formation. The *Distichs of Cato*, a collection of proverbial wisdom and morality, was the common Latin teaching aid, as it had been in Europe. Benjamin Franklin pushed James Logan's translation in 1735. By their fourth year of instruction, boys would read Ovid's *De Tristibus and Metamorphoses* and Cicero's epistles. Later they would turn to Cicero's *Orations* and Hesiod. See, e.g.,: Robert Middlekauff, *Ancients and Axioms: Secondary Education in Eighteenth-Century New England* (New Haven: Yale University Press, 1963); Kenneth Murdock, "The Teaching of Latin and Greek at the Boston Latin School in 1712," *Publications of the Colonial Society of Massachusetts* 27 (March 1927): 21–29; Meyer Reinhold, ed.,

or otherwise, prepared the ground. The distinction in *modern* natural law from its earlier counterpart was the purported *sufficiency* of rationally-based moral principles without reliance upon a theological anthropology. This shifted attention procedurally, if not ultimately in American minds, from God to humanity. For most of its proponents, indeed, this was not an anti-religious move: for the emphasis on human reason was a particular form of religious humanism, a celebration, of sorts, of humanity placed at the pinnacle of created order.

The shift from the colonial curriculum to its republican successor, moreover, was not imposed from outside. Changing theological views played their part. "The God-who-acts was becoming the God whose will was expressed in the laws of nature."[101] What might seem like ambivalence, double consciousness, and potential contradiction in Puritan understandings of the relationship between revelation and reason pushed for resolution in a more optimistic view of human abilities. God's grace, which to earlier Puritans seemed an alien in-breaking into human affairs—Damascene experiences—was later the perfector of existing human actions or traits: God's grace was understood as the reinvigorator of *natural* capacities.[102]

The sharpness of this distinction between the Puritan and Revolutionary cultures needs blunting, of course. Even as the early Puritans believed in a God who acts

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Classick Pages: Classical Reading of Eighteenth-Century Americans (University Park, PA: American Philological Association, 1975); C. K. Shipton "Secondary Education in the Puritan Colonies," *New England Quarterly* 7 (1934): 646–61; and "The System of Public Education Adopted by the Town of Boston, 15th October, 1789."

[101] Catherine Albanese, *Sons of the Fathers: The Civil Religion of the American Revolution* (Philadelphia: Temple University Press, 1976), 34.

[102] Miller, *New England Mind*, 200.

decisively in history, and understood their lives in New England as directed and bound by God's special providence, they were suspicious of the "miraculous."[103] Most Puritans subscribed to the idea that miracles—events not ascribable to human action or natural forces—had served a particular purpose in securing the early Church and its scriptural canon, and had, accordingly, ceased with the apostles.[104]

Likewise, proponents of the republican curriculum thought that their scholarship was complementary to Christian faith: In their telling, morality was discoverable through the reason that originated with the author of nature. And, as taught in the American colleges, at least, this rational morality *would not contradict* revelation.[105] Reason, in other words, could reinforce a divinely-sanctioned ethics. Indeed, reason offered, in effect, one further argument for its veracity.

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[103] Thus the "miraculous," instead, suggested the demonic. See Cotton Mather's account of the Salem Witch Trials in *The Wonders of the Invisible World. Observations as Well Historical as Theological, upon the Nature, the Number, and the Operations of the Devils* (Boston: Printed by Benj. Harris for Sam. Phillips, 1693).

[104] Garnet Howard Milne, *The Westminster Confession of Faith and the Cessation of Special Revelation: The Majority Puritan Viewpoint on whether Extra-biblical Prophecy is still possible* (Waynesboro, GA: Paternoster, 2007). Jonathan Edwards recognized spiritual gifts in the apostolic era, but thought that "the ordinary influences of the Spirit of God working grace in the heart is a far greater privilege than any of them; a greater privilege than the spirit of prophecy, or the gift of tongues, or working miracles even to the moving of mountains"; *The Works of Jonathan Edwards, vol. 8, Ethical Writings*, ed. Paul Ramsey (New Haven, CT: Yale University Press, 1989), 157.

[105] George Marsden, *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (New York: Oxford University Press, 1994), 50.

4.1.2. Overlapping Mindsets

The vocabularies of Puritan and Revolutionary culture and their treatments of natural law overlapped, of course. For instance: In his May 1775 election sermon to the provincial congress meeting at Watertown, Harvard President Samuel Langdon (1723–97) employed the traditional language of the jeremiad[106] to indict sin around him and British corruption. But he praised God too for humanity's "natural rights independent of all human laws" and "the law of nature" which allows for the beginning and continuing of human society.[107] Most famously, the Declaration of Independence also harmonized the varied sentiments of the age.[108] It strikes a tone of modern natural law in its invocation of "Nature's God" who sets up the laws of nature.[109] But the Declaration speaks too with a traditional vocabulary where God is creator and supreme judge of the

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[106] See, Cathleen Kaveny, *Prophecy Without Contempt* (Cambridge, MA: Harvard University Press, 2016). Kaveny treats the genre of the "election sermon" at 156–59.

[107] *Government corrupted by vice, and recovered by righteousness. A sermon preached before the honorable Congress of the colony of the Massachusetts-Bay in New England, assembled at Watertown, on Wednesday the 31st day of May, 1775. Being the anniversary fixed by charter for the election of counsellors* (Watertown, MA: Printed and sold by Benjamin Edes, MDCCLXXV [1775]), 23.

[108] Matthew Harris and Thomas Kidd, *The Founding Fathers and the Debate over Religion in Revolutionary America: A History in Documents* (New York: Oxford University Press, 2012), 11.

[109] Indeed, it strikes something of Deist note: the acknowledgment of God based on reason, and the rejection of revealed religion. There is vast collection of work on the role of religion in the Declaration, the Constitution, and the lives of the founding fathers. See, e.g., Vincent Muñoz, *God and the Founders: Madison, Washington and Jefferson* (New York: Cambridge University Press, 2009); and Edwin Gaustad, *Faith of Our Fathers: Religion and the New Nation* (San Francisco: Harper & Row, 1987). On questions of church and state, see: John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment*, 3rd ed., (Boulder, CO: Westview, 2011); and Frank Lambert, *The Founding Fathers and the Place of Religion in America* (Princeton, NJ: Princeton University Press, 2003).

world, and where Congress is to commit itself to divine providence. Notably the document offers no doctrinal specifics.

This was surely no accident. For some, lack of specificity was the imprimatur of universality. John Adams spoke of Christianity, for example, as the means to bring the multitudes to "the great Principle of the Law of Nature and Nations, Love your Neighbour as yourself, and do to others as you would that others should do to you."[110] For others, this abstraction and emphasis on rationally accessible natural law seemed to render Christianity worryingly instrumental, even superfluous. This was true for Yale's Thomas Clap, who introduced modern science into the curriculum yet strove to maintain Puritan policies, and resist liberalization of doctrine and morals.[111] Jonathan Edwards, likewise, while conversant with the ideas of Shaftesbury and Hutcheson, disputed human ability to access true virtue apart from revelation. Modern natural lawyers, in his mind, were just too optimistic about human nature. God's grace was needed to sanctify the reasoning process.[112]

4.2. The Unity of Truth

Despite differing views of the sufficiency, or otherwise, of human reason, the colonial and Revolutionary curriculums operated with a shared understanding of truth.

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[110] John Adams's diary entry for August 14, 1796; *The Works of John Adams*, ed. Charles Frances Adams (Boston: Little, Brown, 1850), III:423.

[111] Louis Tucker, *Puritan Protagonist: President Thomas Clap of Yale College* (Chapel Hill: University of North Carolina Press, 1962).

[112] See, e.g., *The Works of Jonathan Edwards, vol. 18, The Miscellanies, 501–832*, ed. Ava Chamberlain (New Haven, CT: Yale University Press, 2000), 155.

Both understood truth to be singular and unified. In their telling: the truth of experimental science, art, literature, and religion all speak to the same reality.

This assumption of the *unity of truth* is confusing to contemporary commentators and critics, and is one reason why colonial and Revolutionary discussions of "nature" are often found intellectually suspect. The concept of "nature" the colonists and Revolutionaries used seems slippery: imprecisely bound to the proper regime of science, say, or the *separate* regime of morals.

4.2.1. Disputing "Nature"

Two sorts of complaint are frequently made. First, when critics look at colonial and Revolutionary proponents of natural law, they find that "nature" is sometimes that which is primitive and original, simple and uncorrupted. Nature, in this depiction, is universal. It is found in all people, irrespective of custom, culture, education or the like. Yet sometimes, when critics look at colonial and Revolutionary treatments of natural law they find "nature" to mean that which does *not* exist everywhere, but which *ought* to exist. Nature, in this depiction, is a norm to be sought.[113]

At least for the Puritans, however, this double depiction was not contradictory. The scriptural narrative explained both. All of nature, in their view, was created good: "And God saw all that he had made, and lo, it was very good."[114] And yet, after the Fall, human beings are estranged from their good nature, even as they are called to its

[113] See, Edwin Gaustad, *Neither King nor Prelate: Religion and the New Nation, 1776–1826* (Grand Rapids, MI: Eerdmans, 1993), 87.

[114] Genesis 1:31a, Geneva Bible.

restoration through God's grace. Detached from this narrative of Fall and restoration, however, there are tensions between the depictions, even despite the popularity of secular "fall from grace" narratives and calls to "being who you truly are."[115]

The second complaint about talk of "nature," which divides the working assumptions of today from both the Puritan and the Revolutionary eras, is their taken-for-granted understanding that the physical and the moral are commensurate. The laws of nature—physical forces—were not divorced from natural law understood as moral philosophy. The educated, working view of science from the time of the Revolution through to the middle of the nineteenth century was an equation of Newtonian and Baconian theories of induction. This view "praised the derivation of natural laws from careful observation of facts as the path to reliable knowledge."[116] The purpose of investigating the natural world was to discover its laws. And the laws of the physical universe and moral law were both equally God's law.[117] They possessed a strong sense of the compatibility of science and morals, natural and revealed religion.[118]

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[115] There are, no doubt, other ways to hold together descriptive and normative accounts of nature.

[116] For instance, in Isaac Newton's *Regulae philosophandi.* See, Julie Reuben, *The Making of the Modern University: Intellectual Transformation and the Marginalization of Morality* (Chicago: University of Chicago, 1996), 36.

[117] See, e.g., Robert Boyle, *Some Considerations Touching the Usefulness of Experimental Natural Philosophy* (Oxford: Printed by Henry Hall for Richard Davis, 1663).

[118] Barbara Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton: Princeton University Press, 1983).

4.2.2. Two Books

This idea that God is known in "two books"—by revelation and by nature or reason—was far from new. But it received new impetus with the rise of experimental science, and the corresponding emphasis on induction. Whereas the Puritans often deduced natural law from scripture and doctrine, by the Revolutionary era Americans had turned to careful observation of particular phenomena. The commands of God, in effect, could be known through principles discoverable in nature.

Physical and moral science alike were understood as built-up from individual facts. Science was the conglomerate of pieces of knowledge. This vision generated confidence in the veracity of science: for common sense and experimental methods could surely prove small pieces of evidence, and bigger discoveries, in this telling, simply consisted of smaller pieces.[119] The level of epistemic confidence this generated stood in some distinction to the views of the Puritans. The early Puritans held, after all, that man has "knock't his head in the fall, and craz'd his understanding." After the Fall, humanity is left with only "'some broken fragments, & moth-eaten registers, old rusty outworn monuments' so indistinct that 'there are but very few of them, that he can spell out what they mean, and in others he is mistaken.'"[120] And yet, as Perry Miller claims, despite Puritan distrust of human understanding, their writings came to

> expound upon the coincidence of natural law or the law of reason with the law promulgated at Sinai, until there are times when the reader wonders whether

[119] See, Larry Laudan, "Thomas Reid and the Newtonian Turn of British Methodological Thought," in *Science and Hypothesis: Historical Essays on Scientific Methodology* (Dordrecht, The Netherlands: Reidel, 1981), 86–110.

[120] Willard, *A Compleat Body of Divinity*, 15–16.

Puritans had not come to regard Biblical dispensation as a corroboration to the conclusions of reason rather than the one true and perfect revelation.[121]

If Miller captures the Puritans' increasing embrace of reason, he overstates the shift in epistemic priority. While there were continuities between the colonial and Revolutionary mindsets—particularly if compared to the views of today—the Puritans, nonetheless, began with the revealed law as they understood it, whereas the revolutionaries began with nature. The Puritans found in nature corroboration for revelation; the Revolutionaries found nature sufficient.

4.3. Republican Colleges

The colonial college sought to form ministers and moral laymen for leadership. Following the Revolution, in the new Republic, colleges increasingly emphasized formation of learned magistrates and informed citizens. A 1779 bill to reform The College of William and Mary, for example, explains how, by character formation and good laws, those "whom nature hath endowed with genius and virtue, should be rendered by liberal education worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens."[122] The principles articulated in the University of

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[121] Miller, *New England Mind*, 199.

[122] *The Papers of Thomas Jefferson,* vol. 2, 2 January 1777 to 18 June 1779, including the Revisal of the Laws, 1776–1786 ed. Julian P. Boyd (Princeton, NJ: Princeton University Press, 1950), 526–27. A much-revised version was finally passed into law in 1796 as an "Act to Establish Public Schools." On December 4, 1779, while action on the bill was pending, William and Mary's Board of Visitors, under the leadership of Jefferson—who was by then governor of Virginia as well as a member of the Board—adopted resolutions, which were endorsed by the faculty and supported by the Reverend James Madison, the College President. These resolutions, which

Virginia's later founding are similar: to "form statesmen, legislators and judges"; "expound the principles and structure of government"; and cultivate morals, and instill precepts of order and virtue in youth.[123] In the fledging nation, there was proper concern, then, that colleges produce a sufficient number of men—both civically virtuous and trained in principles of governance—for leadership in the courts and the legislature.

If the colleges in the initial colonial period were "schools of the reformation" in mindset and purpose, by the other side of the Revolution colleges were "schools of the Republic." In a narrower sense, the colleges were schools of the *American* Republic. National self-sufficiency was important. Joel Barlow (1754–1812), for instance, sought to create a university to fulfill all of America's educational and research needs.[124] Dependence on Europe, indeed, was sufficiently frowned upon that the Georgia legislature penalized students who attended institutions beyond American shores.[125] In a broader sense, however, the colleges were schools of the American *Republic.* "The liberal sciences," Barlow said, were of republican character: delighting in "reciprocal communication," cherishing "fraternal feelings," and leading to "a freedom of

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incorporated some, but not all, of Jefferson's plans for the College, came to be known as the Jeffersonian Reorganization.

[123] [Thomas Jefferson, James Madison, et al.], "Report of the Commissioners Appointed to Fix the Site of the University of Virginia. 4 Aug 1818" in *The Founders' Constitution*, ed. Philip P. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1986), Chapter 18, Document 33.

[124] Joel Barlow, *Prospects of a National Institution to be Established in the United States* (Washington City [DC]: Printed by Samuel H. Smith, 1806).

[125] Oscar Handlin, *The American University as an Instrument of Republican Culture* (Leicester, UK: Leicester University Press, 1970), 6.

intercourse," which "combined with the restraints of society" would contribute to the improvement of governance and society.[126]

4.3.1. A Continuing Vocational Focus

As was true of the colonial colleges, the Revolutionary colleges were vocational in their focus. By the mid-eighteenth century, indeed, colleges were becoming "pre-professional schools."[127] At the College of New Jersey, for instance, seventy-five percent of the students in twenty-one graduating classes became lawyers, ministers, or doctors.[128] A 1770 faculty statement at William and Mary declared the college's purpose as providing training for Anglican ministers, and preparation for prospective lawyers and physicians.[129]

Colleges, indeed, sometimes provided the context for specific study of the law. John Witherspoon (1723–94)—the President of the College of New Jersey—urged degree-holders to return to Princeton for independent study and thereby

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[126] Barlow, *Prospects*, 5.

[127] James McLachlan, "Classical Names, American Identities: Some Notes on College Students and the Classical Tradition in the 1770s" in *Classical Traditions in Early America: Essays*, ed. John Eadie, 81–95 (Ann Arbor, MI: Center for Coordination of Ancient and Modern Studies, 1976), 85.

[128] McLachlan, "Classical Names," 85.

[129] The statement also included training as a gentleman (treated as a fourth profession, it seems). The College of William and Mary considered itself the "best Place for training up Youth, who are intended to be qualified for any of the three learned Professions, and to become Gentlemen, and accomplish'd Citizens." "Journal of the Meetings of the President and Masters of William and Mary College: May 1770," *The William and Mary Quarterly* 13, no. 3 (1905): 148–157, 151.

> fit themselves for any of the higher Branches to which they will think proper chiefly to devote further application, whether those called learned Professions, Divinity, law, and Physic, or such liberal Accomplishments in general as fit young Gentlemen for serving their Country in Public Stations.[130]

James Madison was among those who accepted the invitation.[131]

4.4. The Moral Philosophy Course[132]

The continuities and distinctions between the college teaching of natural law in colonial and revolutionary contexts is perhaps best seen through the example of the Moral Philosophy course, which gave shape to the curriculum from the late eighteenth century through the middle of the nineteenth. "Moral Philosophy"—also called "moral science" or "metaphysics and ethics"—was taught by the college president as a capstone course, and integrated the curriculum.[133] Its overall content, in the words of a prominent

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[130] Robson, *Educating Republicans*, 60.

[131] "I intend myself to read Law occasionally and have procured books for that purpose… The principles and Modes of Government are too important to be disregarded by an Inquisitive mind and I think are well worthy of a critical examination by all students that have health and Leisure"; *The Papers of James Madison*, vol. 1, *16 March 1751–16 December 1779*, ed. William Hutchinson and William Rachal (Chicago: University of Chicago Press, 1962), 100–102.

[132] For introductions, see: D. H. Meyer, *The Instructed Conscience: The Shaping of the American National Ethics* (Philadelphia: University of Philadelphia Press, 1972); Henry May, *The Enlightenment in America* (New York: Oxford University Press, 1976); Douglas Sloan, *The Scottish Enlightenment and the American College Ideal* (New York: Teachers College, Columbia University, 1981); Mark Noll, *Princeton and the Republic, 1768–1822: The Search for a Christian Enlightenment in the Era of Samuel Stanhope Smith* (Princeton, NJ: Princeton University Press, 1989). For its decline, see: Sara Paretsky, *Words, Works, and Ways of Knowing: The Breakdown of Moral Philosophy in New England before the Civil War* (Chicago: Chicago University Press, 2016).

[133] George Schmidt, *The Old Time College President* (New York: Columbia University Press, 1930), Chapter IV The Bearer of the Old Tradition, 108–45.

textbook of 1795, was "that science which gives rules for the direction of the will of man in his moral state, or in his pursuit after happiness."[134]

In an important sense, a specific Moral Philosophy course was a continuation of a century of broader instruction. As we have seen, the earliest curriculum at Harvard included moral philosophy in the fourth year. Likewise, the spirit of the Revolutionary colleges' course followed in the logic of Ramus, and the colonial colleges' insistence on the unity of truth. Even the new epistemic priority of humanity and nature—now treated before God and revelation—while in distinction to the general spirit of colonial education, was in continuity with Christian apologetic teaching that had developed earlier in the eighteenth century. Instruction in so-called "controversies against heretics" was the subject of a course, for instance, at William and Mary in 1736. Throughout the colonies, Bishop Butler's *Analogy of Religion, Natural and Revealed* was a popular text, as too was William Paley's *View of the Evidences of Christianity*.[135] If the colleges were no longer schools of the reformation, they nonetheless employed the most modern means available to defend the truth of Christian religion, now expressed by direct appeals to nature.

There were, however, significant discontinuities. While logic had dominated and grounded the colonial curriculum, by the middle of the eighteenth century systematic ethics had taken its place.[136] And morals were now taught at least partially independent of

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[134] John Daniel Gros, *Natural Principles of Rectitude* (New York: T and J Swords, 1795), 10.

[135] (London: Printed for James, John and Paul Knapton, 1736); (London: Printed for R. Faulder, 1794).

[136] Willis, *Growth*, 169–70.

theology. Moral Philosophy's starting points, instead, were physical, sociological, or psychological, rather than theological.[137] Nonetheless, teachers still assumed that this approach tracked divine laws in nature, such that nothing they might find would contradict the teachings of Christianity.

4.4.1. Common Sense Philosophy

Of particular importance was the so-called "Common Sense" philosophy, which started life as the "Scottish" philosophy, but in the New World amalgam of the thought of its principal authors, truly became "the American philosophy" well into the nineteenth century.[138] The writings of Francis Hutcheson (1694–1746) and Thomas Reid (1710–96) —also James Beattie, Adam Ferguson, Dugald Stewart, with Butler and Paley—were read together by Americans and taken to form a unity.[139] This common sense philosophy married enlightenment ideas with the assumptions of dissenting Protestantism.[140]

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[137] G. Stanley Hall, "On the History of American College Text-Books and Teaching in Logic, Ethics, Psychology and Allied Subjects," *Proceedings of the American Antiquarian Society* 9 (1893–94): 137–74, 145.

[138] James McCosh, the Scottish president of Princeton from 1868 to 1888, first wrote its history: *The Scottish Philosophy (*London: Macmillan, 1875).

[139] As these authors were treated as authorities, instruction often took the form of commentary on their work. But as the art of commentary entails, instructors made distinctions and criticisms, as well as offering appreciation. Accordingly, curriculums changed through the period. For example, while Paley's *Moral and Political Philosophy* (1785) was an early text in wide use, later Dugald Stewart's *Philosophy of the Active and Moral Powers* (1828) took its place, and likewise Francis Wayland's *Elements of Moral Science* (1835). See, Willis, *Growth*, 171.

[140] Marsden, *Soul*, 90–93. Unlike its anti-clerical French counterpart, the Scottish Enlightenment was broadly supportive of the Scottish church, and many of its principal figures were clergymen. David Hume, of course, is the exception that proves the rule.

Human morality, said the common sense philosophers, was grounded in universally self-evident, commonsensical principles, such as: the existence of mind and matter, good and evil; that human beings can choose actions; that humans possess an innate moral sense; and that happiness is the goal of morality.[141] Importantly, this innate moral sense was understood as a capacity to perceive moral qualities: a capacity akin to sense perception.[142]

Common sense philosophy as practiced in the Revolutionary colleges assumed that these principles were not only rational and scientific, but also congruent with Christian morality. Common sense was undergirded by the conviction that God is revealed in Nature, and that Nature's law is consistent with true revelation in Scripture. Accordingly, the philosophy of common sense appealed in its moment as properly rationalistic, yes, but also moralistic and theistic.[143]

4.5. Natural Law and Civil Law in the Curriculum

However, did the colleges of the new Republic—engaging, as they did, modern natural law and the common sense tradition—teach what we have called "civil" law: the statutes and common law of their political community? We certainly find that the study

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[141] Schmidt, *Old Time*, 57.

[142] In Julie Reuben's description, Witherspoon, for instance, "maintained that the human mind worked through related processes or faculties: the understanding, the will, and the affections. These faculties included the capacity to perceive moral qualities. Just as people could sense the hardness of an object, they could sense the goodness of an act or idea"; *Making of the Modern University*, 19.

[143] This is the assessment of Wilson Smith in his *Professors and Public Ethics: Studies of Northern Moral Philosophers Before the Civil War* (Ithaca, NY: Cornell University Press, 1956).

of ethics, law, and politics was well embedded in American collegiate study by the time King's College, New York—renamed Columbia in 1784—and Dartmouth College published their first curriculums.[144] In New York in 1755, a student's fourth year was principally devoted to "the Chief Principles of Law and Government," while at Dartmouth in 1796, juniors were assigned a course in "Natural and Moral Philosophy," with instruction in "Natural and Political *Law* and Moral Philosophy" reserved for seniors.[145]

The Moral Philosophy course was understood as preparatory for students' leadership in the colonies.[146] A 1756 plan for the College of Philadelphia—a precursor to

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[144] Even at conservative Yale, the Reverend Thomas Clap—Yale's president from 1739 to 1766—commended an increase in "publick Dissertations upon every Subject necessary to qualify young Gentlemen for those stations and Employments in civil life," with such commencement disputations a colorful part of the life of the colony as much as the college; Anna Haddow, *Political Science in American Colleges and Universities*, 1636–1900 (New York: D. Appleton-Century, 1939), 14.

[145] Reed, *Training*, 114 (emphasis added). In 1792, Columbia's Faculty of Arts consisted of the President and seven professors. John Daniel Gros—a minister in the German Reformed Church in America—was professor of moral philosophy. He taught a course divided into three sections: "1. The first explaining the Principles and Laws resulting from the nature of man, and his natural relations to God and his fellow creatures by which human conduct ought to be regulated in a manner becoming the dignity of human nature, and conformable to the will of God. This constitutes the Law of Nature, strictly so called... 2. In the second part of the system those general principles are applied to the different states, relations and conditions of man, comprehending (a) Ethics... (b) Natural Jurisprudence, laying down the principles of perfect and imperfect rights... 3. The Law of Nations, as founded in nature." See: Snow, *College Curriculum in the United States*, 98; James Fairbanks Colby, "The Collegiate Study of Law," *Report of the Nineteenth Annual Meeting of the American Bar Association* (Philadelphia: Dando, 1896), 525.

[146] John Witherspoon, President of the College of New Jersey—later known as Princeton—taught a notable version. President from 1768 to 1794, he set a pattern of teaching at Princeton broadly in the Scottish Common Sense tradition that lasted through the presidency of James McCosh (1868–88).

the University of Pennsylvania—called for a course that would give the student "a knowledge and a practical sense of his position as a man and a citizen… embracing ethics, natural and civil law, and an introduction to civil history, law and government, and trade and commerce."[147] In Philadelphia, as at King's College and the College of Rhode Island—later know as Brown University—the central instructional text was Francis Hutcheson's Short Introduction to Moral Philosophy.[148] Hutcheson devoted the entirety of Book II of his Short Introduction to "Elements of the Law of Nature."[149]

As John Witherspoon taught the course in Princeton, moral philosophy emphasized the complementary nature of reason and revelation and the supremacy of an innate moral sense as a guide for action.[150] The object of applied common sense, he said, was virtuous conduct, defined as human duties to God, neighbors, and self. Witherspoon offered discourses on the state of nature, natural rights, "compact" as the basis of society,

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[147] Thwing, *American College*, 21 (emphasis on "trade and commerce" removed).

[148] *A Short* Introduction *to* Moral Philosophy*: In Three Books; Containing the Elements of Ethicks, and the Law of Nature.* Its first American edition printed the fifth edition of the Glasgow edition. (Philadelphia: Printed and sold by Joseph Crukshank, in Market Street, between Second and Third Streets, MDCCLXXXVIII [1788].)

[149] In this, Hutcheson followed the pattern set by his Glasgow predecessor Gershom Carmichael, and engaged the works of Hugo Grotius and Samuel Pufendorf.

A recent overview of Hutcheson's thought is provided by Daniel Cary, "Francis Hutcheson's Philosophy and the Scottish Enlightenment: Reception, Reputation, and Legacy," in *Scottish Philosophy in the Eighteenth Century. Volume I: Morals, Politics, Art, Religion*, ed. Aaron Garrett and James Harris, 36–76 (Oxford: Oxford University Press, 2015).

[150] *An Annotated Edition of Lectures on Moral Philosophy*, ed. Jack Scott (Newark: University of Delaware Press, 1982).

Jennifer Herdt offers an incisive treatment of the ways in which Witherspoon sought to hold together Reformed commitments with modern natural law. She concludes that he was not particularly successful in so doing: "Calvin's Legacy for Contemporary Natural Law," *Scottish Journal of Theology* 67, no. 4 (2014): 414–35.

private property, and the right of rebellion. The lectures also covered general discussions of jurisprudence and the nature of contracts.[151]

In a later influential iteration, Mark Hopkins (1802–87), President of Williams College, taught a comprehensive class concerned with "Man, as he is in himself, and in his relations to his fellow creatures, and to God."[152] The imagined breadth of the course is shocking to those accustomed to specialization:

> [W]e take up first the physical man, and endeavor to give… an idea of every organ and tissue of the body. We then take the intellectual man, and investigate, first, and classify his several faculties; then the grounds of belief and the processes of the mind in the pursuit of truth, with an explanation of the inductive and the deductive logic; then the moral nature, together with individual and political morality, comprising a knowledge of constitutional history and of the rights and duties of American citizens; then the emotive nature, as taste and the principles of the fine arts; then natural theology and the analogy of the natural to the moral government of God.[153]

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[151] He offered the following suggestions for reading. On ethical matters, he suggested students read: "Samuel Clarke, *Demonstration of the Being and Attributes of God, more particularly in answer to Mr. Hobbs, Spinoza, and their Followers* (London, 1705); Samuel Pufendorf, *De Officio hominum & civium* (London, 1673); Cicero, *De Officiis*; Lord Shaftesbury's *Characteristicks of Men, Manners, Opinions, Times* (London, 1711); Henry Home, Lord Kames, *Essay on the Principles of Morality and Natural Religion* (Edinburgh, 1751)."

On "politics and government," Witherspoon suggested students read: Hugo Grotius, *Of the Law of War and Peace* (London, 1654); Pufendorf's *De Jure Naturae et Gentium…* (1st Eng trans., London, 1710); Richard Cumberland, *A Treatise on the Laws of Nature*, trans. John Maxwell (London, 1727); the three volumes of legal scholar John Selden's *Works* (London, 1726); the two volumes of Jean Jacques Burlamaqui, *The Principles of Natural and Political Law* (London 1748 – 52); James Harrington, *The Commonwealth of Oceana* (London, 1656); John Locke, *Two Treatises of Civil Government* (London 1690); Algernon Sidney, *Discourses on Civil Government* (London, 1698); Charles. L. Secondat, Baron Montesquieu, *The Sprit of Laws* (Eng. Trans., London, 1752); and Adam Ferguson, *An Enquiry on the History of Civil Society* (Edinburgh, 1767). Underlying all of Witherspoon's lectures was the work of Francis Hutcheson: *A Short Introduction to Moral Philosophy* (Edinburgh, 1747), and the two-volume *A System of Moral Philosophy* (Edinburgh, 1755).

[152] *Miscellaneous Essays and Discourses* (Boston: T. R. Marvin, 1847).

[153] Ibid.

4.5.1. Teaching the Law, not Legal Practice

Of course, teaching about the law—whether in New York's "Chief Principles of Law and Government" or Philadelphia's "natural and civil law" and "law and government"—is not teaching the practice of the law. In this, American colleges followed John Locke, who had urged the young to read: Cicero's *De officiis*;[154] Pufendorf's *De officio hominis et civis*; and Grotius's *De jure belli ac pacis* or Pufendorf's *De jure naturae et gentium*, but not treatises on the practice of law. In reading Cicero, Pufendorf, and Grotius, Locke thought, students would be "instructed in the natural Rights of Men and the Original and Foundations of Society, and the Duties resulting from thence."[155] The focus for virtuous youths, accordingly, was the "Affairs and Intercourse of civilized Nations in general, grounded upon Principles of Reason," and not "the Chicane of private Cases."[156]

All gentlemen have an interest, Locke argued, in knowing the law of the their country, particularly as they might well fulfill offices of state. But the focus of their education should ever be seeking "the true measures of Right and Wrong" and not the "wrangling and captious part of the *Law*."[157] But this was not to the exclusion of the facts of governing. So together with Cicero, Grotius, and Pufendorf, Locke urged the reading of the "*English* Constitution," "the ancient books of the *Common Law*," history, and

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[154] Locke uses the common eighteenth-century nomenclature "Tully's *Offices*."

[155] John Locke, *Some Thoughts Concerning Education,* ed. John Yolton and Jean Yolton (Oxford: Clarendon Press, 1989), 239, §186.

[156] Ibid.

[157] Ibid., 240, §187.

statutes.[158] In the Revolutionary colleges too, then, the focus was knowledge of right and wrong, *and* proper governance. Such knowledge formed the student for his expected position as "a man and citizen."[159]

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[158] Ibid.

[159] Of course, other aspects of the curriculum—and particularly classics—were likewise understood to form the student not only for life but for the professions. "[T]he utility of a knowledge of the classics for the practice of the professions of law, medicine, and theology was taken for granted"; Bruchbacher and Rudy, *Higher Education*, 14. See, Richard Gummere, *The American Colonial Mind and the Classical Tradition* (Cambridge: Harvard University Press, 1963).

Latin was the primary language of college instruction and the language of international scholarship. Study of ancient languages provided, too, aspects of the technical vocabulary for the professions, and functioned as a mark of learning and status. Less well appreciated today is that study of the classics was assumed to provide students with access to the body of ancient wisdom that "would definitely help in the training of leaders and in preparation for service to the community"; Bruchbacher and Rudy, *Higher Education*, 14.

As ever, the classical world was interpreted within the thought world of the time. Whereas the Puritans read primarily through the lens of Scripture, by the Revolution, classical literature found interlocutors—explicitly or implicitly—in John Locke and other enlightenment writers, foundational writers in the common law, and their reception of New England Puritan thought. On this, see generally: Robson, *Educating Republicans*; Caroline Robbins, *The Eighteenth-century Commonwealthman: Studies in the Transmission, Development and Circumstance of English Liberal Thought from the Restoration of Charles II until the War with the Thirteen Colonies* (New York: Atheneum, 1959); Trevor Colbourn, *The Lamp of Experience: Whig History and the Intellectual Origins of the American Revolution* (Chapel Hill: University of North Carolina Press, 1965); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press of Harvard University, 1967); Gordon Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969); and J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975).

With the Revolution came a new focus on the political wealth to be mined in the classical tradition. Lawyers came to study, and speak with, classical erudition, developing practices that had previously been limited to the clergy. James Kent urged lawyers to mastery of Greek and Latin, indeed "the whole circle of the arts and sciences" together with "the general principles of Universal Law"; see, Robert Ferguson, *Law and Letters in American Culture* (Cambridge, MA: Harvard University Press, 1984), 28.

4.5.2. The Changing Role of Disputations

We have seen, then, that colleges taught law in combination with ethics and government, and as part of the moral philosophy course designed to prepare students for civic leadership. One additional site where specifically legal content featured in the colleges' curriculum was in *disputations*. These formal debates on a thesis formed one of the principal methods of early instruction. Indeed, looking to the form and content of the disputations helps illustrate the ways in which the traditional curriculum of the colonial colleges developed through the eighteenth century.

Disputations—first syllogistic in pattern, and later forensic in style—formed an important part of the undergraduate curriculum.[160] One specific link between the American colleges and Scotland was the place these disputations took at commencement exercises, a major event in the lives of the colonies with "clergy, gentry, and townsfolk flock[ing] to the college church to hear the young disputants."[161] The particular link to Scottish education was that students could be potentially examined on any topic treated through their four years of study.[162] A list of disputation theses was printed for

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In the guise of the Ciceronian orator, lawyers, from the mid 1700s onward, newly contributed to the broader political and literary cultures of the era; McLachlan, *Classical Names*, 85.

The lawyer was to be a statesman, and Classical literature spoke to contemporary politics. Words were to provoke action. For this tradition, see: Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge MA: Harvard University Press, 1995).

[160] Mark Garrett Longaker, *Rhetoric and the Republic: Politics, Civic Discourse, and Education in Early America* (Tuscaloosa: University of Alabama Press, 2007).

[161] David Potter, *Debating in the Colonial Chartered Colleges: An Historical Survey, 1642 to 1900* (New York: Teachers College, Columbia University, 1944), 12.

[162] Pryde, *Scottish Universities*, 5.

distribution to those in attendance. These were broadsheets with a hundred or more Latin propositions covering the breadth of the curriculum.[163]

Logic was ever central to college education, but it was particularly so in the earliest years of the colonial colleges. "Logic is the most general of all arts," read one proposition at 1643 and 1708 commencements.[164] The advancement of the ideas of modern natural law resulted in the students' expected ability to debate propositions such as: "Ethics is equally capable of demonstration as mathematics" (Harvard, 1767).

Commencement disputations, however, also increasingly spoke of the law of nations, and questions of government and law.[165] A Harvard thesis of 1743 read: "Are we bound to observe the mandates of kings, unless they themselves keep their agreements?"[166] And five years later: "Is it lawful to resist the supreme magistrate, if the commonwealth cannot otherwise be preserved?" At the College of New Jersey in 1759, a

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[163] James Walsh, *Education of the Founding Fathers of the Republic: Scholasticism in the Colonial Colleges; A Neglected Chapter in the History of American Education* (New York: Fordham University Press, 1935). Cotton Mather's *Magnalia* talks about the principal part of Commencement being the public act where theses were disputed; Book IV, §7, 20.

[164] Potter, *Debating*, 16.

[165] Twentieth-century commentators broadly dismissed the Puritan curriculum as remaining profoundly medieval, and, as such, unable to integrate new developments in science. This view is, at least, partially mistaken. The curriculum did change with the integration of the "new learning" of mathematics and natural science, and with this, the reading of texts in English. And, of course, the scholastic curriculum brought from the Old World was not that of 1400, but had already had already been transformed by the humanism of the preceding centuries. If the broad contours of the scholastic curriculum remained, the works engaged, the reasoning undertaken, and the presumed purpose of this study, had changed.

[166] In Potter, *Debating*, 23. All the examples that follow are likewise from Potter unless otherwise cited.

thesis read: "Is it right to resist by force and arms kings who invade the rights of the people?" Likewise in Philadelphia: "Is it allowed to resist the supreme magistrate if the commonwealth cannot be otherwise preserved?" (1761).

Indeed, at Philadelphia there was an entire "division" of theses on "*De jurisprudentiale naturali*": "The will of God revealed by the light either of nature or of Sacred Scripture is an adequate rule and norm of conscience" (1762); "Almost all laws especially natural laws refer to the whole human race or to all of a certain class"; "All men are by nature equal"; "Whatever is opposed to the common good is also opposed to the law of nature."[167] But theses probing the legal and political limitations of natural law reflection were found across the colleges: "Subjects are bound and obliged, according to the law of nature, to resist their king and defend their liberty when he is acting with inhuman ruthlessness or overthrowing the laws of the state" (College of New Jersey, 1770), for instance; and "Ex post facto laws are not binding" (College of Rhode Island, 1786).[168]

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[167] Walsh, *Education*, 229.

[168] Ibid., 135. The lists of these theses prove fascinating. Other relevant examples include the following. "The rights of the people are as divine as those of their rulers" (College of Philadelphia, 1763). "All power of maintaining laws and inflicting penalties is derived from the people; therefore, for a legislative body to impose taxes upon people who are not represented in that legislature is unjust" (College of Rhode Island, 1769). "Are the people the sole judges of their rights and liberties?" (Harvard, 1769). "Subjects are bound and obliged, according to the law of nature, to resist their king and defend their liberty when he is acting with inhuman ruthlessness or overthrowing the laws of the state" (College of New Jersey, 1770). "A well equipped but unsalaried militia is the best defense for a commonwealth" (College of Rhode Island, 1773). "A defensive war is permissible" (College of Rhode Island, 1774). "All men are born free, and it is glorious to meet death in securing their liberty by force and arms" (College of Rhode Island, 1776).

4.6. Collegiate Professors of Law

With the Revolutionary war, college study of law gained new import. The Declaration of Independence begins, of course, by invoking the "Laws of Nature and of Nature's God." The Declaration justifies the fight for independence as flowing from British denial of "certain unalienable rights," granted not by men but by God.[169] This language is found too in the Federalist Papers and other writings of the Founding Fathers.[170] But while these works often sought to justify "a right of rebellion," natural law was also increasingly invoked in the colleges to inculcate good citizenship and a love of liberty. The college curriculums, in other words, continued to connect law and government within the framework of the natural law tradition.

But there were institutional changes afoot. Yale's president Ezra Stiles called upon "the several States" to endow professorships of law, "[r]emembering that it is scarcely possible to enslave a Republic where the Body of the People are Civilians [citizens], well instructed in their Laws, Rights, and Liberties."[171] This was to be

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[169] The relationship between the Declaration and discourse on natural law and natural rights is well treated by Dieter Grimm, "Europäisches Naturrecht und Amerikanische Revolution," *Ius commune* 3 (1970): 120–51.

[170] R. H. Helmholz, for instance, points to the example of *The Federalist* No. 43 and its invoking of a right to self-defense premised on "the transcendent law of nature." See, *The Federalist*, ed. Jacob Cooke (Middletown, CT: Wesleyan University Press, 1961), 297. Helmholz also provides references to state constitutions invoking natural law and the writings of 23 "leading lights" in the new Republic: *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015), 130n16–39.

[171] As quoted in Edmund Morgan, *The Gentle Puritan: A Life of Ezra Stiles* (New Haven: Yale University Press, 1962), 323. On December 3, 1777, Stiles recorded in his diary: "I drafted a Plan of an University, particularly describing the *Law & Medical* Lectures: a the Desire of the Corpor of Yale to be by them laid before the Committee of the General Assembly of Connect. appointed to consider among other Things where it be

education for free men: a training in the necessary conditions for liberty, with distinctly practical outcomes intended: the equipping of students for roles in Congress, for instance, and to "conduct[] the public arrangements of the military, naval & political Departments & the whole public administration."[172]

Stiles proposed sets of lectures ranging over Roman law, English common law—insisting, however, that "neither this nor any other foreign Law will ever be in force in America" except by its "derivative use, Custom & Adoption"—the codes of the thirteen States, and lectures on the world governments, especially those of Europe and China. His focus was practical, if not professional; "the Spirit & Governing Principles" of the law were to be taught, not matters "officinal," better learned "at the Bar & by living with a Lawyer."[173]

Such college study of the law, therefore, would teach students to sift from history and international practice for what was worthy of America's attention, and help students learn to repel dangers to liberty. College study of the law was still to cultivate character, but character now understood as necessarily connected to the continuance of American liberty. The emphasis had shifted from the good of moral law, as such, to the flourishing of political community: proper knowledge of law and politics, said Stiles, would

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expedient to found these 2 Professorships"; *The Literary Diary of Ezra Stiles*, ed. Franklin Bowditch Dexter, vol. II (New York: Charles Scribner's Sons, 1901), 233. The full address can be found in Charles Warren, *History of the American Bar* (Boston: Little, Brown, 1911), 563–66.

[172] Warren, *History*, 565.

[173] Ibid., 564. In its now obscure sense, "officinal" is an adjective, meaning: "of, belonging to, or characteristic of a shop or shopkeeper."

"transfuse a spirit among the body of the people in America."[174] Indeed, in the shaky days of the new Republic, this spirit, claimed Stiles, would be Americans' "only security of Liberty under Providence," necessary to "effect that public Virtue" required if the new Republic were to flourish.[175]

Despite Stiles's efforts at Yale, however, the first dedicated chair in law in America was at William and Mary, where George Wythe was appointed professor of law and police in 1779.[176] Specialization—a process begun fifty years earlier—would increasingly separate study of the American legal system from ethics and philosophy, but

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[174] Ibid., 566. Law was taught as an act of patriotism: a means to build political leadership. See, Paul Carrington, *The Revolutionary Idea of University Legal Education*, 31 Wm. & Mary L. Rev. 527 (1990).

[175] Warren, *History*, 566. There was a realization that structures of government and law were worthy of significant study in the new Republic. This was true in Joel Barlow's influential, if unsuccessful, proposal to found a national university; Barlow, *Prospects*.

The federal system, he argued, operates if not with new principles of government, then with "at least new combinations of principles, which required to be developed, studied and understood better than they have been"; ibid., 17. He commends the study of the science of government within a natural law sensibility—"we regard it as founded on principles analogue to the nature of man, and designed to promote his happiness"—"believe our government to be founded on these principles"; ibid., 8. "The science of morals connects itself so intimately with the principles of political institutions"; ibid., 11. He notes the opportunity to distinguish American practice from European: eminent men who have studied government and law in Europe had not, he noted, been included among the learned societies: "Locke, Berkeley, Pope, Human, Robertson, Gibbon, Adam Smith, and Blackstone," he says, for example, "were never admitted into the Royal Society"; ibid.

[176] Jefferson studied law under Wythe from 1762 to 1767, and later wrote a brief sketch of his life: "Notes for the Biography of George Wythe," *The Writings of Thomas Jefferson*, ed. Andrew Lipscomb and Albert Bergh (Washington, DC: Thomas Jefferson Memorial Association of the United States, 1903), 1:166–70.

Wythe's appointment marks a smaller separation than it first appears: in the eighteenth century, "police" referred to the complete organizational scheme of government.[177]

By 1792, William and Mary had two degrees: a Bachelor of Arts and a Bachelor of Law. The substance of *both* degrees represents a shift in the curriculum to an emphasis on "law, politics, and science."[178] Both degrees included study of natural law and the law of nations, and principles of politics alongside other subjects. The Bachelor of Law curriculum included, additionally, studies of civil history both ancient and modern, together with municipal law and the principles of public policy.[179]

The study of law remained a study in government, then, such that James Wilson—an Associate Justice of the U.S. Supreme Court—could announce his 1790

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[177] At the beginning of the colonial era, college tutors taught all subjects to a group of students. But in 1722 Harvard founded the Hollis professorship of Divinity—dedicating a position to a particular field of study—and in 1766 abolished its tutorial system, with all instructors assigned to teach particular classes. Kraus, *Development*, 69.

"What the German would call *Polizeiwissenschaft*, and what the Greeks termed πολιτεία was taught for nearly a century at the college of William and Mary under the head of '*police*.' That name would probably suggest nothing but constabulary associations to most college faculties in these modern days"; Herbert Baxter Adams, *The College of William and Mary: A Contribution to the History of Higher Education with Suggestions for National Promotion. Circulars of Information of the Bureau of Education No. 1-1887* (Washington, DC: Government Printing Office, 1887), 39n1.

[178] Ernest Earnest, *Academic Procession: An Informal History of the American College, 1636 to 1953* (Indianapolis, IN: Bobbs-Merrill, 1953), 54.

[179] *Statutes of the University of William and Mary*, 1792. Reprinted in: *The William and Mary Quarterly* 20, no. 1 (1911): 52–59, 57–58.

Thomas Jefferson was decidedly complimentary. "They hold weekly courts and assemblies in the capitol. The professors join in it; and the young men dispute with elegance, method and learning. This single school by throwing from time to time new hands well principled and well informed into the legislature will be of infinite value"; "From Thomas Jefferson to James Madison, 26 July 1780," in *The Papers of Thomas Jefferson*, vol. 3, *18 June 1779–30 September 1780*, ed. Julian P. Boyd (Princeton: Princeton University Press, 1951), 506–508.

lectures in Philadelphia as furnishing "a rational and useful entertainment to gentlemen of all professions, and in particular to assist in forming the legislator, the Magistrate, and the 'Lawyer.'"[180] "The knowledge of those rational principles on which the law is founded," he argued, "ought, especially in a free government, to be diffused over the whole community."[181] Wilson's successor Charles Hare planned a three-year program of teaching, beginning with "Natural Jurisprudence," next "International Jurisprudence," and only in the final year, "Jurisprudence of the United States and Pennsylvania."[182]

At Columbia, James Kent likewise spoke of the "singular obligations" of American citizens, given the nature of their government, "to place the Study of the Law at least on a level with the pursuits of Classical Learning."[183] He was convinced that the "Science of Civil Government" could be "stripped of its delusive refinements, and restored to the plain Principles of Reason" [184]

Nonetheless, specialization, together with the vicissitudes of funding, increasingly separated law from ethics. At the University of Virginia—the other significant site of

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[180] Reed, *Training*, 122. In 1790, Wilson began a proposed three-year course on law in Philadelphia, then the nation's capital, with lectures given three times a week at six in the evening.

[181] *The Works of James Wilson*, ed. Robert Green McCloskey (Cambridge, MA: Belknap Press of Harvard University, 1967), 73.

[182] Ibid., 122–23. See also, C. Stuart Patterson, "The Law Department" in *Benjamin Franklin and the University of Pennsylvania*, ed. Francis Newton Thorpe (Washington, DC: Government Printing Office, 1893).

[183] James Kent, *An Introductory Lecture to a Course of Law Lectures, delivered November 17, 1794* (New York: Published at the request of the trustee, printed by Francis Childs, 1794), 4.

[184] Ibid.

post-revolution college legal education—lack of funds resulted in the appointment of two instead of the three professors in human conduct that Thomas Jefferson had proposed: *Ethics and Moral Science*, and *Law and Politics*. As at William and Mary, with specialization came the continued combination of law with practical politics, but not, as before, moral philosophy.[185]

Conclusion

There were significant continuities in collegiate instruction through the colonial and revolutionary eras. The intellectual worlds of both held to the unity of the truth: the universe was orderly, even divinely ruled, with human knowledge promising an ever-expanding vision of the various laws governing the universe.[186] Only in the late nineteenth century, or even twentieth century, were these connections sundered, when

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[185] Thomas Jefferson's 1818 plans for the university included ten schools. Three were to be concerned with human conduct: private ethics, combined with general grammar, rhetoric, and belles-lettres and the fine arts under a professor of Ideology; a professor of Government to give instruction in the Law of Nature and Nations, Political Economy, and History being interwoven with politics and law; and a professor of Municipal Law, that is domestic law (federal and state laws), in distinction to international law. Thomas Jefferson, "Report for the Commissioners for the University of Virginia, August 4, 1818" in Merrill Peterson, ed., *Thomas Jefferson: Writings*, 457–73 (New York: Literary Classics of the United States, 1984).

[186] This intellectual vision continued through much of the nineteenth century. Certainly it was the vision of Noah Porter (1811–92), Yale's President; Veysey, *Emergence of the American University*, 26.

Recognizing this intellectual vision, of course, does not entail valuing it. "This curriculum really cohered around nothing but tradition. But it did assume, almost subliminally, the unity of knowledge: all truth flowing, it was supposed, from God." James Turner, *Language, Religion, Knowledge: Past and Present* (Notre Dame, IN: University of Notre Dame Press, 2003), 51.

scholars increasingly accepted a distinction between fact and value. Knowing the true would no longer mean knowing, ipso facto, the good.[187]

Scholarly treatments of the revolutionary period and, particularly, the Moral Philosophy course have often occluded its relationship to the study of law. By equating natural law solely with its modern form, some scholars herald the Moral Philosophy course as the beginning of natural-law reflection in the America, thereby cutting off its continuities with the colonial colleges.[188] Others, by accepting the twentieth-century consensus on the nature of law, anachronistically split ethics from politics and law.[189] Both accounts are incomplete, if not entirely mistaken.

From their colonial roots through the Revolution, American colleges taught law. They did not often teach the details of common law rules, at least before the establishment of college law professorships—although Witherspoon taught broadly on contracts—yet neither was the study of law separated from the practicalities of the moral life or government. Through their continued adherence to natural law—however changed in its details through the years—American colleges provided the intellectual tools for future leaders to justify, even critique, law and government. Morality and law were

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[187] Moral "truth," therefore, became only emotional or nonliteral. Science became the only arbiter of truth; Reuben, *Making of Modern University*, 3.

[188] "Natural law, the realm of reason, the realm of nature were in the ascendency. The supernatural was in decline;" Rudolph, *American College and University*, 40.

[189] This is true even of "supporters" of natural law reflection who make a distinction between moral education and political and policy ideas undertaken. Robson's emphasis, for instance, is on finding "politics" in the education of the founding fathers. Thus, when they read Jean Jacques Burlamaqui's *Principles of Natural and Political Law* they found material "related to politics," in Robson's estimation. But in Pufendorf's *De Officio Homines et Cive,* the "emphasis was more on the moral than the governmental facet of politics"; *Educating Republicans*, 83–84.

commensurable ideas. For most Americans, indeed: the physical laws of nature and the moral law remained equally God's law.

* * *

CHAPTER 1's study of law and the American college has argued, first, that when we attend to the history of colleges as sources for natural-law thinking and sites for natural law's engagement with common law, we find distinctive ways of talking about law. The varied natural-law traditions of the Puritans and the early Republic—unlike the majority of today's discourses—did not restrict teaching on law to the skills of its practice. Questions of law were explicitly tied to broader questions of theology, morality, and politics, and were rightly the concern of all people[190]

Second, CHAPTER 1 has offered up two discourses on law that significantly differ from today's leading theological accounts. The Puritans, we saw, adhered to a chastened form of natural law concerned with civilization apart from God's revelation. The Revolutionaries cast off the Puritans' doubts about the sufficiency of reason for the epistemic optimism of "scientific" modern natural law. Might these approaches open alternatives for Christians and others committed to understanding and critiquing American law in morally realist ways?

Third, though, CHAPTER 1 presented us with choices. Embracing one or other of Puritan and modern natural law has consequences. The Puritan account, with its suspicion as to the reach and reliability of human reason, might assuage the (generally protestant) concern that recourse to natural law insufficiently considers sin. But, so chastened, does it provide us with enough? On the other hand, the modern-natural-law approach of the

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[190] At least *all* white educated men.

Revolutionary curriculum—together with the self-evident principles of the Common Sense tradition—might suggest a baseline for contemporary discussions of law in pluralistic society. But is its corralling of epistemic optimism and Christian commitments theologically flawed and ultimately contingent?

In CHAPTER 3 and CHAPTER 4, we will return to American legal education and its changing recourse to, or rejection of, natural law. But first, in CHAPTER 2, we will turn to another source of natural-law thinking in the history of American law: William Blackstone and his famous *Commentaries on the Laws of England.*

CHAPTER 2

THE EARLY AMERICAN RECEPTION OF BLACKSTONE

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Retrospect and Prospect

In CHAPTER 1, we considered early American collegiate education and the broader intellectual cultures—Puritan and Revolutionary—which the colleges inhabited and cultivated. The colleges and their curriculums, we saw, proved a source of natural-law reasoning in America, and a site for natural law's negotiation with common law. In this second chapter of PART I, we turn to another significant source and site: the American reception of William Blackstone's *Commentaries on the Laws of England.* If natural law is to be invoked today to explain and critique American law, then its proponents will do well to understand the importance of Blackstone's *Commentaries* in shaping American common law.

Why is this so? We will see that Blackstone organized the common law (§2). By giving it a hitherto unknown structure and order through its principled basis in natural law, Blackstone commended the common law to Americans at a time when both its disorderliness offended the Enlightenment minds of the builders of a new Republic and its English origin rendered its survival in America uncertain (§3.2., §3.3.). Concise and comprehensive, Blackstone's *Commentaries* provided a much-needed tool to students and practitioners in the new Republic, and well into the nineteenth century the *Commentaries* remained a prominent, and—with some judicious editing—relevant guide: shaping the assumptions of generations of Americans that the common law is fundamentally in accord with natural law or reason (§3.4.).

What do we gain from considering this history? At least three things can be said at the outset. CHAPTER 2 argues, first, and most basically, that a common-law legal

system can indeed be outlined and explained in reference to natural law (§2.1., §2.2.). This, in itself, is a significant recovery. If we can marshal similar thoughts today, then we need not see American law solely through the mostly positivistic lens of contemporary legal practice or scholarship.[1] Instead, we can relate law to broader theological, moral, and political discourse. But, more particularly, examining Blackstone offers us examples of what it might look like for us to offer just such a natural-law treatment of common law. As true for most natural-law accounts, Blackstone offers high-level treatments of law's source and authority (§2.1.). CHAPTER 2 argues, however, that natural law is not simply a prefatory device for Blackstone; contrary to his usual interpretation, for, in addition, Blackstone offers examples of how natural law might serve to structure a body of law, and justify or critique its specific enactments, defenses, and punishments (§2.2.). This is so, even as his lack of interest in theoretical questions opens his thought to potential critique (§2.1.2.).

Second, CHAPTER 2 argues that when we attend to Blackstone's *Commentaries* (§2), we find treatments of natural law that differ from those most generally familiar in theological thought. These treatments have notable consequences for the interaction of natural law and human law. While Blackstone follows in the well-worn tradition of thinking that human law might act where natural law does not, or specify the details of broad natural-law principles, he also suggests that natural law need not operate as a

[1] In her *Law's Virtues*, Cathleen Kaveny offers one model for this. She treats commitments to autonomy and solidarity as fundamental to the contemporary shape of American law; (Washington, DC: Georgetown University Press, 2012).

"trump card" in human legal determinations.[2] When he considers property, for instance, he notes that the practices of human legal systems on the whole depart from natural law. While he offers a brief justification—inheritance laws tend to civic peace, he says, and the wholesale practice of the nations is itself a kind of "secondary natural law"—Blackstone nonetheless advocates for self-consciousness among lawmakers and citizens. Human laws may deviate from natural law, he says, but if so, lawmakers and citizens must recognize this deviation, and justify it.

Third, CHAPTER 2 argues that there is a certain modesty to Blackstone's treatment of natural law. This has consequences for our ability to critique the law. Modern positivist critics of natural law suggest that natural law places human law beyond criticism. Whether or not we agree wholly, we might think, at least, that the Puritan reference of human legal and governmental authority to God, for example—outlined in CHAPTER 1, §2.3.—risks curtailing criticism of *human* decisions and actions. Is Blackstone similarly guilty? What we find in Blackstone's account is that, whatever human law's connection to natural law, the courts must practice human law. Natural law, then, is a standard with which to explain and stabilize human laws, but also a standard against which human laws are rendered contingent and revisable. For instance, Blackstone, we shall see, suggests that capital punishment is only justifiable in reference to a moral standard. It is never justified by the simple diktat of a legislature. Calling into

[2] Speaking of *rights*, Ronald Dworkin suggested that: "Rights are best understood as trumps over some background justifications of political decisions that states a goal for the community as a whole. If someone has a right to publish pornography, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did"; "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (Oxford: Oxford University Press, 1984), 153.

question eighteenth-century England's long list of capital offenses, we see that natural law, in his hands, need not always buttress the status quo. Arriving at a better understanding of Blackstone as a natural-law thinker, therefore, can help us correct features of his appropriation by contemporary conservatives. Blackstone has more to offer.

CHAPTER 2 argues, moreover, that behind Blackstone's modesty is a belief that human reason is sufficiently weakened that our access to natural law is curtailed. In other words, sin has a place in Blackstone's natural law. His response, like John Locke's, is to point to the revealed law of Scripture. This will coincide with, and support, he says, our discernment of natural law. Much more needs to be said, of course, to understand what this might mean in practice. We likely have less confidence than Blackstone or Locke that recourse to the Bible will reveal uncontested moral truths. (And would the Bible's interpreters retain the modesty of interpretation Blackstone says is necessary of those "naturally" discerning the natural law?) Nonetheless, Blackstone's law is concerned with sin and Scripture.

CHAPTER 2's attention to Blackstone's *Commentaries* and their reception in America reveals to us, then, a further source of natural-law thinking and site for its engagement of common law. We turn, first, to Blackstone and his *Commentaries* (§1), next to the *Commentaries*' treatment of natural law (§2), and, finally, the *Commentaries* reception in America (§3).

1. Blackstone and his *Commentaries*

Any history of the American legal tradition—let alone any story of natural-law thinking in the law—must account for the transplant, growth, and withering in New World soil of the influence of William Blackstone (1723–80) and his *Commentaries on the Laws of England*, the "legendary fount of knowledge for lawyers and statesmen in American history."[3] Blackstone's *Commentaries*, based on lectures delivered at Oxford, were published from 1765 to 1769, and present a systematic treatment of English law in four volumes: *The Rights of Persons*, *The Rights of Things*, *Of Private Wrongs*, and *Of Public Wrongs.* From publication, the *Commentaries* have been a touchstone for American law: from a guide for practice—Lincoln taught himself law through reading the *Commentaries*[4]—to the trusted repository of jurisprudential thought of the founding era.

William Blackstone achieved conventional success in England as: a university reformer (Oxford University Press owes much to his reorganization); a member of parliament (for Hindon, 1761–68, and Westbury, 1768–70); and a seemingly undistinguished judge of the Court of Common Pleas.[5] But his fame today rests almost

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[3] Jessie Allen, "Reading Blackstone in the Twenty-First Century and the Twenty-First Century through Blackstone" in *Re-Interpreting Blackstone's Commentaries: A Seminal Text in National and International Contexts,* ed. Wilfred Prest (Oxford: Hart, 2014), 215.

For an outline of Blackstone's life, see Wilfrid Prest, "Blackstone, Sir William (1723–1780)" in *Oxford Dictionary of National Biography*, last modified September 2015, http://www.oxforddnb.com/view/article/2536.

[4] For a nuanced account of Lincoln's legal education, see Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books*, 93 Marq. L. Rev. 1283 (2010).

[5] Biographies of Blackstone, include: Ian Doolittle, *William Blackstone: A Biography* (Haselmere, UK: Ian Doolittle, 2001); David A. Lockmiller, *Sir William*

solely on two interrelated achievements: First, through his lecturing, latterly as the inaugural holder of Oxford's Vinerian Chair (1758–66), he established English common law as a university discipline.[6] Before Blackstone, only the church's canon law and Rome's civilian law had been taught in English universities. Second, in writing his *Commentaries on the Laws of England*, Blackstone organized English common law's seemingly ad hoc collection of forms and precedents into a comprehensive system.[7] His

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Blackstone (Chapel Hill: University of North Carolina Press, 1938); Wilfrid Prest, *William Blackstone: Law and Letters in the Eighteenth Century* (Oxford: Oxford University Press, 2008); and Lewis C. Warden, *The Life of Blackstone* (Charlottesville, VA: Michie, 1938). William Searle Holdsworth offers a summary of Blackstone's life and achievements in volume 12 of *A History of English Law* (London: Meuthen, Sweet & Maxwell, 1972–92), 702–37.

[6] The opening pages of the *Commentaries* make a case for university study of law. "Law," Blackstone begins, is the "most useful and most rational branch of learning"; it is "built upon the surest foundations, and approved by the experience of the ages"; William Blackstone, *Commentaries on the Laws of England*, vol. 1, *Of the Rights of Persons* (1765; repr. Chicago: University of Chicago Press, 1979), *3, *5.

The *Commentaries* are standardly cited to the page of the original edition (known as the star page). Most later editions include the star page in the margin or text. Where necessary for ease of reading, I have sparingly modernized Blackstone's punctuation and spelling.

As a *useful* science, common law's neglect by the universities, said Blackstone, had practical consequences. For one, its neglect leaves ill prepared for public duties those "whom nature and fortune have bestowed more abilities and greater leisure"; *Commentaries* 1, *7. Those future politicians and men of property, that is—whose wealth and position allow university study—are robbed of the constitutional wisdom developed through the centuries which is found embedded in the law. And for those who would become lawyers, the universities' neglect of law excludes them from "liberal education"; ibid., *32. Instead, would-be lawyers are trained, he says, through "a tedious lonely process to extract the theory of law from a mass of undigested learning," or by "assiduous attendance on the courts to pick up theory and practice together"; ibid., *31.

[7] First published from 1765 to 1769, Blackstone was fully involved in eight editions of the *Commentaries*. Among the changes in subsequent editions, Blackstone offered a more rigorous examination of equity (fourth edition), and a defense of why he focused on the good of the English Constitution, and not its imperfections (eighth edition). The variations between the first eight editions are noted in W. G. Hammond's edition of the *Commentaries*: San Francisco: Bancroft-Whitney, 1890.

Commentaries, indeed, offered readers "a general map of the law, marking out the shape of the country, its connexions and boundaries, its greater divisions and principal cities."[8] In an introduction and four further books, Blackstone works methodologically through: the nature of law, its application, and its study; the "rights of the person," what today would be called public or constitutional law;[9] the law of property; civil procedure and remedies; and criminal law. English law, thus marshaled by Blackstone, was rendered elegant and clear: to be understood through his exposition and examples, and admired as the fruit of the rational order of nature and the specific history of the English people.[10]

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[8] *Commentaries* 1, *35.

[9] For Blackstone and his initial readers, "constitutional" did not refer to a document or body of higher laws, but rather *all* the laws, institutions, and conventions of government "as constituted." See, Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Belknap Press of Harvard University, 1967), 68.

His "constitutional" concerns accordingly are not our own. He assumes that the courts and legislature do not clash. His attention, instead, is on the balance of the executive (the Crown) and the legislature (Parliament), and not on citizens' relationship to executive or legislature. See, Edwin S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928); and 42 Harv. L. Rev. 365 (1928).

[10] Blackstone was far from the first English lawyer to describe natural law as a source for, or part of, English common law. For a list of previous exponents, see: R. H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone,* 3 Ave Maria L. Rev. 1, 5–11 (2005).

As early as the thirteenth century, the collection of writings known as "Bracton" presented English law as a rational set of principles, and did so by imitating the form of Justinian's *Institutes* and the terminology of Roman law and canon law; *On the Laws and Customs of England*, ed. G. E. Woodbine, trans. S. E. Thorne (Cambridge, MA: The Belknap Press of Harvard University, 1968–77).

Bracton's work, moreover, likely depended on the natural law of Italian civilian Azo of Bologna (c.1150–1230), not least the suggestion that some binding rules are identifiable by a simple exercise of human reason. See, *Select Passages from the Works of Bracton and* Azo, ed. F. W. Maitland (London: B. Quaritch, 1895).

In the fifteenth-century flowering of English reflection on the law there are sophisticated attempts to bring coherence to common law, including by attempted proofs of the common law's reasonableness from figures such as Reginald Pecock (c1395–

1460), John Fortescue (1394–1476), and Christopher St. German (1460–1540), and likewise in the more practical writings of Thomas Littleton (1422–81). John Fortescue's *De Laudibus Legum Angliae*, for instance, follows in the line of Thomas Aquinas (1225–74) by presenting certain rules as laid down by God for the benefit of humankind. While some rules are solely discoverable through Scripture, he says, others can be known by the exercise of reason alone; *On the Laws and Governance of England*, ed. Shelley Lockwood (Cambridge: Cambridge University Press, 1997). Lockwood describes Thomas as "perhaps Fortescue's major source"; ibid., xxvii.

In the early sixteenth century, Christopher St. German identified the law of nature with the law of reason, and made a distinction between primary reason—that identifies fundamental rules grounding law—and secondary reason, which is the process of reasoning that proceeds from primary reason to particular conclusions. *St. German's Doctor and Student*, ed. T. F. T. Plucknett and J. Barton (London: Selden Society, 1974).

This increasing emphasis on *reason* changed the vocabulary of English common law reflection, if not wholly its natural-law orientation. In St. German's dialogical *Doctor and Student*, when the "student of the laws of England" is asked by the "Doctor of Divinity" what he has to say about the law of nature, he answers that: the term is not in use by common lawyers, but that its content is treated under the aspect of "the law of reason"; ibid., dialogue 1, chapter 5. Frederick Pollock suggests that:

> [o]n the whole, the natural justice or "reason of the thing" which the Common Law recognizes and applied does not appear to differ from the law of nature which the Romans identified with the *jus gentium* and the medieval doctors of canon and civil law boldly adopted as being divine law revealed through man's natural reason." (*The Expansion of the Common Law* (Boston: Little, Brown, 1904), 111.)

Pollock suggests that references to the law of nature—tied to Roman canonical authority—were increasingly dropped from the beginning of the thirteenth century as the English Crown resisted Papal "interference" in England; ibid., 113.

Certainly, common lawyers of the Elizabethan and Jacobean eras offered increasing sophisticated accounts of the place of *reason* in the law, some distinguishing *natural* from *artificial* reason. Some too argued for *contract* as a basis for the law, although not necessarily as a replacement to natural law. Edward Coke (1552–1634) famously made a case for lawyers' artificial reason, gained through study and experience, as controlling the common law, and not natural reason. (Co. Litt. 97b. That is: *The First Part of the Institutes of the Lawes of England, Or, Commentarie Upon Littleton* (London: Printed for the Societie of Stationers, 1628), 97b.) Yet in his *Commentaries on Littleton*, Coke includes Littleton's account of natural law as both a "fountain" for common law, and also as a law in force in England (alongside the common law); Co. Litt. 11a. And in two of Coke's most famous decisions, *Calvin's Case* in 1608 and *Dr. Bonham's Case* in 1610, there are direct appeals to nature; 7 Co. Rep. 1a8, 77 ER 377 and 8 Co. Rep. 107, 77 ER 638. (In Calvin's Case, the law of nature was claimed as part of the law of England, and invoked to consider whether the Scots were aliens for the purposes of English law. Meanwhile, in Dr. Bonham's Case, the law of nature was invoked to suggest that the courts could reject statutes where they conflicted with fundamental principles of the law.)

2. The *Commentaries* and Natural Law

2.1. "Of the Nature of Laws in General"

Natural law undergirds the structure of the *Commentaries* and forms the content of some of its most important concepts. One count of the *Commentaries*' references to "natural law" or "law of nature" found eighty-one.[11] This number does not tally, however, the occurrence of distinct but related terms in the *Commentaries*, such as "natural rights" or "natural justice." Nor does it include those places where descriptive and normative conceptions of nature come together, such as Blackstone's discussion of natural duties toward children,[12] natural liberty,[13] the natural foundations of justice,[14] and natural equity, let alone more implicit treatments.[15]

If John Selden (1584–1654) is a primary figure in English law's turn to contract, he nonetheless made his case through offering an account of natural law. Namely, he argued that natural law has a historical, contractual, basis in the precepts given to Noah. (Selden's primary work is available in: *Opera Omnia*, ed. D. Wilkins (Clark, NJ: Lawbook Exchange, 2006.)) Matthew Hale (1609–76)—whose writings strongly influenced Blackstone's—took something of a mediating path between Coke and Selden on the place of reason and contract. See, Alan Watson, *The Structure of Blackstone's Commentaries*, 97 Yale L.J. 79 (1998).

[11] R. H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015), 133.

[12] *Commentaries* 1, *436.

[13] E.g., ibid., *53.

[14] Ibid., *42.

[15] William Blackstone, *Commentaries on the Laws of England*, vol. 2, *Of the Rights of Things* (1766; repr. Chicago: University of Chicago Press, 1979), *162.

Most scholarly treatments of the *Commentaries* restrict their attention to Blackstone's most sustained discussion of natural law, which occurs in "Of the Nature of Laws in General," the second section of his introduction.[16] The section begins: "Law, in its most general and comprehensive sense, signifies a rule of action."[17] In this broad sense, people speak of "laws of motion, of gravitation, of optics, of mechanics, as well as the laws of nature and of nations."[18] To speak of "law" proper however, says Blackstone, is to speak of a rule of action that involves a superior and an inferior: a law is "prescribed by some superior… which the inferior is bound to obey."[19]

2.1.1. Natural Law as Precept

While Blackstone thus includes brief treatments of "law" as it pertains to inanimate, vegetable, and animal life,[20] his attention is on *precepts*.[21] To speak of law proper, on Blackstone's account, is to speak of free and rational beings that can recognize and follow commands given by a superior. In this understanding of law, Blackstone follows the modern natural lawyers—Hugo Grotius (1583–1645) and Samuel Pufendorf

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[16] In Blackstone's Introduction, "Of the Nature of Laws in General" is preceded by "On the Study of Law," and followed by "Of the Laws of England" and "Of the Countries subject to the Laws of England."

[17] *Commentaries* 1, *38.

[18] Ibid.

[19] Ibid. Blackstone supposes that laws of motion, etc., are commands imposed by God upon matter. Today, when scientists speak of "laws" they mean that a particular phenomenon always occurs under certain conditions, *irrespective of any lawgiver*.

[20] Ibid., *38–39.

[21] Ibid.

(1632–94) among them—and through them the Spanish late scholastic Francisco Suárez (1448–1617). Thus, in Blackstone's account, "law" *for human beings* denotes "the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior."[22]

2.1.2. Will and Reason

Blackstone at first stresses that the content of the law of nature for human beings is God's *will*: the "will of his maker is called the law of nature."[23] As for Grotius, Pufendorf, Suárez, and their ilk, Blackstone's attention, then, is on God's ability and choice to "regulate[] and restrain[]" human will, by "la[ying] down certain immutable laws of human nature."[24]

Given what God has chosen, however—the constitution of the universe as it is, and human beings as *rational*—humans can "discover the purpose of those laws" laid down by God.[25] Accordingly, even if in one sense God may "establish[] at his own pleasure certain arbitrary laws," nonetheless the subject of such laws "answers the end of its formation."[26] God may choose arbitrarily, but human beings so created fulfill the ends of their creation through exercise of the reason God has chosen to impart.

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[22] Ibid., *39.

[23] Ibid.

[24] Ibid., *39–40.

[25] Ibid., *40.

[26] Ibid., *38.

Blackstone, however, is not a philosopher or theologian. His overall account of natural law has internal tensions. After having stated the seemingly arbitrary grounds of God's choices, Blackstone quickly suggests that, given God's "infinite wisdom," God has:

> laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions.[27]

There are ways, perhaps, to account for Blackstone's differing treatments of the relationship of *will* and *reason* in his depiction of natural law. But it is more straightforward to think that Blackstone presents a not-entirely-worked-out conglomerate of the standard positions of his day. Blackstone traverses the overall structure of natural law solely in order to speak of law as it applies to human beings. His attention is not on God's nature, then, except as it pertains to human knowledge of natural law. Indeed, all that is needed for the coherence of his account is that human beings possess the ability to rationally reflect on their nature, that there are "laws of good and evil," and that reflection on human nature brings some knowledge of these laws.[28] The metaphysics of why all this is so, if confused in his treatment, has little import for the arguments in the nearly 2000 pages that follow.

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[27] Ibid., *40.

[28] Ibid.

2.1.3. Knowledge of the First Principles of Natural Law

The principles of good and evil that are discoverable by humans, Blackstone suggests, are that "we should live honestly, should hurt nobody, and should render to everyone its due."[29] It is to these three, he notes, that Justinian reduced the whole of the law.[30] Knowledge of these principles is available through the exercise of right reason, says Blackstone, although indolence and ignorance disrupt their discernment. Happily, he says, "we should want no other prompter to enquire after and pursue the rule of right, but our own self-love, that universal principle of action."[31] With Grotius and Pufendorf, Blackstone affirms that human beings are so constituted that self-interest alone can reveal the first principles of natural law. With John Locke (1632–1704), however, Blackstone also emphasizes *happiness*: "the laws of eternal justice" and "the happiness of each individual," he says, are so interwoven "that the latter cannot be attained by observing the former."[32] And while Blackstone speaks at times, then, of "man's *real* happiness"—and thereby suggests that human beings can wrongly identify the objects of their happiness, or wrongly act to obtain them—happiness, as he describes it, nonetheless consists in pleasure, not perfection.[33] Human beings know, and are induced to follow, the first

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[29] Ibid.

[30] *Juris praecepta sunt haec, honeste vivere, alterum non laedere, suum cuique tribuere.* Blackstone cites this to Justinian's *Institutes* 1.1.5. In modern editions, the usual citation is 1.1.*3*.

[31] *Commentaries* 1, *40.

[32] Ibid.

[33] Ibid., *41, my emphasis. This is in contrast to the more expansive position of the scholastic natural lawyers, such as Thomas Aquinas, for whom the natural law orders all things to the common good.

principles of natural law because of their experience as vulnerable people who live in society. And human beings know, and are induced to follow, the first principles of natural law because they both accord with and further what we experience or anticipate as good or desirable.

While Pufendorf was sure that human beings in their current state can know the first principles of natural law, Blackstone seemingly follows the later thought of Locke, for whom human reason is sufficiently weakened that it needs the support of the revealed law of Scripture. For "every man" finds "that his reason is corrupt, and his understanding full of ignorance and error," says Blackstone.[34] And thus, because of human frailty, God "hath been please, at sundry and times and in diverse manners," to make knowledge of divine and natural laws available to humanity "by an immediate and direct revelation."[35]

The *content* and *obligatoriness* of the natural law known either through reason or revelation is the same, however, says Blackstone, because they share the same source.[36] Yet "humanly speaking," as to knowledge of that law, the revealed law of Scripture is truly "the law of nature, expressly declared so to be by God himself," whereas the other is "what, by the assistance of human reason, we imagine to be that law."[37]

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[34] Ibid.

[35] Ibid., *42.

[36] Divine *positive* law can create obligations beyond natural law.

[37] *Commentaries* 1, *42.

2.1.4. Human Laws and Natural Law

Blackstone is clear that, "[u]pon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these."[38] But the relationship he traces between human law and the natural and divine laws is distinctly variegated. He insists that human beings need human laws because of the human drive to sociability.[39] And Blackstone cites Pufendorf's famous claim that "the fundamental natural law is this: that every man must cherish and maintain sociability, so far as in him lies."[40]

Human laws are necessary, then, on account of the needs of self-interested but weak human beings to live in society. But the situations in which human law is enacted, and the relationship thereby to natural and divine laws, differs. There are circumstances, for instance, where human law pertains but natural and divine laws are *indifferent*: circumstances neither good nor bad in themselves.[41] In such circumstances, human beings, in Blackstone's view, are left to their "own liberty," save the restraints set by society through human laws.[42]

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[38] Ibid.

[39] Ibid., *43. Although, he argues that in a state of nature, the laws of nature and God would be sufficient.

[40] Ibid.

[41] Brian Tierney explores seven hundred years of discussion on natural law and indifference in his *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800* (Washington, DC: Catholic University of America Press, 2014).

[42] *Commentaries* 1, *42.

There are other circumstances, however, to which the natural and divine laws are *not* indifferent. In these circumstances, human laws "are only declaration of, and act in subordination to," their foundations. Murder, for instance, is "expressly forbidden" by divine law, and is an offense "demonstrabl[e] by natural law."[43] It is the divine and natural laws, then, which establish murder's "true unlawfulness," and not the words of judges or the text of legislation.[44] Human laws in such cases do "annex a punishment" to the crime.[45] They do put the law, and the consequences of its breach, into action. But in so doing they "do not at all increase its moral guilt, or superadd any obligation *in foro conscientiaie* to abstain from its perpetration."[46]

And there are situations, too, where "the thing itself has its rise from the law of nature," but "the particular circumstances and mode of doing it become right or wrong, as the law of the land shall direct."[47] In other words: there are situations where human law specifies the details of natural law. Blackstone's example is civil duties: a certain obedience to superiors, he says, is shown by divine and natural laws, but "who those

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[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] Ibid.,*42–43. Blackstone, however, is not interested in the question of the *existence* or otherwise of human laws. His is not the analytical approach of nineteenth- and twentieth-century legal philosophers. So where purported human "laws" offend divine and natural law, then, he is not careful to strip the title of "law" from them. He does not say: *an unjust law is not law at all.* (A maxim associated with Augustine and Thomas Aquinas, and famously quoted by Martin Luther King, Jr. in his "Letter from Birmingham Jail.") Instead, he says that human beings would be "bound to transgress a human law" that enjoined us to commit murder, lest they "offend both the natural and the divine" laws.

[47] Ibid., *55.

superiors shall be, and in what circumstances, or to what degrees they shall be obeyed" is a matter for legislation.[48]

2.1.5. Municipal Law[49]

Blackstone's treatment of *municipal* law—that is, the law of a particular state, as distinguished from the law between states—has confused his interpreters, and not without reason. He first defines municipal law straightforwardly as "the rule by which particular… nations are governed," and cites Justinian: "the civil law is that which every nation has established for its own government."[50] However, shortly thereafter he offers a further definition, within quotation marks: "Municipal law, thus understood, is properly defined to be 'a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.'"[51]

But what does it mean to "command[] what is right and wrong?" The answer divides Blackstone's contemporary readers. Some proponents of natural-law thinking read this second definition as taking for granted Blackstone's earlier articulation of

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[48] Ibid.

[49] Ibid., *43. Blackstone's work is on the law of *England,* but for completeness his discussion of "the nature of laws in general" includes the *law of nations.* In the relations between states, he says, natural law forms the default. Each state recognizes no superior, so they rely upon natural law as the law "to which [all] communities are equally subject"; ibid.

[50] Ibid., *44. *Jus civile est quod quisque sibi populus constituit.*

[51] Ibid.

natural and divine laws as foundational to human law.[52] The second definition, therefore, is descriptive: the lawmaker can, and would only, command that which is in accord with natural law.

Some later editors of the *Commentaries*, however, include notes suggesting that Blackstone's second definition is superfluous given his first, and, indeed, that the second sits in some tension with Blackstone's general treatment of natural law.[53] Others suggest—to their delight or disdain—that the second definition reveals Blackstone to be a positivist. Indeed, not only is Blackstone revealed as a *legal* positivist, for whom the law is whatever the sovereign says it is, but Blackstone, the seeming *moral positivist*, suggests that "right" and "wrong" too are defined by the sovereign lawgiver. Blackstone's references to natural law amount, in other words, to a pious gloss on a Hobbesian vision.[54]

The proponents of the natural-law position, then, read Blackstone's words before the second definition but not those that follow, while the proponents of the positivist position read only the bare statement, not the surrounding discussion. What makes more

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[52] This seems to be Hadley Arkes's position. Arkes presents the second definition as *exemplary* of the idea that human law should "seek to embody principles about the nature of right and wrong"; *First Things: An Inquiry into the Principles of Morals and Justice* (Princeton, NJ: Princeton University Press, 1986), 26.

[53] See, e.g., *Commentaries on the Laws of England in Four Books, With Notes Selected from the Editions of Archibold, Christian, Cole, Ridge, Chitty, Stewart, Kerr, And Others; And in Addition Notes and References To All Text Books and Decisions Wherein the Commentaries Have Cited and All the Statutes Modifying the Text*, ed. William Draper Lewis (Philadelphia: J. B. Lippincott, 1893), volume 1, *44.

[54] Paul Lucas, *Ex Parte Sir William Blackstone, "Plagiarist": A Note on Blackstone and the Natural Law* 7 Am. J. Legal Hist. 142 (1963).

sense in context is to read Blackstone as working with different valences of "right" and "wrong" in his two definitions.

Unlike in his first definition, in Blackstone's second his attention is not on the moral meaning of right and wrong, but rather on *right* as the legal ability to do something and *wrong* as the violation or transgression of the law. This becomes clearer as Blackstone distinguishes "*civil conduct*" from "*moral* conduct."[55] Whereas moral conduct, he says, pertains to human duties to God, self, and neighbor, "municipal or civil law regards [the human being] also as a citizen, and bound to other duties toward his neighbour, than that of mere nature and religion."[56] Blackstone thus sees the civil realm of municipal law as imposing duties *additional* to the law of nature. Human beings, *as citizens*, must "contribute, on [their] part, to the subsistence and peace of the society."[57] When solely concerned with the civil realm, municipal law thus declares actions *right*—that is, permitted or empowered by law—or actions *wrong*—that is, prohibited by law—in situations *indifferent* to natural law, or where the *specification* of human legislation is

[55] *Commentaries* 1, *45. This interpretation receives further support from Blackstone's treatment of the nature of obligations. He offers a "non moral account" which presents an obligation as a reason to act in a particular way (including simply to avoid punishment), and a "moral" account in which laws "are binding upon men's consciences"; ibid., *57. Importantly, non-moral accounts *add* to the moral as an additional motivation for the bad man to follow the law.

Likewise, Blackstone repeatedly distinguishes between things that are *mala in se* ("bad in themselves"), and those which are *mala prohibita* ("wrong because prohibited" by positive law). "Conscience" is engaged with the former, but not the latter; ibid., *57.

[56] Ibid., *45.

[57] Ibid.

needed.[58]

2.2. Natural Law in the *Commentaries* beyond "Of the Nature of Laws in General"

So much for Blackstone's overview of natural law in "Of the Nature of Laws in General." Most contemporary critics of Blackstone's natural law stop their analysis here. In so limiting their attention, some positivists seek to excuse Blackstone's natural-law sensibilities: treating Blackstone's introductory words as merely "an obligatory eighteenth-century exercise" without broader import.[59] Other positivists reject the value of the *Commentaries* precisely because of Blackstone's expressly stated natural-law position.[60] Whatever their assessment, few consider the overall frame of the *Commentaries*. This is a mistake.

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[58] Blackstone gives the example of a wife's goods becoming her husband's. This, he says, "has no foundation in nature; but… [in England was] merely created by law, for the purposes of civil society"; ibid., *55.

[59] Stanley H. Katz, "Introduction to Book I" in *Commentaries* 1, iv. Holdsworth feels the need to provide an explanation for why Blackstone did not wholeheartedly affirm the "orthodoxy" of parliamentary supremacy: "Blackstone's training as a lawyer, his sympathy with the [Old] Whig doctrines which had triumphed at the [Glorious] Revolution, and consequently with the theory that men had natural rights given them by a divinely ordained law of nature, made him susceptible to both the legal and political influences which induced an hesitation to accept all the consequences of the theory of sovereignty"; *History of English Law*, 10:529.

[60] Daniel J. Boorstein portrays Blackstone's work as ultimately circular. Blackstone's natural-law beliefs lead him to assume that the law should be reasonable, and the *Commentaries* thus make English law reasonable; *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (Chicago: Chicago University Press, 1941). Moreover, the "rationality" on which this depends, says Boorstein, relies on foundational, yet indemonstrable, values at the heart of existing social arrangements.

2.2.1. *The Structure of the* Commentaries

Limiting analysis of Blackstone's views on natural law to his explicit discussion at the beginning of the *Commentaries* misses the fundamental contribution of natural law to his project. As David Ibbetson notes: "[i]n the course of the eighteenth century, many areas of [English] law came to be redefined in terms of natural lawyers' principles."[61] Henry Ballow (1707–82), for instance, "plagiarized from Pufendorf" to present an organized English law of contract.[62] The general rule of liability for negligence, first stated in England in 1767, likewise pulled from Pufendorf.[63] New treatments of the law of trusts, and the first work on corporate law, were likewise explicitly based on natural-law grounds. And most of all, Blackstone organizes *all* of English law in its image. English law, which had been formed through the development of particular writs or procedural actions,[64] was, through Blackstone's eighteenth-century adoption and adaptation of natural-law concepts, formed into a system of concepts and categories.

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[61] David Ibbetson, David. "Natural Law." In *The Oxford International Encyclopedia of Legal History*. New York: Oxford University Press, 2009. See also: David Ibbetson, *Natural Law and Common Law,* 5 Edin. L. Rev. 1 (2001); and Julia Rudolph, *Common Law and Enlightenment in England, 1689–1750* (Woodbridge, UK: Boydell, 2013), "Common Law Jurisprudence and the Philosophy of Natural Law," 164–200.

[62] Ibbeston, *Natural Law (Encyclopedia)*. See also, Warren Swain, *The Law of Contract 1670–1870* (Cambridge: Cambridge University Press, 2015), 275–78. Blackstone is widely regarded as offering a poor treatment of contract. See, Stephen Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge: Cambridge University Press, 2011), 1–21.

[63] Ibbeston, *Natural Law (Encyclopedia)*.

[64] The common law that Blackstone sought to organize primarily grew, from the medieval period, through the use and development of *writs*: legal orders of the King's courts that directed or enjoined their addressees to do, or refrain from, a specified act. The writ of *habeus corpus* ("produce the body"), for instance, is a formal order by a court

Blackstone did not order his work through discussion of particular writs to be pleaded—from the *writ of aiel* through the *writ of mesne* to the *writ of waste*[65]—or by discussing an ad hoc collection of terms. Rather, he divided his work into larger questions of rights and duties. He begins the second volume of the *Commentaries*, for instance, by noting that this volume considers "*jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the writers on natural law style the rights of dominion, or property."[66]

2.2.2. *Justifying Laws*

In addition to providing the frame and conceptual basis for the *Commentaries*, Blackstone uses natural law to undergird, explain, and justify specific laws or defenses. For instance, in volume four, concerning crimes, Blackstone explains—with reference to

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to a person or agency to deliver to the court a person currently held by that person or agency.

To bring a case to a common law court a party needed to find an appropriate writ in order to plead his case: the *form* of the legal action having priority over the *cause*. For a short introduction, see F. W. Maitland's *The Forms of Action at Common Law: A Course of Lectures*, ed. A. H. Chaytor and W. J. Whittaker (New York: Cambridge University Press, 1989). *Forms of Action* was first published together with Maitland's *Equity* in 1909.

[65] Writs are highly specific. The *writ of aiel* was an action by a party based on the seisin (possession of land by freehold) of a grandfather for the recovery of land of which that party had been dispossessed. The *writ of mesne* was an action by which a tenant could recover damages from a mesne lord (intermediate feudal lord) whose failure to perform services owed to a superior lord had led the latter to distrain (seize) chattels on the tenant's land. The *writ of waste* was an action commanding a sheriff to inhibit a tenant from an act of waste. (Waste being the unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance.)

[66] *Commentaries* 2, *1.

Grotius and Pufendorf—that the justification for punishing certain crimes such as murder is that they are "crimes against the law of nature."[67] Meanwhile, in volume three, concerning private wrongs, Blackstone suggests that the best justification of self-defense is the prompting of nature.[68] Self-defense, indeed, is "justly called the primary law of nature," he says, because of its direct relationship to the human drive to survival.[69]

If laws are to be justifiable, however, they must have a principled basis on which arguments can be advanced. Natural law, then, also provides Blackstone with a means to criticize laws and policies, which do not possess such a basis. And yet Blackstone is rarely considered a *critic*. For it is true that, in instincts and conviction, Blackstone was a *conservative*. He sought to conserve the values, ideas, and institutions foundational to the British Constitution, which he thought admirable. Thus, while some assess Blackstone's political and legal vision as "moderate and realistic,"[70] the *Commentaries* received strong criticism from their initial publication. Most profoundly, Jeremy Bentham (1748–1832) launched an assault on Blackstone's natural-law arguments, his defense of the British Constitution, and, beyond Blackstone's account alone, the very probity of common law.[71]

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[67] "See Grotius, de j.b.&. p.l.2.c.20. Puffendorf, L. of Nat. and N. b.8.c.3"; William Blackstone, *Commentaries on the Laws of England*, vol. 4, *Of Public Wrongs* (1769; repr. Chicago: University of Chicago Press, 1979), *7.

[68] William Blackstone, *Commentaries on the Laws of England*, vol. 3, *Of Private Wrongs* (1768; repr. Chicago: University of Chicago Press, 1979), *3–4.

[69] Ibid., *4.

[70] Doolittle, *William Blackstone*, 15.

[71] Jeremy Bentham, *A Fragment on Government*, ed. J. H. Burns and H. L. A. Hart (Cambridge: Cambridge University Press, 1988). First published in 1776, Bentham criticizes Blackstone for his apathy to reform and casts legislation—and not common law—as rational and reforming.

Bentham's successors have agreed, at least with his first criticism. H. L. A. Hart and Duncan Kennedy are among the more famous critics who have suggested that Blackstone was an apologist for the status quo, and that his recourse to natural law stifles rightful criticism of the law.[72]

Blackstone's adversaries, however, usually neglect the *Commentaries*' not infrequent criticisms of *specific* laws, from military law to gambling.[73] And importantly, they neglect Blackstone's arguments on the rightful bounds of the state, including the use of the death penalty. Divine and natural laws, says Blackstone, suggest that capital punishment may be appropriate for crimes that are *mala in se*; that is, the death penalty may be acceptable, or even required, for crimes "bad in themselves," such as murder and rape.[74] But there is no natural sanction for inflicting capital punishment "at will and

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[72] Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev 209 (1979); H. L. A. Hart, *Blackstone's Use of the Law of Nature*, 3 Butt. S. Afr. L. Rev. 169 (1956). For Hart's broader statement of the moral grounds for separating law and morality, see: "Positivism and the Separation of Law and Morals," 49–87 in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).

Daniel Boorstein suggests that Blackstone's conservatism relied on unsubstantiated beliefs that the law is "witness to the power of man's reason, to the beauty of English institutions, and, ultimately, to the Intelligence of God"; *Mysterious Science*, 23.

[73] Blackstone discusses military law at *Commentaries* 1 *413–16, 421, and gambling laws at *Commentaries* 4 *171. It is certainly true that Blackstone did not criticize the legal system as a whole. Nonetheless, he condemned statutes relating to the poor as inadequate and imperfect. Such is "the fate that has generally attended most of our statute laws," he says, "when they have not the foundation of the common law to build on"; *Commentaries* 1, *365.

In general, indeed, Blackstone was strongly aware of the inadequacies of criminal law. "Those who still believe in the legend spread by Bentham, that Blackstone was an uncritical optimist who defended all things established, should read the Fourth Book of his Commentaries"; Holdsworth, *History of English Law*, 11:579.

[74] "With regard to offences mala in se, capital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as, in the case of

discretion of the human legislature."[75] For "no individual has, naturally, a power of inflicting death."[76] In an era when theft and forgery, for example, were capital offenses, Blackstone critiques the practice of his age, and undermines the supposed right of the state to determine, without limitation, the punishment of crimes.[77]

2.2.3. Distinguishing Natural Law and Common Law

Believing natural law to structure the law of England, and to serve, with divine law, as one of its foundations, Blackstone devotes little time to *distinguishing* natural law from English common law.[78] In his treatment of laws, penalties, and procedures, natural law and common law are combined or separated depending on immediate context. For instance, he suggests that the measure of human punishments cannot be "absolutely determined by any standing invariable rule," and therefore it should be left to human legislators to consider what is "warranted by the laws of nature and society."[79] But when considering the adjudication of municipal law, he suggests that, while offenses arise from

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murder, by the precept delivered to Noah, their common ancestor and representative, 'whoso sheddeth man's blood, by man shall his blood be shed.' In other instances they are inflicted after the example of the creator, in his positive code of laws for the regulation of the Jewish Republic; as in the case of the crime against nature"; *Commentaries* 4, *9.

[75] Ibid.

[76] Ibid.

[77] See, *Commentaries* 4, *9–12, *17–19.

[78] See, John Finnis, *Blackstone's Theoretical Intentions*, 12 Am. J. Jurs. 163 (1967). Richard Cosgrove argues, alternatively, that Blackstone looks "backwards" to natural law and "forwards" to positivism; *Scholars of the Law: English Jurisprudence from Blackstone to Hart* (New York: New York University Press, 1996), 21–49.

[79] *Commentaries* 4, *12.

breach of "the revealed law of God, others against the law of nature, and some... against neither," in the common-law legal system it is best to consider all offenses as punishable based solely on "the law of man."[80] By this he seems to mean that, while the source of an offense's illegality is the natural law (or human law where natural law is indifferent), courts administer all laws, irrespective of source, as part of the municipal, human processes of justice.

The interwoven relationship of natural law and common law, however, does find sustained, if indirect, exposition as Blackstone considers the nature of property in book two of the *Commentaries*, "Of the Rights of Things." The right of property, he suggests, is: "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[81] Few people, however, care to think too hard about the origins of property, he says, and when they do, they tend to think about the most immediate origin of a particular thing. They ask: from whom did I inherit this land? And, perhaps, if pushed, they consider the positive law and its rules of inheritance.

Few consider, however, that "accurately and strictly speaking... there is no foundation in nature" for receiving property on the basis of words in the last will and testament of a previous owner, or in following the general rules for inheritance.[82] Following Pufendorf, Blackstone affirms instead that the right to property comes from

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[80] *Commentaries* 4, *42.

[81] *Commentaries* 2, *2. See, Carol A. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale. L.J. 601 (1998).

[82] Ibid.

possession, with that right accruing to "he who first began to use it," and "continu[ing] for the same time only that the act of possession lasted."[83]

But why should occupancy determine ownership? For an answer, Blackstone surveys the positions of a number of modern natural lawyers. In Grotius and Pufendorf's thought, he says, a right of possession or occupancy "is founded upon a tacit and implied assent of all mankind."[84] "Barbeyrac, Titius, Mr. Locke, and others," in contrast, hold the view that there is no implied assent, but that "the very act of occupancy, alone, being a degree of bodily labour, is from a principle of justice… sufficient of itself to gain title."[85] Blackstone the lawyer, however, suggests that any dispute on this point "favours too much of nice and scholastic refinement!"[86] For his legal purposes, it is enough to say that occupancy is the grounds for property.

Having established the grounds for property in possession by harmonizing the views of modern natural lawyers, Blackstone suggests, however, that human positive law stands in tension with natural law. If possession is indeed the key to property in Blackstone's account, then it makes sense that "on the death of the possessor the estate should again become common" to the mass of humanity.[87] But Blackstone notes that, "for the sake of civil peace," the positive laws of "almost every nation (which is a kind of

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[83] *Commentaries* 2, *3, citing "Barbeyr, Puff. 1. 4. C. 3." (Barbeyrac's preface notes to, and his translation of, Pufendorf's *Of the Law of Nature and Nations.*")

[84] *Commentaries* 2, *8.

[85] Ibid.

[86] Ibid.

[87] Ibid., *9.

secondary law of nature)" provide for rules of inheritance to property.[88] Nonetheless, such rules are "creatures of the civil polity, and juris positivi merely."[89]

In considering the law of property, then, Blackstone does not treat the first principles of natural law as a trump card. The seemingly inconsistent position of positive law wins out in practice. True, rules for inheritance receive support from the widespread practice codified in the laws of nations, a "secondary natural law," but a tension remains. One consequence is that substantive arguments must be proffered on its behalf. Even if, as Pufendorf suggests, modification to occupancy is "very justly and reasonably" done, and does not take away any present property rights—merely "abridg[ing]... one means of acquiring a future property"—the laws of society nonetheless still deprive citizens of a natural right.[90] Natural law, therefore, may establish a right to property, says Blackstone. But the details require civil enactment, and are worked out sometimes in tension with natural rights, or even in its contradiction. And so with such enactment comes uncertainty. For "we often mistake for nature what we find established by long and inveterate custom."[91] Natural law may explain and stabilize human laws, then, but it likewise renders them contingent and revisable.

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[88] Ibid., *13,*10. There remain types of property subject to the law of nature directly, says Blackstone. These include: unclaimed land, certain kinds of right of water, and wild animals; ibid., *18, *390.

[89] Ibid., *211.

[90] Ibid., *412.

[91] Ibid., *11.

3. Blackstone's Reception in America

As we have seen, Blackstone's *Commentaries* organized and explicated the law of England through the structure of modern natural law. Most straightforwardly the *Commentaries* asserted that English law was in conformity with natural law. More importantly, natural law, with its attention to rights and duties, and deployment of concepts (not particular procedure), structured Blackstone's text and its discussion of important crimes, practices, and principles.

The *Commentaries*' natural-law presentation of English common law found a significant audience in America. It met Americans' natural-law expectations for law and governance (§3.2.), justified continued adherence to the common-law tradition (§3.3.), and served as a guide for legal practice in the new nation (§3.4.).

3.1. The *Commentaries* in America

There is some irony that the chief legacy of Blackstone, the English conservative, is in America.[92] There were early intimations, nonetheless, that this would be so. If Edmund Burke is correct, by the time of the Revolution, nearly as many copies of the *Commentaries* had been sold in the American colonies as in England.[93] Certainly, 1000

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[92] Blackstone's influence in England was soon diminished: first by Jeremy Bentham's attacks on his conservatism; and next by John Austin and other students of an emerging legal positivism, who rejected Blackstone's appeals to nature.

Meanwhile, in the United States, one in thirteen cases before the U.S. Supreme Court from 2000–12, referenced Blackstone; Allen, "Reading Blackstone," 218.

[93] "Speech on Moving His Resolutions for Conciliation with the Colonies (March 22, 1775)" in *The Works of the Right Honorable Edmund Burke*, rev. ed., vol. 2 (Boston:

English copies were sold in the colonies prior to Robert Bell's first American edition of 1771–72.[94] And in the years that followed, a further 139 American editions were printed, together with 141 abridgments and extracts.[95]

Blackstone reached an influential audience. Subscribers to the first American edition included John Adams and John Jay.[96] Justices and judges in the new Republic acknowledged their reliance on the *Commentaries*, not least John Marshall (1755–1835) and Joseph Story (1779–1845).[97] And if ordinary American lawyers could avoid Blackstone in the various legal treatises of their day, they were surely negligent if they missed him in the cases: from 1789 to 1915, Blackstone's *Commentaries* were cited 10,000 times. Indeed, beyond the law proper, *across all literature*, in the "founding era" from 1760 to 1805, Blackstone was the second most cited secular author, after Montesquieu and before John Locke.[98]

Little, Brown, 1865), 125. Burke concluded that the study of law was one of the circumstances that had engendered the colonists' "fierce spirit of liberty"; ibid., 120, 127.

[94] David Lockmiller, *Sir William Blackstone* (Chapel Hill: University of North Carolina Press, 1938), 170. Bell's Philadelphia edition reprinted the fourth Oxford edition of 1770.

[95] Ann Jordan Laeuchli, *A Bibliographical Catalog of William Blackstone*, ed. James Mooney (Buffalo, NY: William S. Hein for Yale Law Library, 2015). In comparison, there were fifty-seven English editions, and seventy-three abridgments and extracts.

[96] As Dennis Nolan notes: "In all, 16 of the subscribers became signatories of the Declaration of Independence, six were delegates to the 1787 Constitutional Convention, one was elected President of the United States and another became Chief Justice of the Supreme Court"; *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U L. Rev. 731, 743–44 (1976).

[97] Ibid., 756.

A list of names and numbers cannot suffice, of course, as a history of the *Commentaries*' reception. Care is needed. Claiming too much for Blackstone is a tempting, if familiar, trap. With more or less evidence, a litany of voices have lauded him as "the prime influence on the Declaration of Independence, the United States Constitution, the reception of the common law in America and the development of American legal education."[99] Today, Blackstone functions for many as the authoritative recorder of the law at the time of the Constitution's writing. But more than this, he is an *idea*: for some, he is usefully invoked for antiquarian reasons—a piece of Anglo-American nostalgia—but for other, mostly conservative voices, he is the claimed authority for the necessary congruence of state and federal laws with the founders' ideals, or even the law of God.[100]

But neither should too little be claimed for Blackstone. The *Commentaries* found fertile ground in the American colonies and new Republic for good reason. Its volumes

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[98] Indeed, Locke is a poor third, cited two and half times less frequently than Blackstone: Donald Lutz, "The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought," *Political Science Review* 78, no. 1 (1984): 189–97. See also the Liberty Fund's account of the founding fathers' libraries, last modified April 16, 2016, http://oll.libertyfund.org/pages/founding-father-s-library.

[99] This is the "popular mind" on Blackstone that Dennis Nolan seeks to disrupt; *Blackstone*, 731–32.

[100] Blackstone, after all, claimed that human law's validity comes from the law of nature, and that the law of nature is God's will; *Commentaries* 1, *39.

Myriad conservative political and legal groups are named for, or invoke, Blackstone. For instance, the *Blackstone Legal Fellowship*—a program of the *Alliance Defending Freedom*—founded to respond to the successes of the "progressive" *American Civil Liberties Union*. The Fellowship funds and coordinates legal strategies to protect what they understand to be religious freedom, the sanctity of human life, and traditional family values.

were the needed repository and organizer of the law Americans had known.[101] A common law system requires precedent. Even when making determinations based on statutes, judges must provide answers in circumstances not treated by the bare text of legislation. Colonial history bred common law minds in American lawyers and officials: they looked for precedent and analogy, and as no official American law reports were available until 1789, in the young Republic they found in Blackstone a sound, accessible guide to the common law as it stood.[102]

3.2. American Natural-Law Assumptions

The *Commentaries'* successful transplant to American soil was possible because of widely held, commonsensical assumptions about natural law. In the background culture of many Americans, irrespective of education—although made evident with more precision through collegiate education, or heard more clearly in the debates of statesman

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[101] One reason that Blackstone's influence in America was greater than in England was simply that a broader range of material was available in England; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991), 23.

For busy practitioners, "[t]he easiest course to pursue" was to follow Blackstone "where constitutions or legislatures had not spoken"; Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States* (New York: Carnegie Foundation for the Advancement of Teaching, 1921), 111.

[102] Ephraim Kirby, *Reports of Cases Adjudged in the Superior Court of the State of Connecticut from the year 1785, to May 1788* (Litchfield, CT: Collier & Adam, 1789).

Informal reports had circulated prior to independence. See, Erwin Surrency, *Law Reports in the United States*, 25 Am. J. Legal Hist. 48 (1981). R. H. Helmholz reports that the *colonies* of Maryland and Pennsylvania had printed law reports prior to independence, and that the State of Connecticut was joined by Delaware, New Jersey, New York, North Carolina, South Carolina, Vermont, and Virginia in having printed reports prior to 1800. Printed federal reports began in 1789–90; *Natural Law in Court*, 220n4.

and sermons of preachers—was a distinction between those rights bestowed by nature and those bestowed by men.[103] Early Americans *knew* that freedom of speech was a natural right, existing in a state of nature, whereas habeas corpus and jury rights were acquired: rights put into law in civil society for the purpose of restraining government. Blackstone both contributed to this natural law common sense, and was received as authoritative because his *Commentaries* accepted and reflected it.[104]

More precisely, both Blackstone's work and the thought-world of the early American Republic were pervaded by *modern* natural law: best known to us, as to them, in the writings of Hugo Grotius, Thomas Hobbes, Samuel Pufendorf, and John Locke. If most Americans were unaware of the differing details of the various positions held by the modern natural lawyers, the common sense of the age embraced their basic shared claim that, amid the conflict of competing personal interests, adherence to the natural law secures self-preservation and maintains the social order. Americans knew that adherence to the natural law was to their mutual advantage: keeping them safe in their beds, and cooperative in the civic square and marketplace.

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[103] Philip Hamburger examines the "simplified, generalized theory" of natural law and natural rights that "Americans often learned in school, [...] repeated and had reinforced in sermons and secular political arguments," and which therefore functioned as unexplained assumptions for many Americans in the eighteenth century: *Natural Law, Natural Rights, and American Constitutions*, 102 Yale L.J. 907, 915 (1993).

[104] By "common sense" I mean here simply the sociological reality of the general views within a community, held widely and usually unreflectively. Or, rather, more particularly: I mean the conglomeration of sense, feeling, and judgment underlying such generally held views.

3.3. Anti-British Feeling

This natural-law common sense, then, was the intellectual background to Blackstone's initial success in America. Nothing about Blackstone's success, however, was inevitable. Indeed, the political circumstances militated against it. While the Revolutionary war was many things, in popular sentiment, at least, it was a repudiation of British rule, and the various apparatuses of that rule, English law included.[105]

And yet the colonists were, with their British rulers, co-inheritors of a common-law tradition, and heirs to the previous century's debates on the so-called *ancient constitution* understood as ensuring Englishmen's liberty.[106] The famous *Dr. Bonham's Case* was invoked in the colonies, for instance, to argue that Acts of Parliament could be void if offensive to natural reason.[107]

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[105] "In the first flush of enthusiastic independence from the mother country, there was a strong movement to repudiate all traces of the English common law"; Reed, *Training*, 110. Indeed, Reed suggests that because of the extent of the repudiation of common law in the new Republic "[i]t is hardly an exaggeration to say that what we actually took over from England was simply Blackstone"; ibid., 111.

[106] A now classic treatment is J. G. A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1957).

[107] "[I]n many cases, the common law will control Acts of Parliament, and some times adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to perform, the common law will control it, and adjudge such Act to be void"; *Dr. Bonham's Case* (C.P. 1610); Coke, Reports 8:118a (modernized spelling).

Giddings v. Brown, a 1657 case in Boston, is the first clear case of a court in America holding a particular legislative act by a town meeting invalid on the strength of the dicta of Coke in Dr. Bonham's Case. See, Thomas Hutchinson, *Hutchinson Papers* (Albany, NY: Printed for the Prince Society by J. Munsell, 1865), 2:1–15.

The right interpretation of the case is much debated. Many in the colonies, however, took it to mean that courts could invalidate statutes. James Otis (whose words were recorded by John Adams) said that "an Act against natural Equity is void: and if an Act of Parliament should be made, in the very Words of this Petition, it would be void";

As late as 1766, George Mason explained to London merchants that it was "the liberty and privileges of Englishmen" that properly undergirded the colonists' reactions to the taxation imposed by the Sugar Act of 1764, Stamp Act of 1765, and Quartering Act of 1765.[108] Nonetheless, in the new American Republic, factions sought to repudiate the remaining traces of British rule, particularly those, like the common law, considered lacking in principled reason. Seeking to begin America's story afresh and make America's laws accord with reason, state legislators in Kentucky, Pennsylvania and elsewhere passed "noncitation acts" forbidding state judges from recourse to English precedents.[109]

Petition of Lechmere (Feb. 1761) in *Legal Papers of John Adams*, ed. L. Kinvin Wroth and Hiller B. Zobel (Cambridge, MA: Belknap Press of Harvard University, 1965), 2:127.

Adams later reported: "Reason & the Constitution are against this Writ"; "[n]o Acts of Parliament can establish such a writ; Though it should be made in the very words of the petition it would be void, AN ACT AGAINST THE CONSTITUTION IS VOID." See, M. H. Smith, *The Writs of Assistance Case* (Berkeley: University of California Press, 1978); and Philip Hamburger, *Law and Judicial Duty* (Cambridge, MA: Harvard University Press, 2008), "Colonial Departures," 255–80.

[108] George Mason, "Letter to the Committee of Merchants in London (June 6, 1766)" in "*The Life of George Mason, 1725–1792, including his Speeches, Public Papers, and Correspondence*," ed. Kate Mason Rowland (New York: G. P. Putnam's Sons, 1892), 1:387.

[109] Nathan Isaacs examines the noncitation acts by looking at: *Turnpike Co. v. Rutter*, 4 Serg. and R. (Pa.) 6 (1818); Morehead and Brown (Kentucky), Statutes, 613 (1807); *Hickman v. Boffman*, Hardin's Rep (Ky) 348, 356, 364; and *Gallatin v. Bradford*, Hardin's Rep. 365, note (1808). "The Merchant and His Law" *Journal of Political Economy* 23, no. 6 (1915): 529–61, 541.

Thomas Jefferson's antipathy toward the practice of Lord Mansfield provided him a further, pragmatic, reason to shift Americans' eyes from Westminster and its courts. "I hold it essential in America to forbid that any English decision should ever be cited in a court, which has happened since the accession of Ld. Mansfield to the bench. Because tho' there have come many good ones from him, yet there is so much sly poison instilled into a great part of them, that it is better to proscribe the whole." "From Thomas Jefferson to John Brown Cutting (October 2, 1788)," in *March-October 7, 1788*, vol. 13 of *The*

However, the same Enlightenment sensibility that animated opposition to the adoption or retention of the seemingly chaotic and tradition-laden English common law was the sensibility Americans found in the writings of Blackstone, the common law's champion. His *Commentaries* commended the common law to them as an organized system governed by principle, not the ad hoc collection of rules they thought they knew. True, states adopted written, codified constitutions—when Britain had none—but Americans did not, after all, opt for the statutory codes that formed European civil law.[110] Americans kept the common law.

Papers of Thomas Jefferson, ed. Julian Boyd (Princeton, NJ: Princeton University Press, 1956).

[110] Reed, *Training*, 111. Debates about replacing the common law with a written civil code were not over, however, and were particularly fierce in the decades following the Civil War. The desire for codification continued, and found twentieth-century expression in the Uniform Commercial Code and Restatement projects, which seek to harmonize legal rules across the states. See, Lewis Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 Yale J.L. & Human. 149, 152–56 (2013).

The success of the *Commentaries* came despite, and not because of, William Blackstone the man. As a member of parliament, Blackstone was not sympathetic to the colonists' cause. He opposed the repeal of the Stamp Act of 1765, and in the *Commentaries* denied that the American colonists shared the liberties Mason claimed for them as Englishmen. The American colonies, he held, are dominions, not part of the mother country. Writing of *The Countries subject to the Laws of England*, Blackstone suggests: "But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

OUR American plantations are principally of this [] sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions"; Blackstone, *Commentaries* 1, 105.

3.4. Blackstone as Guide

The formal and principled coherence of Blackstone's work, the coherence that rendered the common law acceptable to Enlightenment minds, also made it a straightforward guide for students and practitioners in the new Republic. The success of the *Commentaries*, therefore, was not predetermined by the work's legal quality or literary grace, although Blackstone was praised for both. Providing principle and structure to the legal system, the *Commentaries* met the concerns of the time for intellectual coherence, and the practical needs of students and practitioners. Indeed, if needed, they could turn quickly to chapter XVI of volume I, *Of the Rights of Persons*, to learn the law "Of PARENT and CHILD," or to chapter XII of volume III, *Of Private Wrongs*, for the law "Of TRESPASS."

If Blackstone's work was to continue to function as a repository of the content of the law, however, it needed continued re-presentation. Even if based in principle, the common law develops through the refinement of cases. With his 1803 edition, St. George Tucker was just the first to keep Blackstone up-to-date. Tucker rendered the *Commentaries* more fully American: adding 1000 footnotes emending and contextualizing Blackstone's text.[111] A pattern was set. Well into the nineteenth century, Americans offered, in effect, commentaries on the *Commentaries*. When updating and annotating the text finally proved too cumbersome—and James Kent (1763–1847) and Joseph Story (1779–1847) came to offer home-grown alternatives—the *Commentaries*

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[111] *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws, of the Federal Government of the United States, and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Young Birch and Abraham Small, 1803).

slipped from the prescriptive to the historical: a book consulted for what the law *is* became a record of what the law once *was*.

Yet what the law *was* is of no small interest in a system predicated on precedent. And if one ascribes to theories of constitutional interpretation that treat as authoritative the Constitution's understood meaning at the time of its promulgation, Blackstone's importance is greater still.[112] With the exception of 1801 to 1810, the U.S. Supreme Court cites the *Commentaries* more *today* than at any time since the founding of the Republic.[113]

Conclusion

CHAPTER 1 has argued that Blackstone organized the common law. He did so by structuring the law around rights and principles offered by the natural-law tradition. This hitherto unknown cohesion functioned to commend common law to Americans at a Revolutionary moment where—intellectually and politically—the rejection of the common-law tradition was far from unlikely.

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[112] This position is known as *Originalism*. See, e.g., *Originalism: The Quarter-Century of Debate*, ed. Steven Calabresi (Washington, DC: Regnery, 2007); and Robert Bennett and Lawrence Solum, *Constitutional Originalism: A Debate* (Ithaca, NY: Cornell University Press, 2011).

For just one recent use of Blackstone—*as representative of the thought of the U.S. founders*—see Judge Neil Gorsuch, Williams v. Trammell, 782 F.3d 1184, 1220 (10th Cir. 2015).

In fact, in appealing to a variety of common law sources (including Matthew Hale and Francis Bacon), Judge Gorsuch is more sophisticated in his use of Blackstone than most of his peers on the bench. For the range of sources known to the founders, see *The Founders' Constitution*, ed. Philip Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987).

[113] Allen, "Reading Blackstone," 218.

For those for whom natural-law reasoning is attractive, the *Commentaries* provide a model for a natural-law treatment of common law. Recognizing that this is possible is, itself, an achievement (given the broadly positivistic terrain of analysis of the common law). But Blackstone, in addition, offers an example not only for how natural law can serve to describe the ultimate source or justifications for human law as a system but also tools for structuring the body of law, and justifying or critiquing its specific enactments, defenses, and punishments.

We have seen, however, that Blackstone does not merely apply natural law to common law. Whether we like the result or not, he suggests that, *in matters of legal determination*, human law is in conversation with natural law. And this conversation, he suggests, is not one in which natural law necessarily has the final word. CHAPTER 2 has argued, accordingly, that one result is that natural law may explain and stabilize human laws while simultaneously rendering them contingent and revisable. Given the realities of sin, says Blackstone, human reason must be suitably modest in its claims to track God's reason and will known in natural law.

In PART I, then, we have considered the colleges and Blackstone's *Commentaries* both as influential sources for natural-law thinking in America and as sites for natural law's negotiation with common law. In PART II, which follows, we turn to professionalized American legal education, and its recourse to, or rejection of, natural law. We turn first to the rise of law schools in CHAPTER 3. What place for natural law do we find there?

PART II

PROFESSIONAL LEGAL EDUCATION

CHAPTER 3

1817. THE RISE OF THE LAW SCHOOL: JOSEPH STORY, COMMON LAW, AND THE SUBSUMPTION OF NATURAL LAW

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Retrospect and Prospect

In PART I, we considered two sources for natural-law thinking in America, and particularly their implications for common law: CHAPTER 1 focused on traditions of collegiate education. CHAPTER 2 considered the influence of William Blackstone's *Commentaries on the Law of England.*

In PART II, we will consider the uptake and interpretation of these sources in professional legal education in the United States. Three chapters offer a chronological sweep of legal education through the nineteenth and early twentieth centuries: CHAPTER 3 treats the origins of professional legal education around 1817; CHAPTER 4, the reformation of university law schools that began in 1870; and CHAPTER 5, the skepticism and pragmatism evident in the thought of Oliver Wendell Holmes, Jr. (1841–1935), but known most fully in the "legal realism" of the 1930s.

CHAPTER 3 treats the beginnings of professional legal education. As we will see, natural law formed the background to new developments in legal education in the late eighteenth and early nineteenth centuries. Blackstone's *Commentaries*, indeed, served as the primary educational basis for both "proprietary schools" (§1.1.), and, from 1817, university law schools (§1.2.). The importance of natural law was this: If English common law was viewed as connected to natural law, then common law remained sufficiently reasonable and cosmopolitan to make continued sense in America (c.f., CHAPTER 2, §3.3.). Where tensions remained with the new American landscape these were worked out, moreover, through the ordinary operation of common-law reasoning;

refinements to English legal precedents occurred in the necessary application of common law to American cases.

Yet from this zenith, natural law seemed to quickly recede from instruction in the law schools. For an answer for why this was so, CHAPTER 3 turns to U.S. Supreme Court Justice Joseph Story (1779–1845) (§2.). Story shaped legal education both as a professor at Harvard Law School and as one of the two most influential treatise writers of the nineteenth century. (Some claim, indeed, that, through his writing, Story "saved" natural law in America.) Story, we shall see, was a champion of natural-law reasoning in the common law (§2.2.), yet, over the course of his lifetime, natural law mostly fell from sight in the university law schools and even explicitly in much of his legal writing.

How did this happen? CHAPTER 3 argues that as American common law was worked out in the early nineteenth century, natural law was subsumed into its details. This is true in Story's own treatises (§2.4.). In ways confusing, then, to natural law's contemporary champions and its positivist opponents, Story's treatment of natural law is exemplary of the ways in which natural law can be historicized and relativized, at least in its relationship to common law (§2.1.).

What might we gain from attending to the origins of American legal education and its treatment of natural law? And if natural law is, indeed, "subsumed" into common law, what are the consequences? Three things can be said at the outset. First, attention to Story's writings offers us one model of the relationship of reason to history (§2.1.). Any natural-law account of common law, after all, must explain how natural law—

traditionally understood as timelessly applying to all people and all places[1]—can relate to the historically-bound development of common law: for unlike Roman law and its successors, common law *develops* through cases (and not in reference to a fixed code). In Story's telling, while "history" is not the same as "reason," it is nevertheless through history that reason is revealed. The customs of a people, he says, function as the seedbed of positive law. We come to know what the law is by "finding" it through the determination of cases. Even the rights we claim, then, have particular lineages, notwithstanding their applicability to all human beings.

Second, Story's attention to how natural law might operate in the details of a particular legal system issues a broad challenge to natural-law accounts of human law, which solely emphasize natural law as either the source of laws or an external judgment upon them. Story's account expands the sites of natural law's influence, even as he suggests that natural law might not have the final word in adjudication (§2.3.). Instead, natural law can provide common-law legal principles, such as the idea of natural justice (§2.4.1.). Natural law, moreover, can act as an internal yardstick. Without determining the content of a law, in other words, natural law might indicate when a law is insufficiently close to an ideal of justice (§2.4.2.). Or sometimes natural law can work in combination with positive law: giving force to fundamental tenets of morality, not least concerning crime and punishment (§2.4.5.), and yet only as defined and enacted by positive law. (Indeed, on Story's account, American courts, even when treating

[1] In Thomas Aquinas's account, for instance, natural law is the same for all people in its general principles if not the conclusions that proceed therefrom. See, Thomas Aquinas, *Summa Theologiæ*, I-II, q. 94, art. 4–5.

international law—with its potential for unmediated appeals to natural law—can modify or override natural law (§2.5.).)

Third, Story speaks to what Christian reflection can add to natural-law treatments of common law. Certainly, "additive" accounts are not currently popular. They can be accused of offering thin or even bad theology, and may seem to merely "baptize" political power. Nonetheless, Story suggests how Christians might respond to the best parts of common law. Christian faith, he says, better illustrates the moral life. And it provides motivating reasons to follow moral law: for God holds together virtue and happiness in ways purely secular accounts cannot.[2] We might worry, however, that Christian illustration and motivation fail to interrogate the *content* of law. Perhaps despite himself, however, there is a spirit of critique in Story's use of natural law. While he ultimately offers an unconvincing rationale for the 1833 status quo on women's suffrage (§2.3.), and retreats from a position recognizing the illegitimate treatment of Native Americans' property, his natural-law framework indicts these practices. Natural law, then, may condemn as well as support common law.

1. Legal Education from Apprenticeship to University Law School

SUMMARY*:* For most of America's history, becoming a lawyer has required "purely practical training" with little time or attention given to the principled content of

[2] John Hare considers the differing ways this is true for the Christian accounts often known under the headings of "divine command" and "natural law": *God's Command* (Oxford: Oxford University Press, 2015).

the law, common or natural.[3] From colonial beginnings through the nineteenth century, the prevailing method of legal instruction in America was simply to spend time in the offices of a judge or attorney in a more or less formal apprenticeship. At two crucial moments, however, training for the practice of law and attention to natural law came together: in late eighteenth-century *proprietary schools*—owned and operated by lawyers—and in the emerging *university law schools* of the nineteenth century. The early curriculums of both proprietary and university law schools were formed around Blackstone's *Commentaries*, following his natural-law framework for the common law. A natural-law mindset found universality in otherwise parochial rules, and, in the new Republic, the common-law practice of the courts rendered these rules pertinent to the new jurisdiction. As time passed, the university law schools' early promise of philosophical engagement of the common law, however, gave way to a focus on the preparation of students for the professional tasks of lawyering.

To practice law in America, first you apprenticed.[4] For most of American history, professional legal education—with few exceptions—consisted of an apprenticeship with a local judge or practicing lawyer.[5] The tasks and expectations of these apprenticeships, even their basic structure, differed significantly across counties and states, but it was the diligence, or otherwise, of the "master" that most determined the education. Some apprenticeships were primarily an exercise of observation, with apprentices picking up

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[3] Josef Redlich, *The Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation for the Advancement of Teaching* (New York: The Foundation, 1914), 7.

For a brief overview of the role of natural law in American legal education see: R. H. Helmholz, "Legal Education in the United States," in his *Natural Law in Court: A History of Legal Theory in Practice*, 127–41 (Cambridge, MA: Harvard University Press, 2015).

[4] For brief overviews, see: Lawrence Friedman, *A History of American Law*, 3rd ed. (New York: Simon & Schuster, 2005): 226–50; and William Johnson, *Schooled Lawyers: A Study in the Clash of Professional Cultures* (New York: New York University Press, 1978), 42–58. For a case study, see: Charles McKirdy, *The Lawyer as Apprentice: Legal Education in Eighteenth-Century Massachusetts*, 28 J. Legal Educ. 124 (1976).

[5] Before the Revolution, some Americans trained at London's Inns of Court.

rules of thumb and basic procedure along the way.[6] Other masters set their apprentices structured programs of reading. In his "rules to be observed by students of law" from the 1820s, Massachusetts Chief Justice Lemuel Shaw, for instance, required weekly reports from his apprentices on their reading over the last seven days.[7] Whatever the form of the apprenticeship, however, local judges or practicing lawyers, irrespective of the jurisdiction, almost always administered examinations for entry into the profession.[8] It was this combination of "on-the-job" training and examination by leaders at the bar that

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[6] Roscoe Pound, *The Place of Justice Story in the Making of American Law*, 1 Mass. L.Q. 135, 140 (1916).

[7] Lemuel Shaw's *Rules to be observed by students at law* reads as follows: "1. Students on their entrance who have previously been at a Law School, or in any other office as students, will be expected to state particularly what books they have read, the progress they have made in each branch of the law. 2. Students are requested to report to me each Monday in the forenoon the course of their reading the preceding week, and receive such advice and direction as to the pursuits of the current week as the case may require. In case of the absence or engagement of either party on Monday forenoon, such conference to be had as soon thereafter as circumstances will permit. 3. At any and all other times students are invited to call me and enter into free conversation upon subjects connected with their studies, and especially in reference to those changes and alterations of the general law which may have been effected by the Statutes of the Commonwealth and by local usage, and in respect to which therefore little can be found in books. 4. As one of the main objects of the attendance of students in the office of an attorney and counsellor is practice, they will be employed in conveyancing, pleading, copying, and other writing as the business of the office may require. 5. As order, diligence, and industry are essential to success in so laborious a profession, students will accordingly be expected to attend in the office, unless some other arrangement is made in particular cases, during those hours which are usually appropriated to business, and to apply themselves to the appropriate studies and business of the office. 6. If a student proposes to take a journey or to be absent for any cause for any considerable [time] he will be expected to give notice of the fact and the probable length of his absence; and if he is confined by sickness or other necessary cause he will be expected to give notice of the fact." In Frederick Hathaway Chase, *Lemuel Shaw, Chief Justice of the Supreme Court of Massachusetts, 1830–1860* (Boston: Houghton Mifflin, 1918), 120–21.

[8] For a very brief overview see Robert Stevens, "Once Upon a Time," in *Law School: Legal Education in America from the 1850s to the 1980s*, 3–19 (Chapel Hill: University of North Carolina Press, 1983).

formed the norm for most American lawyers until the end of the nineteenth century, and, indeed, to this day, it is possible in several states to qualify for practice by undertaking supervision under an experienced attorney.[9]

By the final decades of the 1700s, though, those at the pinnacle of the profession desired to improve the quality of legal education. Educators at the College of New Jersey, for instance, endeavored to transform the college into a site of legal training. President John Witherspoon (1723–94) urged graduates to return to Princeton to "fit themselves for any of the higher Branches to which they will think proper chiefly to devote further application," an invitation later accepted by James Madison.[10] Witherspoon promised, moreover, to offer lectures on "Composition, and the Eloquence of the Pulpit and Bar," and the possibility of an independent study program, in effect, in which the student was to "chuse his own Studies" in tandem with "Lists and Characters of the Principal Writers on any Branch" of higher learning.[11]

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[9] California is the most significant jurisdiction in which it is possible to qualify for legal practice by apprenticeship. The requirements for admission are contained in the *Rules of the State Bar of California,* Title 4 – Admissions and Education Standards, Division 1, Chapter 3, Rule 4.29. Rule 4.29 adopted effective September 1, 2008; amended effective November 14, 2009.

[10] See his 1 December 1773 letter to William Bradford in *16 March 1751–16 December 1779*, vol. 1 of *The Papers of James Madison*, ed. William Hutchinson and William Rachal (Chicago: University of Chicago Press, 1962), 100–102.

[11] "For the Information of the Public. By Order of the Trustees of the College of New-Jersey," in *Extracts from American Newspapers, Relating to New Jersey, 1768–1769*, vol. VII of *Documents Relating to the Colonial History of the State of New Jersey*, ed. William Nelson (Paterson, NJ: Call Printing and Publishing, 1904): 306.

Whatever its merits, this model of self-directed study, however, did not replace apprenticeships. It would take the creation of the new institutions of the proprietary and university law schools to do so.

1.1. Proprietary Schools

Following the Revolution, the increasing technical complexity of the laws of the new states and the emerging federal government—products of an increasingly complex society with changing economic and social structures, not least urbanization and industrialization—provoked a shift in legal education. Elite would-be lawyers looked for more systematic instruction, and entrepreneurial attorneys set up schools for this purpose. The product, a "proprietary school"—owned by a lawyer-teacher—functioned as "essentially a specialized and elaborated law office," such that apprentices were only somewhat recast as students.[12] This form of professional education left to the colleges the teaching of philosophy or government as it pertained to law (CHAPTER 1). And yet, some connections remained. In their attention to the details of common-law practice, the proprietary schools operated within a framework that assumed, and perhaps even required, natural law. We see this clearly when we look to the most famous of the proprietary schools: the Litchfield Law School.

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[12] Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States* (New York: Carnegie Foundation for the Advancement of Teaching, 1921), 49, 128. See, Charles McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 Wash. U. L.Q. 597 (1981); Rosco Pound, *The Achievement of the American Law School*, 38 Dicta 269 (1961).

Set up in Litchfield, Connecticut, in 1784, the Litchfield Law School was not the first law school in America, but it was the first to teach students from all across the new nation and the first to gain a national reputation.[13] Tapping Reeve (1744–1823), its first owner and teacher, exercised a national influence in legal education, particularly through his presentation of the common law as a principled system.

The curriculum at Litchfield would have been "unthinkable" without Blackstone's *Commentaries*.[14] What allowed Reeve to teach students beyond the local Connecticut context was "the cosmopolitanism of Blackstone" (CHAPTER 2).[15] The conflation of common law and natural law in Blackstone's work gave universality to the seemingly parochial rules he outlined. At the Litchfield School, said Yale's president Timothy Dwight IV, "[l]aw is taught… as a science; and not merely, nor principally, as a mechanical business; not as a collection of loose, independent fragments, but as a regular, well-compacted system."[16] Based on the evidence of student notebooks of the 1790s, we can see that Reeve taught sequences of lectures under distinct headings: nine lectures on

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[13] See, Marian McKenna, *Tapping Reeve and the Litchfield Law School* (New York: Oceana, 1986). From the roughly 1,000 students who attended, two became Vice-Presidents of the United States, fourteen governors, and more than ten percent served in Congress. Three joined the bench of the United States Supreme Court, and at least thirty-four were members of their states' highest courts. Samuel Fisher, *Litchfield Law School, 1774–1833: Biographical Catalogue of Students* (New Haven: Yale University Press, 1946).

[14] John Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School," in *History of the Yale Law School: The Tercentennial Lectures*, ed. Anthony Kronman (New Haven: Yale University Press, 2004), 27.

[15] Ibid.

[16] "Learning, Morals, &c. of New-England, Letter II" in *Travels in New-England and New-York*, vol. 4 (New Haven, CT: Timothy Dwight, 1821–22), 306.

the law of husbands and wives, for instance, and 19 on contracts. Students heard lectures, yes, but also copied essays and drew charts comparing English law with the law of Connecticut. Student Asa Bacon's notebook, for instance, contains a comparison chart running 117 pages.[17]

The natural-law framework of Reeve's common law instruction allowed the Litchfield School to teach students from across various jurisdictions, despite differences in the states' legal rules. And continuities between English law and law in America remained possible—despite the political break—because precedents in common law can always be distinguished: in the common law, the judicial decisions, which constitute authoritative examples or rules for subsequent cases, are only binding in analogous situations.[18] New Americans, then, could at once accept English law as authoritative, but—as in Asa Bacon's comparison table—they could determine whether on-the-ground American facts rendered English precedents sufficiently analogous or not to be applicable.

Accordingly, America's first law treatise—*A System of the Laws of the State of Connecticut*—could mold its presentation of Connecticut's laws into the English pattern

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[17] Whitney Bagnall, Yale Law School Library Document Collection Center, Litchfield Law School Sources, "Composite Curriculum at Litchfield Law School Based on Lectures of Tapping Reeve, 1790–1798," published September 30, 2013, http://documents.law.yale.edu/composite-curriculum-litchfield-law-school-based-lectures-tapping-reeve-1790-1798.

[18] For a discussion of the philosophy of the common law, see, e.g., Neil McCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978).

identified and laid out by Blackstone.[19] And the Litchfield curriculum—which set the standards for law school teaching long after its closure in 1833—followed Blackstone's *Commentaries* too, albeit with notable changes, including the deletion of Blackstone's treatment of the English Constitution and public law.[20] Reeve, indeed, was eulogized precisely for "refining our jurisprudence, by embodying the best principles and maxims of the English system, and rejecting such as were inapplicable in our local circumstances, or ill-adopted to the texture of our government."[21] While some parts of English law were just simply discarded, then, on the whole natural law and history justified the retention of English common law. And common-law judges' capacity to follow or distinguish precedents—through attention to the particularities of each individual case—allowed natural law-inflected common law to make continued sense in America.

1.2. University Law Schools

Proprietary schools like Tapping Reeve's in Litchfield, then, embedded and perpetuated a common-law professional education that relied upon natural-law foundations. With the development of *university* law schools, however, there arose the possibility that America professional legal education might come to *explicitly* engage the

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[19] Langbein, "Blackstone, Litchfield, and Yale," 27; Zephaniah Swift, *A System of Laws of the State of Connecticut: In Six Books* (Windham, CT: Printed by John Byrne for the author, 1795).

[20] Bagnall, "Litchfield Law School Sources."

[21] Lyman Beecher, *A Sermon Preached at the Funeral of the Hon. Tapping Reeve: Late Chief Justice of the State of Connecticut, who Died December Thirteen, Eighteen Hundred and Twenty-Three, in the Eightieth Year of His Age, with Explanatory Notes* (Litchfield, CT: S. S. Smith, 1827), 5fn*.

content of common law and natural law: treating the law in a liberal manner by interrogating the law humanistically, and seeking to advance the content of the law, not solely to train its practitioners.[22]

Just such plans were imagined in New York. A *University of New York* was to be founded by adding faculties to the undergraduate King's College, now to be renamed Columbia College. A law faculty would have three professors: one concerned with "the Law of Nature and Nations"; another with "Roman Civil Law"; and the third with "Municipal Law" (that is, American domestic law).[23] A lack of funds stalled the project, however, and the scheme for a *University of New York* failed.

In the end, it was in Cambridge, Massachusetts that the first recognizable university law school began when, in 1817 at Harvard, Asahel Stearns, a distinguished Boston lawyer, was appointed Professor of Law to teach students pursuing a degree of bachelor of laws.[24] As at William and Mary and the University of Virginia, Harvard had a tradition of *college* professors of law, but 1817 was something new: a separate school with a separate faculty and degree program.[25]

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[22] See, Nolan, *Blackstone*, 760.

[23] Reed, *Training*, 120.

[24] See: Daniel Coquillette and Bruce Kimball, *On the Battlefield of Merit: Harvard Law School, The First Century* (Cambridge, MA: Harvard University Press, 2015); *The Centennial History of the Harvard Law School, 1817–1917* (Boston: Harvard Law School Association, 1918); Samuel Eliot, ed., *The Development of Harvard University since the Inauguration of President Eliot, 1869–1929*, (Cambridge, MA: Harvard University Press, 1930); and Arthur Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1967* (Cambridge, MA: Belknap Press of Harvard University, 1967).

[25] Harvard determined in 1816 to allocate funds left in 1781 by Isaac Royall, Jr. to found a college professorship in law; Isaac Royall, "Will & Codicils," dated May 16,

The founding of Harvard Law School was partly the product of a campaign by Isaac Parker, the first holder of Harvard College's Royall chair in law. In his inaugural address in 1816, Parker advocated that Harvard found "a school for the instruction of resident graduates in jurisprudence."[26] In his speech, Parker traced the development of law and the legal profession in America from its earlier "low state"—"a trade rather than a science"—to his present day, suggesting that great nineteenth-century lawyers understood law to be "a comprehensive system of human wisdom, derived from the nature of man in his social and civil state, and founded on the everlasting basis of natural justice and moral philosophy."[27]

This conception of law, Parker thought, was "worthy to be taught" at Harvard in "fellowship with its fellow sciences."[28] Law's "fundamental and general principles," he argued, were rightly to be treated as a "branch of liberal education in every country, but especially in those where freedom prevails and every citizen has an equal interest in its preservation and improvement."[29] Parker's vision for Harvard, as Stiles's for college education at Yale (CHAPTER 2, §4.6) and Reeve's for the training of lawyers at Litchfield,

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1778, Harvard Law School Library, Cambridge, MA. See also, Janet Halley, *My Isaac Royall Legacy*, 24 Harv. Blacklett. J. 118, 120n18 (2008).

[26] Parker's inaugural address was given in April 17, 1816. This can be found in Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (New York: Lewis, 1908), 302.

[27] Ibid., 300–301.

[28] Ibid., 301.

[29] Ibid.

combined universal appeals to natural justice and a vision of law as a science with the particularities of the American experience and its traditions of liberty.

Early university legal education had a "dogmatic character."[30] Recitation of content was a central component. As at Litchfield, Blackstone's *Commentaries* "formed the almost exclusive basis of the work."[31] Students gained a systematic coverage of the content of the law, with the central subjects and principles of common law and equity expounded for their memorization. As too at Litchfield, in its earliest days Harvard Law School—despite the high-mindedness of Parker's vision—was a "glorified law office under the eaves of a university."[32] It sought to inculcate the craft of lawyering. If this was tedious work—seemingly involving little judgment or imagination—its systematicity promised students that in the common law they would find a unity of principles, reasonably organized under distinct heads.

Early advertisements for the new degree, however, touted connections to college study of the law and Harvard's broader educational context. Students could "attend, free of expense," the various public lectures of the college's Royall Professor, private lectures designed for graduates on "Moral and Political Philosophy," and a whole host of public graduate lectures on "Theology, Rhetoric and Oratory, Philosophy, Natural and

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[30] Redlich, *Common Law and the Case Method*, 8.

[31] Ibid., 6. The Law School's early course of study was described by Stearns in 1825 as consisting of: "[i]n the first place a reading of *Blackstone*, more or less particular, of the whole work. This practise has been found by experience to be highly useful. It aids the student in fixing his attention, enables him more readily to acquaintance with the technical terms and language of the law, and at the same time to obtain a more distinct view of that admirable outline of the science"; "1825 Report of Professor Stearns to the Board of Overseers," in Warren, *History*, 333.

[32] Pound, "Place of Justice Story," 161.

Experimental Philosophy, Astronomy, Chemistry, and Anatomy and Mineralogy."[33] Perhaps given its precursors in apprenticeship and the proprietary school, Harvard Law School struggled, however, to integrate such humanistic reflection on the law with study for professional practice. In 1825, Stearns distinguished between students heading to the bar and those who were not. "For those gentlemen who do not pursue the study of law as a profession," he offered an extended reading course on "the Civil Law, the Law of Nations, Constitutional Law and Political Economy" in the place of practice-related courses.[34]

The needs of "professional" students took priority, such that the province of law was seemingly trimmed at Harvard even under Joseph Story (1779–1845), the U.S. Supreme Court justice who penned an encyclopedia article on natural law, and whose judicial opinions made appeals to "eternal maxims of social justice."[35] Story's

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[33] *Boston Daily Advertiser*, July 28, 1817, in Warren, *History*, 314–15. The Law School itself was a lean operation confined to the lower north room of a low, two-story wooden building. Stearns's instruction was paid out of students' fees.

[34] "1825 Report of Professor Stearns to the Board of Overseers," in Warren, *History*, 333.

[35] See: Story's opinion in *Da Jeune Eugenie*, 26 F.Cas., 832, 846 (C.C.D. Mass. 1822); and also Christopher Eisgruber, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. Chi. L. Rev. 273 (1988).

The Harvard Corporation first invited Story to occupy a chair in 1820. Story declined. However, in 1829, Nathan Dane—author of the nine volume *General Abridgment and Digest of American Law*—proposed that he would gift $10,000 of his publishing profits to Harvard on the condition that Story take up a chair. Story was convinced, and the school reorganized with Story as Dane Professor, and John Hooker Ashmun as Royall Professor. From eleven students in 1819, the school reached 163 by 1844. See, Reed, *Training*, 143.

appointment, nonetheless, revitalized the School.[36] His fame drew students. So too did shifts in legal and broader culture: for those with sufficient resources, education in Cambridge seemed more congenial than apprenticeship in a law office.[37] And for the more serious minded: no law office could compare with Harvard's libraries and their ever-increasing holdings of law reports and treatises. Story's nationalist outlook—prioritizing federal law over the states—fit too with the aspirations of Harvard and the legal profession for prestige across the Republic.

Story adhered to a view of common law as a collection of principles, indeed a science, and taught "the Law of Nature" and "the Law of Nations" as two of the five "federal" courses of study.[38] These five, he thought, were in force across the Republic. Story deliberately focused on the common law developed by courts at the expense of statutes passed by legislatures. Despite Story's commitment to natural law, however, by 1832 the regular two-year course of legal study consisted solely of standard common law

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[36] Coquillette and Kimball, "The School Saved," 131–156, and "Joseph Story's Law School in the Young Republic," 157–188 in *On the Battlefield of Merit.*

[37] Friedman, *History of American Law*, 241; R. Kent Newmeyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina, 1985), 240.

[38] The five were: "the Law of Nature, the Law of Nations, Maritime and Commercial Law, Equity Law, and, lastly, the Constitutional Law of the United States." *A Discourse pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University: on the Twenty-Fifth Day of August, 1829* (Boston: Hilliard, Gray, Little, and Wilkins, 1829), 41. And see Louis Brandeis, *The Harvard Law School*, 1 Green Bag 10, 14 (1880).

subjects and federal constitutional law to the exclusion, it seems, of broader reflection on the nature and purpose of law.[39]

What was true at Harvard was true elsewhere: initial plans for the broad study of the law quickly gave way to practitioner-focused instruction. Columbia's 1857 plan for a law school, for instance, included courses in "Modern History, Political Economy, the Principles of Natural and International Law, Civil and Common Law, and the study of Cicero, Plato, and Aristotle."[40] Within a couple of years, however, the school claimed "a special emphasis on real estate law," with natural-law reflection confined to a solitary "Moral Philosophy" course taught by a professor borrowed from Columbia College.[41]

Not that the educational dream of directly connecting law with universal justice had dissipated. At regular intervals, in various institutions, there were calls to reform and renew. Theodore Dwight Woolsey at Yale called for a place of "sound learning relating to the foundations of justice, the doctrine of government... all those branches of

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[39] "Under the lead of this most successful of American law schools the orthodox province of law school teaching was now defined. Politics and law were no longer to be joined"; Reed, *Training*, 148–49.

[40] *A History of the School of Law, Columbia University, by the Staff of the Foundation for Research in Legal History, under the Direction of Julius Goebel, Jr.* (New York: Columbia University Press, 1955), 28.

[41] Columbia University School of Law, "Announcement," 1859; reference found in David Forte, *On Teaching Natural Law*, 29 J. Legal Educ. 413 (1978). His inaugural address offers a treatment of natural theology, and includes discussion of human nature and reason: "man is distinguished from the lower animals, and connected with the nature of angels and of God, by the reasoning faculty; and that, in the use of this faculty, all mankind—from the child to the sage, from the barbarian to the philosopher—are doing precisely the same thing in the self-same way—namely, deducing conclusions from premises"; "Inaugural Address by Charles Murray Nairne, Professor Literature and Philosophy, February 1858" in *Addresses of the Newly-appointed Professors of Columbia College* (New York: Trustees of Columbia College, 1858), 156.

knowledge which the most finished statesman and legislator ought to know."[42] And new establishments, like the *Lumpkin School of Law* in Georgia, solemnly declared that law would be taught "as far as in us lies... not as a collection of arbitrary rules, but as a connected logical system, founded on principles that appeal for sanction to eternal truth."[43]

So where, then, did natural law go at Harvard?

2. The Contribution of Joseph Story

SUMMARY: For Joseph Story, history and reason (in the shape of natural law) formed the basis of common law. Under his auspices, therefore, natural law did not disappear from legal education, but was rather subsumed in the teaching of the doctrines of common law. Natural law, for Story, refers to the rules of conduct humans know from their status as dependent and social beings. It is understood by reason, but better known through revelation. However, in its *legal treatment*, natural law, for Story, could admit of exceptions and even be passed over in favor of other interests. Unlike in its usual interpretation by contemporary critics and proponents, therefore, natural law for Story was known in the details of the positive law, where it can: specify duties; serve as a yardstick, from which positive laws can deviate only so far; act as a limiting point; furnish rights; classify and justify branches of the law; and form a source of law, albeit one of several.

If only the titles of courses are considered, we might think that professional legal education—spearheaded by Joseph Story at Harvard—focused solely on common law doctrine. The collegiate tradition of teaching law together with philosophy and government, we might conclude, was left behind for the practice of lawyering. To think that way, however, is to ignore the various assumptions and practices of Story's day that cast common law as incorporating or subsuming natural law. It is just this relationship of

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[42] *Historical Discourse* (New Haven, CT: Law Department of Yale College, 1874).

[43] Quoted in Gwen Wood, *A Unique and Fortuitous Combination: An Administrative History of the University of Georgia School of Law* (Athens: University of Georgia Press for University of Georgia Law School Association, 1998), 6.

common law and natural law that we see in Story's treatment of: law in general (§2.1.); natural law (§2.2.); the limits of natural law (§2.3.); and the place of natural law in the details of common law (§2.4.). Natural law *simpliciter* receives explicit attention as a source of law, moreover, when Story considers international law (§2.5.).

Joseph Story (1779–1845) was a busy man. He served on the U.S. Supreme Court from 1812, and headed Harvard's law school from 1829. He also wrote at least 13 major books. With James Kent (1763–1847),[44] he was recognized in his time, and is recognized still, as the foremost American legal scholar of the early nineteenth century.[45] Story and Kent's shared achievement was to provide accessible but comprehensive treatises on the main branches of American law. These made common-law rules and precedents readily accessible to lawyers at a time when, as we will shortly see, the common law was under

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[44] The standard biography is John Horton, *James Kent: A Study in Conservatism, 1763–1847* (New York: Appleton-Century, 1939), See also, John Langbein, *Chancellor Kent and the History of Legal Literature*, 93 Columb. L. Rev. 547 (1993).

In his course of lectures at Columbia, Kent sought to "present a comprehensive, plain, and practical view of the principles of our municipal law." He did so through a trifold scheme: first, a general outline of the principle and usages of the law of nature; second, Constitutional law of the United States; and, third, law of New York State. *A Lecture, Introductory to a Course of Law Lectures in Columbia College, delivered February 2, 1824* (New York: The College, 1824), 3

Kent sought to "give the study of the law, in our own state, a more accurate and scientific character, than it has hitherto usually received"; ibid 4. And thought that if legal education indeed was to prepare a student to be a lawyer and statesman: "He must not only be properly instructed in moral science, and adorned with the accomplishments of various learning; he must not only have his passions controlled by the disciplines of Christian truth, and his mind deeply initiated in the elementary doctrines of natural and public law, but he must be accurately taught in every great leading branch of our own domestic jurisprudence"; ibid. 7.

[45] As Friedman puts it: "Both were erudite teachers and judges. Both had enormous reputations in their day. Both have since suffered a decline in prestige, and an irretrievable decline in their readership. In their day, they had greater reputations, at home and abroad, than any other legal scholar in America"; *History of American Law*, 246.

threat from *ignorance* and *populism*. Indeed, in Roscoe Pound's estimation, against these threats, Kent and Story "saved the common law" in America.[46]

The first threat to common law was eminently practical: American lawyers in the early nineteenth century had significant difficulties in accessing, and understanding, the precedents that form the basis of common law. There were few reported American court decisions. So through multiple volumes, Kent and Story laid out the law, making known American decisions, whenever possible, and making those decisions understandable by outlining their principled relationship to earlier English precedents. Offering both selected English cases—suitably annotated and cited—and appeals to natural law, Story and Kent provided the principles that were lacking from American common law.[47]

The second threat to common law emerged from the populist political atmosphere of the early nineteenth century. Common law—codified by judges, not the people or their elected representatives—found little favor from those who distrusted elites. Story's defense and promotion of common law was part and parcel of his broader belief that lawyers and courts form a necessary corrective to the excesses of politicians and legislatures.[48] The law, as he saw it, is a bulwark to the tyranny of the majority.[49] On the

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[46] "Place of Justice Story," 140.

[47] Newmeyer, *Story*, 68.

[48] See, Newmeyer, *Story*, 63, 178.

[49] We should not be romantic, however, about Story's promotion of individual liberty. The tyranny threatening the individual in Story's mind was most often economic regulation. Story believed in economic progress as moral progress. An individual's right to contract, for instance, he held as sacrosanct. His support of laissez-faire economics is one reason Story's reputation diminished after his death. With increasing corporate power in the late-nineteenth century, Story's defenses of property rights and the corporation seemed, at best, out of touch, as did his suspicion of state regulation.

bench, in the lecture hall, and in his treatises, Story made the argument for common law, propounded a judicial nationalism that opposed states' rights, and read the U.S. Constitution as granting extensive powers to the federal government.[50]

Story's ideal was uniformity of law across the states: an ideal formed from his studies of legal history and comparative jurisprudence. Just as for Blackstone, and Reeve at Litchfield, Story did not hold a parochial view of common law. To be clear, this did not mean, however, that Story understood common law to exist apart from its particular history. History and principle went together. He thus looked to English law to understand American law, but also to the civil law of continental Europe, Roman law, and even other ancient legal systems. Common law could draw from the tradition of natural-law reflection Story found in English common law, but also the work of the great European civilians.[51] Truth has no boundaries.

2.1. The Nature of Law: History and Reason

Story relates *history* and *reason* in ways that find few contemporary proponents. They do not believe, as Story does, that law holds together history and reason. Even twentieth-century admirers of Story, then, downplayed Story's natural-law commitments,

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[50] In his interpretation of Article VII of the U.S. Constitution, moreover, he concluded that the authority for the Constitution's ratification came from the "express authority of the people alone"; *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution* (Boston: Hilliard, Gray, 1833), 2:710.

If *the states* also possessed authority then the Constitution was, in effect, a treaty, and parties to a treaty can declare other parties in breach and dissolve it. Story strongly refuted such an interpretation.

[51] That is, practitioners of Roman (civil) law, and the various legal systems that derive therefrom.

or set them aside (believing his account of natural law to be insufficiently robust for the purposes to which they want to put it).[52]

Certainly, Story sometimes offers a recognizably *historicist view* of the nature of law: "[l]aws are the very soul of a people," he says.[53] Laws, then, are "not merely those which are contained in the letter of [a people's] ordinances and statute books, but still more those which have grown up of themselves from their manners, and religion, and history."[54]

We might balk today at the ethnic and cultural uniformity assumed by members of the nineteenth-century historical school.[55] They too would have balked, however, at Story's apparent elision of enacted law—the letter of ordinances and statute books—and law as the "ways" of a particular nation. Story, of course, recognizes that there is a difference. But he thinks that customs are the seedbed of positive law. In other words, he thinks that it is from a people's ways that positive law properly selects, specifies, enacts, and protects. Story, then, has conservative instincts. Legislatures rightly follow the

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[52] Newmeyer downplays Story's account of natural law, while James McClellan laments that it deviates from scholastic natural law. See, James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (Norman: University of Oklahoma Press, 1971).

[53] "Laws, Legislation, Codes" in *Encyclopedia Americana*, ed. Francis Lieber (Philaldelphia: Lea & Blanchard, 1844), 7:576. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 94.

[54] Ibid.

[55] There are ways to imagine that laws might emerge from heterogeneous communities. Luke Bretherton, for instance, imagines a *sensus communis* emerging from the practices of broad-based community organizing. See, Luke Bretherton, "Civil Society as a the Body Politic" in *Resurrecting Democracy: Faith, Citizenship, and the Politics of a Common Life*, 179–218 (Oxford: Oxford University Press, 2014).

people. The "duty of the skilful legislator" in Story's estimation, is *not* to create new laws, "but only develop those which existed prior to any express recognition."[56]

Story, however, does not think that the customs of the people are always right. But here too an appeal to history is illuminating: anomalous or even wrong aspects of the common law are the results of accidental or political circumstances, or even ignorance, all of which, Story trusts, can be gradually ameliorated by the processes of common-law adjudication.[57]

Story likewise confuses interpreters in his treatment of human rights. (A domain, indeed, where many expect the most congruence between American legal thought and the natural-law tradition.)[58] He says that history, not nature, provides the substance of rights. If Story is, indeed, a natural lawyer of sorts, then his immediate appeals are not trans-historical or -cultural. The rights sought (and achieved) by the American Revolution, he thought, were *the rights of Englishmen.*

Story, for instance, points to the First Continental Congress, and the declaration and list of resolutions it issued on October 14, 1774.[59] These resolutions proceed from the

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[56] Story, "Laws, Legislation, Codes," 7:576; available in Cohen, *Story*, 94.

[57] See Newmeyer's discussion in *Story*, 254–55.

[58] For instance, the Witherspoon Institute—a conservative research institution in Princeton, New Jersey—has an online "archive for and a commentary and study guide" for documents relating to natural law and rights: "Natural Law, Natural Rights, and the American Constitutionalism," http://www.nlnrac.org. For a view stressing the importance of natural law and rights in American history, but their limited domain, see Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 Yale L.J. (1993).

[59] For an accessible history of the Continental Congress, see Jack N. Rakove, *The Beginnings of National Politics: An Interpretative History of the Continental Congress* (New York: Knopf, 1979). The best source for understanding its details are the 23,000

claim that "our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England."[60] In Story's reading, then, the revolutionaries sought specific rights with a particular lineage. They did not appeal abstractly to natural law or justice. When asserting a right of participation in government, then, they claimed that such participation was a "foundation of English liberty, and of all free government." Likewise on the legal system, they insisted, that "the respective colonies are entitled to the common law of England" and, especially, the practice of trial by a jury of one's peers.

We can see, however, that the "English liberty" of political participation is also the liberty of "all free government." In the text of their declaration, the Continental Congress, before enumerating rights, suggests that the basis for these rights is "the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts" that shaped the government of the colonies. Can all three—nature, constitution, and compact—be its basis? We might think that the wording betrays that its drafters were divided in their beliefs, or that they pulled upon anything at hand to help justify their resolutions. As is true for Story's thought, however, it is likely that the delegates to the Continental Congress worked from the assumption that natural law, significant aspects of the English Constitution (developed through the centuries), and the

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letters contained in the 26 volumes of Paul H. Smith, ed., *Letters of Delegates to Congress, 1774–1789* (Washington, DC: Library of Congress, 1976–2000).

[60] "Declaration and Resolves of the First Continental Congress. October 14, 1774." This is available online through Yale Law School's Avalon Project, http://avalon.law.yale.edu/18th_century/resolves.asp.

specific liberties afforded by the express mechanism of charters formed a cord of three strands. They did not assume that history and reason necessarily stand in contradiction.

Story, then, understood himself to stand in continuity with those American revolutionaries who protested the failure of the British authorities to treat the American colonists as subjects of the English Constitution. Like the delegates to the first Continental Congress, however—and unlike paradigmatic legal historicists—Story did not take history itself to be the source of laws. Indeed, he criticized prominent members of the European historical school of his day for forgetting that "the objects of their veneration, the juridical classics of Rome, owed their greatness to a perpetual habit of reverting to the maxims of natural law (their aequitas)."[61]

If Story thought that laws somehow come from history, then, he thought that they come from the history of a people's moral reflection. Laws are established in communities' considered "ways," their thought-out practices. It is such an account that explains why Story can say that laws "exist[] prior to all positive legislation."[62] Indeed, Story goes so far to suggest that law "is founded, not upon any will, but on the discovery of a right already existing."[63] The laws of the United States, accordingly, are at once completely the product of its history, and yet these laws are somehow discovered not created. The U.S. Constitution, then, may set down and determine particular rights, but its language of inalienability and indefeasibility, thought Story, is an acknowledgement that

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[61] "Laws, Legislations, Codes," 7.579; available in Morris, ed., *Joseph Story*, 97.

[62] Ibid.

[63] Ibid. C.f., Blackstone's treatment of reason and will in CHAPTER 2, §2.1.

the Constitution "is a solemn recognition and admission of those rights, arising from the law of nature, and the gift of Providence."[64]

Even astute commentators have struggled with Story's position on the nature of law, and its implications for the practice of law. Kent Newmeyer suggests that, as a judge and treatise writer, "Story never stopped to ponder whether he was 'finding' or 'making [the law.]' The two were not mutually exclusive at this stage in the development of American common law."[65] But in this assessment, at least, Newmeyer is wrong. As we have just seen, Story certainly pondered the difference between finding and making the law. In his non-judicial writings, he insists that law is properly found, not made. And, accordingly, in his judicial writings—with no access to Story's internal psychology—it is most straightforward to assume that Story sought to "find" the law. In other words, the "found" law put down in his judicial opinions, he believed, was the law "made" by, and expressed through, the history, morals, and religion of Americans. What Newmeyer does descriptively capture in his assessment, nonetheless, is that, in a particular sense, to "find" the law is always to "make" the law. In an era with few authoritative legal resources, with each recorded decision or entry in a treatise, Story set down and defined hitherto unwritten aspects of American common law.

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[64] *Commentaries on the Constitution* 3, 309.

[65] *Story*, 70.

2.2. Story's Vision of Natural Law

Story speaks of natural law variously in his many writings. "In the largest sense," he says, natural law is the "philosophy of morals."[66] He writes in his article on "natural law" for the *Encyclopedia Americana*, therefore, that natural law "comprehends natural theology, moral philosophy, and political philosophy; in other words, it comprehends man's duties to God, himself, to other men, and as a member of political society."[67] Or, more succinctly, and invoking William Paley: natural law, he says, is "the science, which teaches men their duty and the reasons for it."[68]

The *legal* face of natural law, however, receives greater attention in Story's inaugural address as Dane Professor. He quotes the *Institutes of Justinian*, which equates natural law with *justice*: "the set and constant purpose which gives to every man his due."[69] Justice so defined was the business of the "national jurisprudence," which Story advocated. (This favored the application of consistent laws across the whole of America, to the expense of "states' rights.") Linking natural law to justice, justice to national

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[66] *A Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University: on the Twenty-fifth day of August, 1829* (Boston: Hilliard, Gray, Little, and Wilkins, 1829), 43. In this sense, the study of natural law exceeded his duties as a professor of law: "In the course of the academical instruction in this university already provided for, the subjects of ethics, natural law, and theology are assigned to other professors"; ibid., 45.

[67] "Natural Law" in *Encyclopedia Americana*, ed. Francis Lieber (Philaldelphia: Lea & Blanchard, 1844), 9.150. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 122.

[68] Ibid.

[69] *Discourse Pronounced upon the Inauguration of the Author,* 43. Moyle's translation of *Iustitia est constans et perpetua voluntas ius suum cuique tribuens*; J. B. Moyle, *The Institutes of Justinian*, 3rd ed., (Oxford: Clarendon Press, 1896), 3.

jurisprudence, and national jurisprudence to the law school, allowed Story to present the motivating purpose of the school as "knowledge of things divine and human, the science of the just and the unjust."[70] Natural law, then, on Story's account, not only forms the "foundation of all laws," but also "constitutes the first step in the science of jurisprudence."[71]

Depending on context and generality, therefore, "natural law" to Story could mean the whole system of morals or just that part of morality that pertains to justice. Story does not remain, however, at this level of abstraction. In his treatise on the conflict of laws,[72] for instance, he commends James Kent's definition of natural law in the case of *Wightman v. Wightman* (4 John, Ch. R. 343):

> by the Law of Nature, I understand, those fit and just rules of conduct, which the Creator has prescribed to Man, as a dependent and social being; and which are to be ascertained from the deductions of right reason, though they may be more precisely known, and more explicitly declared by Divine Revelation.[73]

To put it more straightforwardly, natural law for Story is: the rules of conduct that fit humans as dependent and social beings (§2.2.1), which may be understood by the exercise of reason (§2.2.2.), yet are better known through revelation (§2.2.3.).

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[70] Ibid. Translation of *[Iuris prudentia est] divinarum atque humanarum rerum notitia, justi atque iniusti scientia.*

[71] Ibid., 42.

[72] Conflict of laws is also known as private international law. It concerns the relationships between non-state actors (individuals, companies, and so forth) in the international context.

[73] In Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic: In regard to Contracts, Rights, and Remedies, and especially in regard to Marriages, Divorces, Wills, Successions, and Judgments*, 3rd ed. (Boston: Little, Brown, 1846), 200n2.

2.2.1. Rules of Conduct Known as Dependent and Social Beings

In Story's account, what a human being gains from reflecting on natural law is rules to "form his character, and regulate his conduct."[74] Story does not offer a moral psychology, however, that links compliance with rules with the formation of character. What he does suggest, though, is that by following natural law a human being ensures his "permanent happiness."[75] Like Blackstone and Locke (CHAPTER 2, §2.1.3.), Story offers a eudaimonist account where human beings' "love of happiness" is the "end and aim" of life, and the content of natural law is, accordingly, the "duty of preserving that happiness."[76] What makes for distinctly *human* life is the species' possession of "intellectual powers, and the freedom of [the] will."[77] Or as Story puts it in one of his encyclopedia articles, "[God] has given to man the power of discernment between good and evil, and a liberty of choice and the use of those means which lead to happiness or misery."[78]

So Story takes human nature and human faculties as lying behind human responsibilities: humans possess reason to know the natural law, a will to follow it, and an instinct to seek their happiness. But Story also takes human *sociability* to be constitutive of human nature. The heart of natural law, then, as Story outlines it, is the

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[74] *Discourse Pronounced upon the Inauguration of the Author,* 42.

[75] Ibid.

[76] Ibid., 44.

[77] Ibid.

[78] "Natural Law," 150–51; available in Cohen, *Story*, 123.

regulation of a person's conduct "in all his various relations."[79] The human being, accordingly, has particular duties pertaining to life "as a solitary being, as a member of a family, as a parent, and lastly as a member of the commonwealth."[80] Story is concerned with human responsibility not only in "private relations as a social being," but also—most especially in his work on public laws and the Constitution—in the human being as "subject and magistrate, called upon to frame, administer, or obey laws, and owing allegiance to his country and government, and bound, from the profession he derives from the institutions of society, to uphold and protect them in return."[81] Rightly included in the discussion of the legal domain of natural law, then, is the very nature and purpose of government, marriage, property rights, social liberties, civil and political rights, the authority of laws, and the legitimacy of political institutions.

2.2.2. Understood by the Exercise of Reason

From human faculties and sociability Story thinks it possible to outline significant details of human responsibilities. Despite what we have seen, then, Story does not simply identify natural law either abstractly as an end point (justice) or minimally as the mere possession of human capacities of moral reflection. Instead, through reflection on human facilities and sociability, Story thinks there can be specification of particular rights and duties. The distinctly legal content of these rights and duties will be treated shortly—

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[79] "Natural Law," 150; available in Cohen, *Story*, 122.

[80] *Discourse Pronounced upon the Inauguration of the Author*, 44.

[81] Ibid., 42.

through discussion of different branches of common law (§2.3)—but it is helpful at this stage to attend to their moral analogs.

First, Story thinks we have duties toward God, namely *piety* or *devotion*.[82] As God is our creator, we "owe" God our worship and reverence. As God is our benefactor, we owe God gratitude. As God is lawmaker and judge, we are to obey God's commands. Even prayer is a duty for Story, emanating from our frailty and dependence. We need assistance and forgiveness, he says, and prayer tends to our improvement through: self-reflection, the bringing together of divided affections, the spiritual elevation of our thoughts, and the more lively sense of our duties. Story also provides similar reasons for a duty of public worship and the maintenance of religious institutions. In his writings on the Constitution, Story makes clear that he does not think that government should impose religion or favor one sect over another, but nonetheless it should "foster and encourage the Christian religion generally, as a matter of sound policy as well as of religious truth."[83] For if proper piety cultivates a motivation to fulfill our duties, then religion is the foundation of a stable moral society.

Second, Story thinks we have duties toward ourselves.[84] Human beings should seek true happiness. They should maintain personal holiness, temperance, and humility, and should seek to improve in their knowledge, wisdom, and virtue. In short, human beings should preserve "a conscience void of offense towards God and towards man."[85]

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[82] "Natural Law," 151; available in Cohen, *Story*, 123.

[83] *Commentaries on the Constitution* 2, 629.

[84] "Natural Law," 151; available in Cohen, *Story*, 123.

[85] Ibid.

Third, human beings, in Story's account, have duties toward others.[86] These *relative* duties flow from the rights of others. Story has a whole vocabulary of different rights, which are not exhausted by natural law.[87] But *natural* rights, in his terms, belong to all of humanity, and result from the human constitution, and so include "man's right to life, limbs, and liberty, to the produce of his personal labor, at least to the extent of his present wants, and to the use, in common with the rest of mankind, of air, light, water, and the common means of subsidence."[88]

2.2.3. Better Known through Revelation

While Story thinks that rational reflection on human capabilities and life together sufficiently provide the content of natural law, he also maintains that Christian revelation provides it a "higher sanction."[89] Most straightforwardly, the Christian faith helps

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[86] Ibid.

[87] For instance: "*Adventitious* Rights are those, which are accidental, or arise from peculiar situations and relations, and presuppose some act of man, from which they spring; such as the rights of the magistrate, of a judge, of electors, of representatives, of legislators, &c. we call those rights *alienable*, which may be transferred, by law, to others, such as the right to property, to debts, houses, lands, and money. We call those rights *unalienable*, which are incapable, by law, of such transfer, such as the rights to life, liberty and the enjoyment of happiness. We call those rights *perfect*, which are determinate, which may be asserted by force, or in civil society by the operation of law; and *imperfect*, those which are indeterminate and vague, which may not be asserted by force or by law but are obligatory only upon the consciences of parties. Thus a man has a perfect right to his life, to his personal liberty, and to his property; and he may by force assert and vindicate those rights against every aggressor. But he has but an imperfect right to gratitude for favors he bestowed others, or to charity, if he is in want, Or to the affection of others, even if he is truly deserving of it." "Natural Law," 151–52; available in Cohen, *Story*, 123–24.

[88] "Natural Law," 151; available in Cohen, *Story*, 123.

[89] *Discourse Pronounced upon the Inauguration of the Author*, 43.

illuminate the duties found in natural law. We might think of it this way: Christian faith provides a thick narrative and set of commitments that suppose that human beings are created with particular powers and faculties enabling the pursuit of happiness. Human beings, that is to say, have sufficient reason and agency to act for good or ill. Christian faith likewise accounts for human equality in creation, and therefore checks the arrogance of power.[90]

Revelation, however, on Story's account, provides individuals not only with illumination of natural law but also additional *motivation* to fulfill the duties that arise therefrom. Story is not a systematic theologian. But he contends that in the Christian faith's hope of life after death—what he calls "the doctrine of the immortality of the soul"—human beings gain a sense of the importance of their motivations and actions, and the connection between the two, irrespective of immediate consequences. Christian faith, therefore, exhorts the practice of virtue and awakens hope.[91] God—infinite in power, knowledge, wisdom, benevolence, justice, and mercy—makes it possible, despite appearances, perhaps, that the pursuit of virtue is connected "directly or ultimately" to happiness.[92]

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[90] In a more restricted sense, Story thought that tendencies toward equality in the history of the common law attest this understanding. Thus, Story thought Thomas Jefferson wrong in thinking that Christianity is not part of the common law. Jefferson's position, well known in private, was made public in a letter of 1824 to John Cartwright, the English radical. The letter was published in the *Boston Daily Advertiser*.

[91] *Discourse Pronounced upon the Inauguration of the Author*, 43.

[92] "Natural Law," 151; available in Cohen, *Story*, 123. In his encyclopedia article he says that these things are assumed, "not because they are not susceptible of complete proof, but because, not being intended to be discussed in this place, they nevertheless form the basis of the subsequent remarks."

Revelation provides an account, too, of natural law's *obligatoriness* for Story. "The obligatory force of the law of nature upon man is derived," thinks Story, "from its presumed coincidence with the will of his Creator."[93] Given God's nature, God's will accords with what is, indeed, beneficial to human beings and their happiness. But natural law has force seemingly not as a result of its correspondence with reason, but rather through God having the "supreme right to prescribe the rules, by which man shall regulate his conduct."[94] If James McClellan can call Story's natural law "Thomistic" because of its close relationship to natural theology, Story's treatment of a human obligation to follow natural law places him more proximately in line with Francisco *Suárez* and those who followed.[95] On Story's account, as it pertains to *moral* duties, natural law—as God's will—provides human beings with a reason for fulfilling imperfect duties. Laws may not prescribe the fulfillment of charitable obligations, for instance, but, as a result of God's commands, conscience is under an obligation to perform.

2.3. The Limits of Natural Law

Despite his equation of natural law—in one regard, at least—with the entire philosophy of morals, and despite his belief that natural law's precepts can be deduced from human capacities and sociability, and despite his view that natural law is morally

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[93] "Natural Law," 150; available in Cohen, *Story*, 122.

[94] Ibid.

[95] McClellan, 66. McClellan takes the non-Thomistic parts of Story as a "sad commentary on the intellectual confusion of the times"; ibid., 69. McClellan sees Story as caught up in the mistakes of Hobbes, Locke, and other moderns, rather than mining the resources of Cicero, say, and Aquinas. C.f., CHAPTER TWO, §2.1.1.

obligatory (even its resultant imperfect duties), Story is nonetheless clear that there are *limits* to natural law.

Most obviously, he suggests, there are situations where reason cannot provide an answer. (Blackstone called these "matters indifferent.")[96] In complex human societies, all sorts of regulations that make life more convenient have little connection in their specifics to the deductions of human reason.[97] Americans drive on the right-hand-side of the road, while the British drive on the left. Sometimes, decisions must be made for convenience, and where the decision (right or left) is one where moral or rational concerns are hardly engaged, the decision is arbitrary.

Less straightforward is Story's understanding of the way that "general rights of mankind" are instantiated in civilization. Story maintains that there are, indeed, rights to life, liberty, property, and the use of air, light, water, and the fruits of the earth.[98] But life, liberty, and property, he notes, can be justly taken away to prevent crimes, enforce others' rights, and maintain the safety and happiness of society. And, likewise, the use of air, light, water, and so forth are rightly regulated. The answer Story gives to all this is that the common law, through its historical (but principled) outworking of rules, has the authority to regulate even rights that derive from the natural law. In other words, common law—even when beginning from natural law, and seeking congruence with it—can admit

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[96] See, CHAPTER TWO, §2.1.4.

[97] "Law of Nations" in *Encyclopedia Americana*, ed. Francis Lieber (Philaldelphia: Lea & Blanchard, 1844), 9:141–42. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 113–14.

[98] "Natural Law," 9:152; available in Cohen, *Story*, 124.

of exceptions and modifications to natural law. In this, Story likewise follows in the pattern of Blackstone.[99]

Contemporary legal commentators have often equated natural law with the maxim *an unjust law is no law at all*, thereby dismissing natural law in the process as unworkable as a legal theory.[100] What such an equation does, however, is miss the ways in which someone like Story can at once accept natural law as binding, yet think that in its outworking it admits exceptions. Indeed, as is central to R. H. Helmholz's recent work,[101] the history of self-conscious reflection on natural law *in the practice of the law* has allowed lawyers to explicitly recognize natural-law arguments, but reject them in place of other interests. Slavery is the most notorious example.[102] But Story mentions another. Natural law insists both on human equality and, partly as a result, on a right to be involved in the operation of government. Why, then, is this "not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights, and interests, and protections, and having a vital stake in all regulations and laws of society?"[103] His answer is simply that, irrespective of whether or not this right has a fixed

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[99] See, CHAPTER TWO, §2.2.3.

[100] *Lex iniusta non est lex*. See, J. S. Russell, *Trial by Slogan: Natural Law and Lex Iniusta Non Est Lex,* 19 L. & Phil. 433 (2000).

[101] *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: Harvard University Press, 2015).

[102] For an overview of the history, see: David Boucher, "Slavery and Racism in Natural Law and Natural Rights," in *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights In Transition* (Oxford: Oxford University Press, 2009), 187–216.

[103] *Commentaries on the Constitution* 2, 54.

foundation in the laws of nature, the question of who gets to vote "has always been treated in the practice of nations, as a strictly civil right, derived from, and regulated by each society, according to its own circumstances and interests."[104] We may find this less than convincing. Story was a man of his time. His example, nonetheless, serves to show that, conceptually, recognizing the moral force of natural law need not necessarily result in its instantiation in positive law. What we might add is that Story fails to appreciate that natural-law thinking can critique present-day arrangements.[105] A conflict between natural law and well-established practice need not always be resolved against natural law.

2.4. Natural Law in the Operation of Common Law

Common law, we have seen, may sometimes specify legal results that oppose natural law. But in Story's several treatises and commentaries, the relationships he traces between natural law and common law are more often complementary than oppositional. What we find, indeed, is that there are often natural-law roots to common-law legal principles. The varied forms this takes are evident in the following five short examples.[106]

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[104] Ibid., 55.

[105] C.f., CHAPTER TWO, §2.2.2.

[106] Story's writings range across many volumes and tackle multiple branches of law. Five short examples, then, must suffice to indicate Story's position.

2.4.1. Equity[107]

The connections of natural law to "equity" are numerous, perhaps owing to the several meanings of the term. To start, Story tells us, "equity" has general moral and legal meanings. *In a moral sense*, equity is that which is "founded in natural justice, in honesty, and in right, *ex aequo et bono*."[108] *In a legal sense*, at its highest level of generality, equity likewise suggests the connection between legal rules and justice. Quoting Blackstone, Story explains that equity "is the soul and spirit of the law; positive law is construed, and rational law is made by it. In this, equity is synonymous with justice."[109]

More specifically, though, equity is also a body of laws, which, distinct from common law proper, possessed its own courts (Chancery), subject matter (trusts, most notably), and particular remedies (specific performance, for instance, and injunctions). But akin to common law, equity as a body of laws grew through the centuries in England to act on well-established principles (as opposed to, say, *de novo* recourses to abstract

[107] Courts of equity once operated separately from the common-law courts in England and America. The body of laws known as "equity," therefore, may be contrasted with "common law." For our purposes, however, equity has a broader meaning than the distinction with common law. And, by the nineteenth century, courts of equity operated too with common-law reasoning.

[108] "Equity" in *Encyclopedia Americana*, ed. Francis Lieber (Philadelphia: Lea & Blanchard, 1844), 4.560 . Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 58.

[109] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* (Boston: Hilliard, Gray, 1836), 1:7. Quoting William Blackstone, *Commentaries on the Laws of England*, vol. 3, *Of Private Wrongs* (1768; repr. Chicago: University of Chicago Press, 1979), *429.

fairness).[110] So even as equity operated distinctly from, and in parallel with, the common law, in its decision-making it more and more resembled a principled system of precedent. Equity courts specified principles, even rules, and made decisions based on them.

Writing of the active body of law in his time, then, Story described "equity" as composed "partly of the principles of natural law, and partly of artificial modification of those principles."[111] Two short examples helpfully illustrate this. Consider, first, the concept of "general average" in mercantile law. The general average is the contribution that all parties to an endeavor make when expenses are incurred or losses sustained in furtherance of the endeavor. (The classic example is the jettisoning of cargo in dangerous conditions at sea. In that situation, losses are proportionately shared, rather than shouldered by the merchant whose goods happened to be nearest at hand.)[112] Story notes that this principle is not founded on contract: parties need not have specifically agreed that potential losses are to be treated in this way. Instead, general average "has its origins

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[110] Story therefore does not adopt the high position of Lord Kames that "a Court of Equity commences at the limits of the Common Law, and enforces benevolence, where the law of nature makes it our duty. And thus a Court of Equity, accompanying the law of nature, in its general refinements, enforces every natural duty, that is not provided for at Common Law." Quoted in *Commentaries on Equity Jurisprudence: As Administered in England and America* (Boston: Hilliard, Gray, 1836), 1:18.

John Selden (1584–1654) famous complained of the variability of equity in his day: "Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience." Frederick Pollock, ed., *Table Talk of John Selden* (London: Quaritch, 1927), 43.

[111] *Commentaries on Equity Jurisprudence* 2, preface.

[112] See, Richard Cornah, ed., *Lowndes & Rudolf: The Law of General Average and the York-Antwerp Rules*, 15th ed. (London: Sweet and Maxwell, forthcoming).

in the plain dictates of natural law."[113] But why not think that the principle is a matter of *convention*, rather than natural justice? Elsewhere, indeed, Story recognizes that since antiquity merchants have developed and practiced their own conventions because they navigate multiple jurisdictions and engage in fast-developing practices. What Story might reply is that, whether conventional or not, general average is itself grounded in a fundamental sense of fairness: equity here, then, specifies a principle of natural law.

A second example of the way in which equity functions as natural justice is as a rule of interpretation in the administration of estates. Story thinks it uncontroversial that a debtor should pay her creditors. Equity accordingly has developed a rule of interpretation that, irrespective of what appears in the wording of a will, a testator—that is, the deceased—is given the "just and benignant interpretation" of fulfilling her "moral obligations in the just order, which natural law would assign to them."[114] Paying off debts comes before distributing bounty. In other words: equity developed—through recourse to an idea of natural justice—a rule that all testators would be taken as desiring to fulfill their duties, whatever their actual intentions.

2.4.2. Contract

A contract, in Story's definition, is "an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act, and each

[113] *Commentaries on Equity Jurisprudence* 2, 468.

[114] Ibid., 525.

acquires a right to what the other promises."[115] At first glance, a contract seems entirely the creature of the parties to it; it is, in other words, an exercise of the will of the parties. (Indeed, if a court needs to enforce a contract, legal orthodoxy holds that it does so simply by bringing about what the parties agreed.) Yet this bare structure of agreement, in Story's reckoning, is held up by the scaffold of natural law. At the most basic level: "Natural law requires that if one person accepts from another a service," says Story, "he should render to him something in return," whether this is known through express agreement or implied from the nature of the undertaking.[116] Built in to human sociability, in other words, is a fundamental sense of reciprocal fairness. Part of this sense is the importance of *promises*, which Story calls "essential to the existence of social intercourse among men."[117] Thought through more fully, if contracts are to be the binding

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[115] "Contract" in *Encyclopedia Americana*, ed. Francis Lieber (Philadelphia: Lea & Blanchard, 1844), 3:503. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 14.

[116] Ibid.

[117] Ibid. In the later twentieth century, legal scholarship on contracts mostly followed trends in the "law and economics" school of interpretation. However, some scholars did return to the idea of a *promise* as standing at the heart of contract. See, Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981).

The common law has traditionally required "consideration" as an essential part of a binding contract: for a contract to exist, a party must receive something in recompense for undertaking her part of the contract. (This may itself be a promise.) Story skirts close to rejecting the need for consideration: "confidence in promises is so essential to the existence of social intercourse among men, that even the bare promise [i.e. a unilateral promise] of one of the parties, when given and received in earnest, that is, with the idea of its being binding, is not entirely destitute of the force of obligation" "Contract," 3:503; available in Cohen, *Story*, 14.

agreements of persons, they must: be voluntary and founded in consent; involve mutual and reciprocal obligations; and be for the mutual benefit of the parties.[118]

Consent receives a classical if somewhat formal treatment from Story. It is "an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side."[119] For more precision, Story turns to Pufendorf and his treatment of consent as: a physical power, a moral power, and the serious and free use of both.[120] In the background of Story's thought is a particular understanding of human nature: a human being is a reasonable creature who can exercise a power, and thereby bind himself to promises.

How, then, does the positive law of contracts relate to natural law? First, Story is clear that the positive law of contracts must stay sufficiently close to natural law so that

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[118] These conditions are true, too, for other areas of the law that involve relations akin to contract: "In the civil and French law, as in our law, the principles, which regulate the contract of deposits, are the deductions from natural law, and do not depend upon any positive regulations"; Joseph Story, *Commentaries on the Law of Bailments: With Illustrations from the Civil and the Foreign Law* (Cambridge, MA: Hilliard and Brown, 1832), 34.

Partnership too "is also upon the like ground, that partnership is a contract founded purely upon the consent of the parties, that jurists are accustomed to attach to it the ordinary incidents and attributes of contracts. It is accordingly treated by them, as in its very nature and character a contract arising from and governed by the principles of natural law and justice"; Joseph Story, *Commentaries on the Law of Partnership: As a Branch of Commercial and Maritime Jurisprudence: With Occasional Illustrations from the Civil and Foreign Law* (Boston: Little and Brown, 1841), 7–8. Accordingly, he says, partnership is founded in good faith, by the positive consent of the parties who are of legal age and competence, and for a lawful object and purpose.

[119] *Commentaries on Equity Jurisprudence* 2, 227.

[120] Ibid. Story points to Pufendorf's discussion in *De jure naturae et gentium* (1734), III.6.3. He later alludes to Grotius, "the use of reason is the first requisite to constitute the obligation of promise"; *Commentaries on Equity Jurisprudence* 2, 228. Quoting *De jure belli ac pacis* (1646), II.XI.IV.3.

"the idea of justice implanted in the human mind should not be violated."[121] What natural law does practically, then, is insist that laws should stick close to our best instincts. But positive law specifies too: it can take care of special cases, establish particular forms and procedures, and—through the long experience of common law—create rules that give effect to promises.[122] Importantly, positive law might even withdraw from certain contracts their natural obligation: for instance, in Story's day, if all the legal criteria were met, a bad bargain was still enforced at law despite its offending conscience, morals, and religion.[123]

Story, then, does not treat natural law and common law as necessary competitors. Consider the question of the obligatoriness of contracts. Why are parties bound to a contract? Story first suggests that it is difficult, in fact, to say more than *a contract is obligatory*.[124] What could be more intelligible? He does suggest, however, that the language of "right" helpfully illustrates what this means. We are under an obligation where, by our act of contracting, we give another a right to require something of us. The obligation of a contract, then, is a conferred right or power over another's free will or actions. But how is this right or power to be measured? Story suggests: only by

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[121] "Contract," 3:503; available in Cohen, *Story*, 14.

[122] Ibid.

[123] The situation changed in the twentieth century often with the enactment of statutes ensuring consumer protections. However, there were also common-law fixes, including the rise of "unconscionability" (an equitable doctrine) as part of contract law. See: Colleen McCullough, *Unconscionablity as a Coherent Legal Doctrine*, U. Pa. L. Rev., 779 (2016); Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor*," 102 Geo. L.J. 1383 (2014).

[124] His context here is discussion of the U.S. Constitution. See, *Commentaries on the Constitution* 3, 243–44.

considering a combination of moral, natural, and positive law. He says: "the moral law is explained, and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law."[125] Positive law, in other words, gains its force from its relationship with moral law, which is known through natural law. But, particularly in advanced, complex societies, moral law requires specification through the enactments of positive legislation.

2.4.3. Marriage

Story argues that "[m]arriage is treated by all civilized nations as a peculiar and favored contract. It is in its origin a contract of natural law."[126] In some countries, he notes, marriage has religious obligations and sanctions "superadded."[127] This, Story suggests, has led to confusion. Not least, many persist in the "great mistake" of believing that, if marriage is a religious contract, it is not a natural and civil contract as well.[128] In the first edition of his *Commentaries on the Conflict of Laws*, he posits "the common law of England (and the like law exists in America) considers marriage in no other light than as a civil contract."[129] (Questions of its holiness, or otherwise, he suggests, are best left to religious authorities.) However, in the footnote of a later edition, he returns to the language of "contract" and suggests that it is not enough, perhaps, to think of marriage as

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[125] Ibid., 243.

[126] *Conflict of Laws*, 100.

[127] Ibid.

[128] Ibid.

[129] Ibid.

merely a civil contract. "It is rather," he adds, "an institution of society, founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligations, different from what belongs to ordinary contracts."[130] Once again, natural law provides content—the societal basis for marriage—which positive law secures and enacts.

His encyclopedia article on the topic spells this out more fully. Marriage arises from natural law, in his account, for the "private comfort" of its parties, yes, but marriage furthers societal flourishing too: it best allows for the procreation of healthy citizens and their education, and secures the peace of society by, in words that might cause us to cringe, "assigning to one man the exclusive right to one woman."[131] Marriage promotes the cultivation of morals by cultivating domestic life—and the affections and virtues that follow—and distributes everyone into families, thereby creating permanent unions of interests and guardianships, and providing additional reasons for honest industry and good economy. Secured by positive law, "whatever has a natural tendency to discourage [marriage], or to destroy its value" can rightly be criminalized: "fornication, incest, adultery, seduction, and other lewdness."[132] So, from what is good, Story thinks, society can identify what is bad, and can justifiably take official action against it (although he is quick to suggest that "there are many independent grounds" for the criminality of fornication and the like).

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[130] *Conflict of Laws*, 17n3.

[131] "Natural Law," 9:152; available in Cohen, *Story*, 124.

[132] Ibid., 9:153; 125.

Unsurprisingly, Story's logic that the law can criminalize acts that destroy institutions founded in natural law applies *a fortiori* to incest. Objections to incest, he says, are "founded in reason and nature."[133] Objections flow from the social relationships of human beings: the institution of families, and the "habits and affections flowing from that relation."[134] The arguments he offers, while empirically buoyed by references to cross-cultural "horror and detestation" of incest, focus most on the *social institution* of the family.[135] Incest wrongly blends incompatible duties and feelings, he suggests, and therefore perplexes and confounds the various relations within the family. If legally acceptable, incest would impair the general perception of the purpose and goods of the family, and—as most people are socialized in their families—incest would broadly "corrupt the purity of moral taste."[136]

But, in the case of incest, how are natural and positive laws specifically related? The prohibitions of natural law, Story says, are "of absolute, uniform, and universal obligation."[137] Yet it is only through common law's adoption of natural law that the prohibition against incest becomes enforceable. And this adoption happens in a particular way, for common law "is founded in the common reason and acknowledged duty of

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[133] *Conflict of Laws*, 201.

[134] Ibid.

[135] It is notable that Story's argument is not exhausted by reference to societal revulsion. For criticism of the cogency of moral and political arguments that rely on revulsion, see Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2010).

[136] *Conflict of Laws*, 201.

[137] Ibid.

mankind, [and] sanctioned by immemorial usage."[138] Common law, once again, then, is not a positivist alternative to natural law in Story's thought, but a body of laws the proper content of which is natural law and history, where history itself is not value-free but the arbiter and refiner of morals.

Common law, nonetheless, does make definite what natural law cannot. Ascertaining the beginning and end points of incestuous relations, for instance, is unclear by recourse to natural law or even the dictates of Christian faith.[139] But, as canon lawyers for centuries knew, the need for specification by courts or legislatures does not render natural law unhelpful. Indeed, when Story considers the practical issue of recognition of marriages across state lines, natural law marks an enforceable qualitative boundary, a limiting point.[140] The general rule is that courts will recognize as valid any marriage lawfully conducted under the laws where it was celebrated. However, if a foreign nation allowed, for example, marriage between a parent and child, American courts would not recognize it.[141] The law of nature forbids it despite the general acquiescence to the law of marriage of other jurisdictions. Yet, if the positive law in a court's own jurisdiction considered a particular relation as incestuous, which natural law does not clearly treat as incestuous—for instance, marriage between a man and his deceased wife's sister—the

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[138] Ibid.

[139] Ibid.,104, 200.

[140] *Conflict of Laws*, 107.

[141] A form of this argument was used to support the Defense of Marriage Act. See, e.g., "Amici Curiae Brief of Robert P. George, Sherif Girgis, and Ryan T. Anderson in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal" in United States v. Windsor, 570 U.S.___ (2013) (Docket No. 12-307).

court should recognize this marriage, even if it could not be celebrated within the court's jurisdiction.[142]

2.4.4. Property

In his discussion of title to land (the bundle of interests individuals can hold in a piece of property), Story notes that European nations based their New World claims to title on the "right of discovery."[143] He argues, though, that these claims do not properly pertain to land occupied by Native Americans. It is "not easy to perceive," he says, "how, in point of justice, or humanity, or general conformity to the law of nature" Europeans could come to hold title on land "inhabited by the natives."[144] For Native Americans' "right, whatever it was, of occupation or use stood upon original principles deducible from the law of nature, and could not be justly narrowed or extinguished without their own free consent."[145]

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[142] A similar logic holds for issues of comity in international law: nations have equal sovereignty in international law, and so a nation cannot insist that its own laws have superior obligation to those of other nations. *However*, while U.S. courts most often will enforce contracts, say, conducted in other nations, they will not enforce contracts that violate "the law of our own country, the law of nature, of the law of God." (He has in mind, contracts of evasions, of fraud, that are against good morals or religion, or opposed to national policy.) Natural law, then, is among the limiting factors of the enforceability of law. *Conflict of Laws*, 44; ibid. 204. Story references the opinion of Mr. Justice Best in *Forbes v. Cochrane*, 2 B. and Cres. R. 448, 471; 101 Eng. Rep. 450, 459.

[143] For a helpful treatment of colonialist ideologies, see David B. Abernathy, *The Dynamics of Global Dominance: European Overseas Empires, 1415–1980* (New Haven, CT: Yale University Press, 2001).

[144] *Commentaries on the Constitution* 1, 5.

[145] Ibid.

Story quickly retreats somewhat from the implications of his comments, however. He suggests that considering the "actual merits of the titles claimed by the respective parties" is not the purpose of his present work. And, indeed, that even within the realm of the law of nature, there may be occasions where "civilized man may demand [title] from the savage for use and cultivation different from, and perhaps more beneficial to society than the uses, to which the latter may choose to appropriate it."[146] And yet, despite his retreat—as true for women's suffrage (§2.3.)—Story suggests there can be appeals to natural law that shore up Native Americans' rights to property.

2.4.5. Crime and Punishment

As Story presents it, natural law underpins a major classificatory and conceptual division in criminal law.[147] Legal systems in both the civil and common law worlds distinguish between crimes understood as bad in themselves (delicta juris naturalis or crimes *mala in se*) and those where actions are indifferent, on their face, but where an authority has affixed a penalty for a particular reason (delicta juris positivi or crimes *mala prohibita*).[148] In the common-law world, natural law provides a justification for a right to punish crimes of the first type—murder, theft, and so forth—even where express laws do

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[146] Ibid., 6.

[147] C.f., CHAPTER TWO, §2.2.1.

[148] "Criminal law" in *Encyclopedia Americana*, ed. Francis Lieber (Philadelphia: Lea & Blanchard, 1844), 34. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 40. C.f., CHAPTER TWO, §2.2.2.

not exist, but it provides no similar justification for the second type. (Story's example of the latter is laws relating to trade in contraband.)

Story does recognize challenges to the right to punish without express laws. The influential jurist P. J. A. Feuerbach (1775–1833), for one, insisted on a purely deterrence-based theory of criminal law: only express laws, in this telling, promulgated and known, can psychologically restrain would-be criminals, and thus justify punishment.[149] Story does not directly address such challenges. But his answer would likely appeal to a rationally-accessible natural law, which prohibits killing except in self-defense. People do not need a statute book, he thought, to know that murder is wrong.

Story, however, does not think that natural law provides a clear guide to the proper punishments for crimes. Proper punishments cannot be discerned *a priori*, but instead "depend upon the particular circumstances of every age and nation."[150] Accordingly, the tariff of punishment "must be left to the exercise of a sound discretion on the part of the legislature."[151] However, Story is clear that capital punishment is not prohibited by natural law or, indeed, by the norms of a Christian commonwealth. In fact, his view of the acceptability of capital punishment is actually bolstered by his belief in natural rights: "it is often said," he reports, "that life is a gift of God, and therefore it

[149] For a recent overview see Tatjana Hörnle, "PJA von Feuerbach and his *Textbook of the Common Penal Law*" in *Foundational Texts in Modern Criminal Law*, ed. Markus Dubber (Oxford: Oxford University Press, 2014), 119–40.

[150] "Death, Punishment of" in *Encyclopedia Americana*, ed. Francis Lieber (Philadelphia: Lea & Blanchard, 1844), 4:143. Available in *Joseph Story and the Encyclopedia Americana*, ed. Morris L. Cohen (Clark, NJ: Lawbook Exchange, 2006), 50.

[151] Ibid.

cannot justly be taken away."[152] But, he says, "[l]ife is no more a gift of God than other personal endowments or rights."[153] We have rights to our personal liberty—for instance, freedom of movement—which imprisonment removes.[154] So too, then, can life be taken away by civil society, just as freedom can.

We have seen, therefore, in these examples from five branches of the law—equity (§2.4.1.), contract (§2.4.2.), marriage (§2.4.3.), property (§2.4.4.), and crime and punishment (§2.4.5.)—that natural law affords Story with distinct ways to explain and justify American common law.

2.5. The *Jeune Eugenie* Decision

We have seen, then, that through Story's many volumes of commentary on aspects of common law and equity, natural law plays a distinctive if variegated role. But it is in his treatment of international law, however, that Story turns most directly to natural law as a source of law. This is seen best in his 1822 decision *Da Jeune Eugenie*.[155] In this decision, Story—presiding as a circuit justice on the U.S. circuit court

[152] "Death, Punishment of," 4:142; available in Cohen, *Story*, 49.

[153] Ibid.

[154] He does not seem to consider whether the permanency of capital punishment makes it different from other punishments. One could imagine casting (non-permanent) imprisonment as a *restriction* on a right, which is restored after the term of punishment has been served. The once-and-for-all nature of capital punishment does not allow for this.

[155] Elsewhere the name recorded is "*La* Jeune Eugenie."

for Massachusetts—held that federal courts have the authority to confiscate foreign ships employed in the African slave trade.[156] His principal justification was natural law.

The facts of the case are relatively straightforward. The crew of a ship of the U.S. Revenue-Marine captured the *Jeune Eugenie* off the coast of West Africa, suspecting that it was an American ship engaged in the slave trade. Under a U.S. law prohibiting the slave trade, the crew of the Revenue ship claimed the *Jeune Eugenie* as a prize.[157] The French consul in Boston and the *Jeune Eugenie*'s French owners, however, submitted claims for the return of the ship.

In his decision, Justice Story determined that the ship was, indeed, French-owned, but he nonetheless refused to return it to the owners, as it had clearly been involved in the African slave trade. He held that the federal courts have the authority to hear cases involving foreign citizens who participate in the international slave trade and to confiscate their property. Unless the slave trade were to be specifically protected by U.S.

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[156] *Da Jeune Eugenie*, 26 F.Cas., 832, 846 (C.C.D. Mass. 1822). For brief details, see: Federal Judiciary Center, "*Amistad*: The Federal Courts and the Challenge to Slavery — Historical Background and Documents Legal Questions before the Federal Courts," http://www.fjc.gov/history/home.nsf/page/tu_amistad_questions.html.

Story can hardly be viewed as a hero of abolitionism in today's terms. In his opinion in *Prigg v. Pennsylvania* he declared that the Fugitive Slave Act of 1793 was constitutional and that individual states could not prevent the recapture of runaway slaves from other parts of the United States.

[157] By an Act passed on March 2, 1807, the importation of slaves into the United States was prohibited after June 1, 1808. The Act also authorized the president to employ armed vessels to seize ships, including on the high seas, attempting to violate the act. Previous Acts prohibited U.S. citizens or residents from being engaged in the international transportation of slaves. An Act of April 20, 1818 additionally provided that a defendant had to prove that the "negroes" he was charged with having brought into the United States were in the United States five year prior to the prosecution. An Act of March 3, 1819, provided that ships seized by armed U.S. vessels were to be sold, with the proceeds distributed as a prize to the crew. An Act of May 15, 1820 made it a capital offense to seize a "negro or mulatto" with intent to make him or her a slave.

law, he said, then slavery's evident violations of natural law and international law gives U.S. courts the authority to act. (Importantly, note that Story treats natural law as a source of the law that U.S. courts can administer. Natural law is not merely an external moral judgment on the law. Nonetheless, *other* sources of law—U.S. positive and constitutional law—can modify or override, he says, the provisions of natural law.)

Ultimately, the results were less dramatic than the decision. At the request of President Monroe, the *Jeune Eugenie* was delivered to the French government so that French courts could examine the owners' involvement in the slave trade. And the law did not stand still. In the 1825 case of *The Antelope*, the Supreme Court held—in an opinion written by Chief Justice John Marshall—that the federal courts must recognize a nation's right to engage in the slave trade if the law of that nation does not prohibit the trade. Whatever the promise of Story's decision in *Jenue Eugenie*, then, *The Antelope* restricted courts' ability to directly appeal to natural law as some form of "trump" over national laws, foreign or domestic.[158]

Moreover, twentieth-century legal commentators have downplayed the role of natural law in Story's decision.[159] They focused, instead, on Story's discussion of the law of nations and, particularly, *state practice* as one of the sources of the law of nations. In other words, they focus on what has come to be called "customary international law."

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[158] The Antelope, 23 U.S. 66 (1825). See, John T. Noonan, Jr., *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977).

Ronald Dworkin describes rights as "trumps" inasmuch as they permit rights-holders to act in a certain way even if society would be served better—on a utilitarian calculus, say—by doing otherwise. See his "Rights as Trumps" in *Theories of Rights*, ed. Jeremy Waldron, 153–67 (Oxford: Oxford University Press, 1984).

[159] E.g., R. Kent Newmeyer, *Story*, 349.

Customary international law is one part of international law, formed through the consistent practice of states (if accompanied by the conviction that the practice is obligatory).[160]

Newmeyer and other commentators who support the customary-international-law interpretation of the *Jeune Eugenie* case emphasize Story's treatment of state practice. The slave trade, Story noted, was banned in France, the United States, and the United Kingdom. And treaties condemning the slave trade and working for its global abolition had been signed in Vienna, Aix-la-Chapelle, and London.[161] Prioritizing state practice, they say, Story thereafer "consult[ed] the universal morality of natural law" for additional conceptual support or rhetorical potency.[162]

Story's twentieth-century interpreters are right to the extent that Story sought, and expected, the congruence of customary law and natural law. (We have, of course, seen this to be analogously true in Story's treatment of domestic law (§2.4.).) Commentators fail to account, however, for Story's indexing of positive law to natural law: the law of nations stands on natural law, in Story's account, such that the international slave trade is not just illegal because of the "present state of nations"—state practice understood as

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[160] *The Statute of the International Court of Justice* (annexed to the Charter of the United Nations), for instance, treats "international custom, as evidence of a general practice accepted as law" as one of the sources of international law; article 38(b). (New York: United Nations, 2005.)

It remains an open question in international jurisprudence whether *opinio juris*—the term used for the subjective sense that a custom is binding—is to be inferred inductively or deductively by a court. See, Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction, and Assertion*, 26 Eur. J. Int. Law 417 (2015).

[161] *Da Jeune Eugenie*, 26 F.Cas., 832, 846 (C.C.D. Mass. 1822).

[162] Newmeyer, *Story*, 350.

obligatory—but also because the slave trade carries with it "a breach of all the moral duties, of all maxims of justice, mercy and humanity, and of the admitted rights, which independent Christian nations now hold sacred in their intercourse with each other."[163] Accordingly, after reviewing the horrors of the trade, Story concludes that:

> It is of this traffic, thus carried on, and necessarily carried on, beginning in lawless wars, and rapine, and kidnapping, and ending in disease, and death, and slavery,—it is of this traffic in aggregate of its accumulated wrongs, that I would ask, if it be consistent with the law of nations? . . . [*Even if* each element of the trade (war, slavery, plunder, taking of life, selling human beings) could be shown to be lawful] It does not advance one jot to the support of the proposition, that a traffic, that involves them all, that is unnecessary, unjust and inhuman, is countenanced by the eternal law of nature, on which rests the law of nations.[164]

In deciding the case of the *Jeune Eugenie*, indeed, Story reviews the basis of the laws of nations. The sources of international law, he says, are: first, "general principles of right and justice"; second—when concerned with indifferent things—the "customary observances and recognitions of civilized nations"; and lastly, "the conventional or positive law, that regulates the intercourse between states."[165] The practice of states, therefore, can indeed change the content of international law. However, "no practice can obliterate the fundamental distinction between right and wrong."[166]

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[163] *Da Jeune Eugenie*, 26 F.Cas., 832, 845 (C.C.D. Mass. 1822).

[164] Ibid., 846.

[165] Ibid. The Statute of the International Court of Justice includes these sources in Article 38: (a.) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b.) international custom, as evidence of a general practice accepted as law; (c.) the general principles of law recognized by civilized nations; (d.) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[166] *Da Jeune Eugenie*, 26 F.Cas., 832, 864 (C.C.D. Mass. 1822).

What does this mean for the practice of adjudication? In Story's decision, the African slave trade clearly violates his first general principle: "It is repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice."[167] But Story does not end his analysis with the first principle. The second principle (customary law) and the third (positive and treaty-based law) also provide good reasons for decision. Importantly, Story assumes that reasons are rightly in accord with the first general principle.[168]

However, just as nineteenth-century American jurists could decry the international slave trade while countenancing its domestic operation, so too could Story speak of natural law as the first source of the law of nations while recognizing in theory—if not in the practice of this particular case—that he was bound to enforce "the universal law of society," *except* where slavery was "protected by a foreign government."[169] While Newmeyer and others might undervalue the role of natural law in Story's decision, we should not miss that slavery in 1822 was, in Story's telling, *legally* (if not morally) defensible. On Story's account, natural law provides all the presumptions that the slave trade is "altogether illegal" in international law. But this "throw[s] on a claimant the burthen of proof, in order to shew, that by the particular law of his own

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[167] Ibid.

[168] The 1814 treaty of peace between the United Kingdom and France, for instance, calls for universal abolition of the slave trade, given that its traffic is "repugnant to the principles of natural justice and of the enlightened age in which we live." Story quotes this at ibid., 847. For the full document, see Edward Baines, *History of the Wars of the French Revolution: From the Breaking out of the War in 1792, to the Restoration of a General Peace in 1815; Comprehending the Civil History of Great Britain and France during that Period* (London: Printed for Longman, et al., 1817), 2:343–46.

[169] *Da Jeune Eugenie*, 26 F.Cas., 832, 847 (C.C.D. Mass. 1822).

country he is entitled to carry on this traffic."[170] Legally speaking, natural law is a rebuttable presumption. But it is a strange one. For, even if rebutted, natural law still (rightly) condemns the practice.

Story does not stop there. In closing, he offers a dictum—an authoritative but non-binding statement of law[171]—that "upon principles of universal law" those engaged in the international slave trade could not "have a right to be heard upon a claim of this nature in any court."[172] This is a procedural determination, he says, which receives support from the practice of other nations.[173]

Irrespective of these words—substantive or procedural, ratio or dicta—within three years, Chief Justice Marshall held in *The Antelope* that, whatever his personal beliefs that slavery violates natural law, the fact that many nations nonetheless approve the trade means that the U.S. Supreme Court could not rule that the slave trade was a violation of international law.

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[170] Ibid., 848.

[171] The statement is non-binding because the issue was not decided as part of the case before the court. (*Obiter dicta* are words said in passing, "by the way." *Ratio decidenti*—the reason for the decision—are binding.)

"That [slavery] is contrary to the law of nature will scarcely be denied... Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself as a part and to whose law the appeal is made. If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade. Both Europe and America embarked in it, and for nearly two centuries it was carried on without opposition and without censure"; *The Antelope* 23 U.S. 66 (1825), 22.

[172] *Da Jeune Eugenie*, 26 F.Cas., 832, 848 (C.C.D. Mass. 1822).

[173] In "trade contrary to the general law of nations," he says, the British High Court of Admiralty holds the same position; ibid.

Conclusion

CHAPTER 3 is the first of three that, together, offer a depiction of legal education through the nineteenth and early twentieth centuries. More particularly, we consider legal education's uptake and interpretation of the natural-law visions of common law offered by American colleges (CHAPTER 1) and Blackstone's *Commentaries* (CHAPTER 2).

We began this task in CHAPTER 3 by considering the emergence of professional law schools. We saw that early nineteenth-century proprietary and university law schools framed the common law in reference to the natural-law vision of Blackstone's *Commentaries*. And yet we quickly noted a puzzle. If natural law had this central place in legal education, why did it soon recede from view? What happened was this: as nineteenth-century American common law developed into a principled system of law, it subsumed natural law into its doctrinal details. Except in rare circumstances—notably in the arena of international law—common law less frequently appealed to natural law, for judges and jurists could now turn to the developing body of principles and precedents constitutive of American common law. Not that this change of practice entailed a rejection of natural law. The life and work of Joseph Story—professor, jurist, and judge—showed us, instead, that natural law could remain central to the animating vision and moral purpose of common law even when it was not explicitly invoked.

Attention to Story's writings, moreover, has helped us consider three challenges and possibilities for those who might wish to invoke natural law today. First, Story offers one model for how reason can relate to history in a natural-law account of common law. Reason, it seems, is known and "discovered" in historical particularity. Human customs,

Story says, are the proximate source of all laws. But common law is not an alternative to natural law. Common law itself, he says, is built up from common reason and history. Common law, then, is a historical enactment of natural law, even as common law and natural law do not fully overlap.

Second, this historicized view of natural law view can redirect our attention. No longer is natural law necessarily considered solely as a source or external standard for common law. It can be, instead, a constitutive part. As part of American common law, however, natural law gives up its final word. If natural-law-inflected common law enacts positive law in America, the principles of natural law *simpliciter* can be frustrated, even as natural law serves as partially constructive of common law. What does this more broadly? What Story offers is, in effect, a natural-law account of positive law.[174] Contemporary proponents of natural law will, accordingly, have to decide whether Story's account of natural law is a betrayal of the tradition, or its necessary form in a pluralistic democratic order.

Third, this separation of natural law and positive law opens up space for Christian reflection on the law. Christian faith offers resources to better understand and follow natural law. Christian narratives illustrate the natural law, and Christian beliefs offer motivation to follow the law. And where common law fails to get the answer right—whether on women's suffrage, Native American land rights, or the slave trade—natural law, then, can still offer critique. Natural law can condemn bad common law, even if bad law wins out. For some, this portrayal of a historicized and relativized natural law will be

[174] For more on this possibility, see Jeremy Waldron, "What is Natural Law Like?" in *Reason, Morality, and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George, 73–92 (Oxford: Oxford University Press, 2013).

contradictory, or, at least, a betrayal of the tradition. (The separation of legality from goodness, after all, is the very definition of positivism.) But what Story's account shows, perhaps, is that natural law can meaningfully explain and account for aspects of a legal system, even when it is not employed as a *legal theory*. In other words, we might recognize the importance of natural law in the common-law legal system without thinking that natural law fully explains *legality* (what makes specific laws legally valid) or *normativity* (what makes us comply with laws).

In the next two chapters, we will continue to trace the changing role of natural law and common law in legal education. In CHAPTER 5, we see natural law's seeming demise in twentieth-century legal realism. But first, in CHAPTER 4, we turn to Christopher Columbus Langdell and his 1870 reforms of the university law school.

CHAPTER 4

1870. THE MODERN LAW SCHOOL: CHRISTOPHER COLUMBUS LANGDELL'S LEGAL SCIENCE AS PERPETUATION AND REJECTION OF NATURAL LAW

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Retrospect and Prospect

In this second chapter of PART II, we continue our evaluation of professional legal education in the United States, and its uptake and interpretation of the collegiate and Blackstonian natural-law sources discussed in PART I. The three chapters of PART II offer a chronological sweep through the leading American treatments of natural law and common law: In CHAPTER 3, our focus was the early-nineteenth-century beginnings of professional legal education, and the influence of Joseph Story in historicizing and relativizing natural law. In CHAPTER 5, our focus will be the impact on legal education of the twentieth-century American legal realists, and their appeal to the skeptical thought of Oliver Wendell Holmes, Jr. But in CHAPTER 4, we stand between Story and the realists. Our focus is squarely the late-nineteenth century, and the reformation of university law schools begun by Christopher Columbus Langdell.

In what follows, we will see that by the mid-nineteenth century, the job of training elite lawyers had fallen in large measure to university law schools.[1] In the structure of their teaching, and in their general understanding of the legal system, these law schools remained deeply indebted to Joseph Story (CHAPTER 3), and, ultimately, to Blackstone (CHAPTER 2). But university law schools failed to meet the promise of high scholarship—including philosophical analysis of the common law—that law's inclusion as a university discipline might have suggested. There was, instead, intellectual and organizational malaise.

[1] The majority of American lawyers were still training through apprenticeships. (See, CHAPTER 3, §1.)

In 1870, however, law schools' professional orientation and natural-law assumptions were forever changed by reforms initiated at Harvard by Christopher Columbus Langdell (1826–1906) (§1.). In time, these reforms set the standard for all American university legal education, with significant consequences for the relationship of common law to natural law. The loci of these shifts were Langdell's development of the *case method,* which challenged the rules and maxims of earlier teaching (§2), and his vision of law as a *legal science*, the standards and practices of which were shaped by the nineteenth-century approach to the natural sciences (§3).

Some commentators treat Langdell's turn to the natural sciences as continuous with Blackstone and Story's understanding of law as a science. Others herald or bemoan Langdell as a nascent legal positivist. We will see, however, that, although Langdell's later critics have often insufficiently distinguished his legal science from earlier natural-law treatments of law or later positivist accounts, there were significant differences. Langdell affirmed that the sole source of common law is the positive law of judges and legislators, not morality or even custom—as natural-law-inflected treatments of common law had maintained—and that precedent in the law, in the end, must rule over reason (§4). And yet—in ways confusing to his later critics—Langdell retained a commitment to principle in the law, and to the legal system's *internal* coherence (§5). These commitments are sharply distinct from those of his twentieth-century successors, who came to understand the law as merely a matter of power and legal "coherence" as merely the match between legal outcomes and political desires (CHAPTER 5).

What do we learn about the feasibility of natural-law engagements of common law from Langdell's late-nineteen-century reformation of American legal education? At

least three things can be said at the outset. First, if he is meaningfully classed as a natural lawyer, Langdell offers an *inductionist* natural law (§3). He offers, in other words, a vision of law where more general laws or principles are formed by inference from the decisions of particular legal cases. This approach is distinct from prominent forms of the natural-law tradition—especially in its *modern* guise (CHAPTER 1, §4.1.)—which work *deductively*: that is, by applying *a priori* principles (concerning human nature, say) to particulars. Of the modern natural lawyers, only Hugo Grotius allows for both induction and deduction. Thomas Hobbes, Samuel Pufendorf, and John Locke, instead, solely work by deduction.[2] Definitions begin their treatises. Mathematics is their model. In turning to induction, then—cases (not principles) and the natural sciences (not the mathematical)—Langdell uses a model that more closely matches the logic of common law. Langdell, therefore, may provide us with a helpful example of the profits and pitfalls of an approach that more closely fits natural-law analysis to the actual practice of the American legal system.

Second, considering Langdell and his reforms we find, however, that the question of justification haunts induction (§4). What is it about a legal case—the source material of common law—that makes its rules or principles worthy of following? It is Langdell's silence on this question that allows his interpretation as either a natural lawyer or positivist. What we will see, however, is that Langdell simply assumes that the content of common law is principled. He offers little or no argument for why this might be so. This

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[2] For extracts of the relevant discussions by Grotius, Hobbes, Pufendorf, and Locke, see: J. B. Schneewind, *Moral Philosophy from Montaigne to Kant* (Cambridge: Cambridge University Press, 2003), 88– 200. The same ground is covered by Knud Haakonssen, "Natural Law in the Seventeenth Century," in *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment*, 15–62 (Cambridge: Cambridge University Press, 1996).

is different both to Story, who suggests that history—and thus the refinement of case law—works out reason (CHAPTER 3, §2.1.), and the legal realists who, as we will see, look to standards external from the law (CHAPTER 5). Langdell can only offer a contingent reply: in American common law—*it so happens*—reason and precedent come together. Those attracted to an inductivist account of natural law, therefore, will need to think carefully about what exactly they expect to find in the process of induction. Contemporary Christian proponents of natural-law readings of common law, for instance, would surely hesitate to affirm as "natural law" all that they find in developed case law. (The evident cruelties legally perpetuated through the history of the United States should disabuse us of any easy fit.) Even the most confident proponents, then, will require extra discernment to separate the natural-law wheat from the common-law chaff.

Third, this question of justification is a reminder that contemporary proponents of natural law must repeatedly ask *for whom* any account of natural law is justifiable.[3] Langdell's audience, he thought, would be convinced by law's reference to the natural sciences. This provided its legitimacy. His was an age when the power of the scientific method promised progress in all aspects of life. Following in the mainstream of the natural-law tradition, Langdell assumed too that all reasonable people would see the truths of his legal science. Needless to say, contemporary American proponents of natural law cannot take this for granted. They do not find a public square with shared epistemological understandings, let alone normative visions. Their questions, then, become: Who will be moved by a natural-law account of common law? What shared assumptions are necessary for agreement?

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[3] See, e.g., Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988).

In CHAPTER 5, we will see what happened in legal education when confidence in the inner rationality of common law broke down. But in CHAPTER 4, we turn to the confident 1870 reform of legal education led by Christopher Columbus Langdell.

1. The Birth of the Modern Law School

1.1. From Story to Langdell

High aspirations for university legal education did not lead to high achievement. By the mid-nineteenth century, the site of most legal education remained far from university campuses in the offices and chambers of experienced lawyers and judges. The few university law schools that did exist were hardly the acme of excellence. Indeed, despite Joseph Story's fame and influence, following his death in 1845, Harvard Law School still had no entry requirements and conducted no examinations; residence and the proper payment of fees sufficed to qualify students for degrees.[4] So it was that, in 1870, Oliver Wendell Holmes, Jr. could declare the school "almost a disgrace to the Commonwealth of Massachusetts."[5]

Partly as cause, partly as symptom: low standards in the university law schools coincided with the obsolescence of the tools used by educated lawyers of the early and

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[4] Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States* (New York: Carnegie Foundation for the Advancement of Teaching, 1921), 145n1. C. C. Langdell, "The Law School," in *Annual Reports of the President and Treasurer of Harvard College. 1889–90* (Cambridge, MA: Published by the University, 1891), 131–32.

[5] This appeared in a "summary of events" anonymously written with Arthur Sedgwick in 5 Am. L. Rev. 177, 177 (1870).

middle years of the nineteenth century. The various commentaries and other treatises—written by Joseph Story (CHAPTER 3, §2), and others—that were profitably used to chart federal and state laws in the early nineteenth century were now out of date, and most practitioners found the increasing volume of reported law cases unmanageable.[6]

At Harvard Law School, these twin challenges of low standards and inadequate tools were met with the 1870 appointment of Christopher Columbus Langdell (1826–1906) as the school's first dean, and, more particularly, by his introduction the same year of the *case method*: a method of instruction and, it would seem, a legal way of thinking—a *Langdellian legal science*—that would eventually shape all of American legal education.[7]

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[6] Joel Seligman, *The High Citadel: The Influence of Harvard Law School* (Boston: Houghton Mifflin, 1978), 45. In the preface of his casebook on contracts, Langdell writes of the "great and rapidly increasing number of reported cases in every department of law," and suggests that the case method provides a "satisfactory principle" to glean this material: *A Selection of Cases on the Law of Contracts with References and Citations . . . Prepared for Use as a Text-Book in Harvard Law School* (Boston: Little, Brown, 1871), vi.

[7] In 1870, Harvard's President Eliot brought Langdell to serve as Dane Professor in the Law School. Charles Eliot's presidency is now remembered for its broad and widely influential reforms, particularly in scientific and medical education. Eliot's reforms—notably the development of the college elective system, the improvement of professional education, and the strengthening of a research culture—are well-captured in his: "The New Education: Its Organization," a two-part essay in *Atlantic Monthly* (February and March 1869); *Educational Reforms: Essay and Addresses* (New York: Century, 1898); and *University Administration* (Boston: Houghton Mifflin, 1908).

The case method first appears in the written record with Langdell's 1870–71 report to President Eliot, his first year as the first dean. Langdell lists the professors and their subjects of instruction. After professors Washburn and Holmes, and their respective subjects, he records: "Professor Langdell's subjects of instruction were Contracts, Sales of Personal Property, and Civil Procedure at Common Law," and then: "[i]n each of the two former subjects he used as a text-book a selection of cases which he had prepared for the purpose." *Annual Report to the President and Treasurer of the Harvard College 1870–71* (Cambridge, MA: University Press, 1872, 60).

To many, 1870 marks the birth of the modern American law school.[8] Under Langdell's influence, to study law meant to engage directly with reported legal opinions, almost entirely those of appellate court judges. Standard methods of instruction—the memorization of principles, rules, or maxims through rote-learning, lecture-instruction, and textbooks[9]—were replaced by the studied tracing of major legal doctrines through selected sets of the leading cases. In the past, professors taught their students legal rules. Now, students were to divine the rules for themselves by reading the cases.

1.2. The Pedagogical Change

Consider just this one example. Both Story and Langdell treat the English case of *Chamberlain v. Agar*,[10] both in their respective works on equity process and procedure. In Story's *Commentaries on Equity Pleadings*, the case is discussed within a 45-page treatment of pleadings. (A "plea," in an equity suit, is "a special answer," given by a defendant, "showing or relying upon one or more things, as a cause why the suit should

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[8] Anthony Chase, *The Birth of the Modern Law School*, 23 Am. J. Legal Hist. 329 (1979); Robert Stevens, "Two Cheers for 1870: The American Law School," in *Law in American History*, ed. Donald Fleming and Bernard Bailyn (Boston: Little, Brown, 1971). For an important study on the shape of American legal education from Langdell through to the legal realists, which treats Langdell with unusual sympathy, see William LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994).

[9] The standard approach was codified at Columbia Law School. Named for the school's dean, Theodore William Dwight (1822–1892), this "Dwight Method" was highly influential across American law schools. See, Thomas Fenton Taylor, *The Dwight Method*, 7 Harv. L. Rev. 203 (1893).

[10] 2 Ves. & B. 259. The case concerns a letter adding to a will (that is, a testamentary paper or codicil), which the plaintiff believed promised her an annuity of £200. On the death of the testator, his executors (his sons) claimed in a plea that the letter did not exist, and did not answer questions as to the circumstances surrounding the purported letter.

be either dismissed, delayed, or barred."[11]) The chapter begins with Story's treatment of the true nature, office, and frame of a plea. It is striking that, even in a treatise on the *practice* of the law, Story first provides a conceptual background before turning to the particular situations where pleas are an appropriate form of defense. When *Chamberlain v. Agar* appears, it is only in a footnote. It stands along with five other cases as authority for "a doctrine . . . stated in a more general form."[12] It is one authority for a right of "discovery"—the compelled disclosure of relevant facts or documents—where a plaintiff's claim relies upon the existence of a document. If a defendant argues that a document does not exist, the defendant cannot avoid answering questions as to the circumstances surrounding the purported document. A plea to dismiss the suit for lack of documentation, in other words, cannot simply ignore the circumstances that might prove the document's existence.[13]

Langdell's treatment of *Chamberlain v. Agar* is quite different. It appears in his *Cases in Equity Pleading, Selected with Special Reference to the Subject of Discovery, Prepared for Use as a Text-Book in Harvard Law School.*[14] This casebook has no introduction apart from the title page and a list of cases. The report of *Chamberlain v. Agar* appears on pages 67 through 69. The entry includes a brief summary of the facts, a

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[11] Joseph Story, *Commentaries on Equity Pleadings and the Incidents thereto, According to the Practice of the Courts of Equity of England and America* (London: A. Maxwell, Bell Yard, 1838), 406.

[12] Ibid., 436.

[13] Story also considers the case when discussing actual fraud as part of the substantive law of equity. *Commentaries on Equity Jurisprudence as Administered in England and America* (Boston: Hilliard, Gray, 1836), 1:259.

[14] (Cambridge, MA: Printed for the Author, 1878.)

paragraph of each of the lawyers' arguments, and the judgment of Sir Thomas Plumer, Vice-Chancellor. Langdell adds no commentary. The only footnotes are internal citations to the cases mentioned in the judgment. Langdell's understanding of the law and editorial judgment are, of course, evident in the very selection of the texts, but the casebook is designed, nonetheless, to require its student-readers to determine for themselves the importance of the selected cases by reading the judgments and considering the relationships between them. In short, unlike Story's treatise, Langdell's casebook gives its readers neither a general description of the subject matter nor an analytic treatment of how its components fit together. From its raw materials, (would-be) lawyers are to work out the law for themselves.

As dean, Langdell introduced meritocratic reforms at Harvard that were widely copied, and which continue, in some form, to this day: fixed entry standards, a systematic progression of courses, increased hours of instruction, and regular examinations.[15] These reforms, however, need not have accompanied the advent of the case method. Entry standards could have been raised under any regime of teaching. And yet, in time, the case

[15] "[A]ll of them who were not graduates of colleges had passed an examination for admission, either in Latin or French, and also in Blackstone's Commentaries." C. C. Langdell, "The Law School," in *Annual Reports of the President and Treasurer of Harvard College. 1889–90.* (Cambridge, MA: Published by the University, 1891), 131. Likewise, a student's course of study was to be "regular, systematic and earnest, not intermittent, desultory or perfunctory," with three years of study "pursued in the prescribed order." See, *The Harvard Law School*, 3 Law Q. Rev. 118 (1887). ("We reprint from the *Boston* (Mass.) *Weekly Advertiser* the speeches delivered by Mr. Justice Holmes and Prof. Langdell at the 'quarter-millennial' celebration of Harvard University on the 5th of November.")

The new culture required additional weekly hours of instruction—an increase from ten hours to over thirty hours—and with that, the growth of the faculty from three professors in 1870 to five professors, one assistant professor, and three lecturers by 1890. Langdell, *Harvard Annual Reports 1889–90*, 132.

method was identified both with the rise in educational standards that followed from Langdell's reforms and, more broadly, with the increasing prestige of university legal education, such that the case method and high quality legal education came to seem inseparable.

2. The Case Method

The twentieth-century triumph of the case method, however, has mostly obscured the controversy and dissention that surrounded its nineteenth-century introduction. Older forms of teaching remained standard. A history of legal education written in 1904 declared that "[t]he method of instruction in vogue in most of our law schools at the present day, as it was in all until a comparatively recent date, is that of the lecture."[16] With the case method's 1870 introduction at Harvard, student numbers dropped, and "[h]ardly one of the Boston lawyers had any faith in it."[17] When Langdell retired in 1895, only six other schools had adopted the case method, and it remained sufficiently controversial in the ensuing decades that, in 1914, the Carnegie Endowment for the

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[16] Edwin Dexter, *A History of Education in the United States* (New York: Macmillan, 1904), 326.

[17] "The number of students declined more than either of us had expected, and the demonstration of success achieved in prominent law offices and in practice by graduates of the School, who had enjoyed Langdell's system and thoroughly utilized it, came more slowly than we had anticipated;" Charles Eliot, *Langdell and the Law School*, 33 Harv. L. Rev. 518, 522–23 (1920). James Barr Ames, "Christopher Columbus Langdell" in *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge, MA: Harvard University Press, 1913), 467–84.

Advancement of Teaching commissioned a study of its utility.[18] The method's widespread adoption came only as prominent students of Langdell came of age and praised the system in which they were trained, and as the case method's use slowly became an institutional mark of *prestige*: even if its uptake was small, the case method was used, its supporters noted, "in nearly all the best schools."[19]

The case method's twentieth-century success, moreover, has obscured not only the cautious initial uptake of the method, but also the wide range of nineteenth-century voices on the nature and purpose of law, explicit natural-la accounts included. Over the twentieth century, Langdell became a too-convenient symbol for his era and his method definitive of the age's particular *genius*, "an entirely original creation of the American mind in the realm of law."[20] In fact, though, Langdell's teaching was an outlier until the twentieth century, , and natural-law voices remained strong in Langdell's time, particularly in public campaigns on matters of combined moral, political, and legal import.

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[18] Josef Redlich, *The Common Law and the Case Method in American University Law Schools: A Report to the Carnegie Foundation for the Advancement of Teaching* (New York: Carnegie Foundation for the Advancement of Teaching, 1914). The foundation had previously undertaken an influential study of medical education. Controversy over the case method was still sufficiently strong, that the foundation looked abroad to find a fair commentator. They commissioned the Austrian Josef Redlich, a professor of law at the University of Vienna: a statesman, historian, and jurist with wide expertise including knowledge of British parliamentary procedure and English local government.

[19] Ames, "Christopher Columbus Langdell," 478.

[20] "If Langdell had not existed," wrote Grant Gilmore, "we should have had to invent him." *The Ages of American Law*, 2nd ed., with a final chapter by Philip Bobbitt (New Haven: Yale University Press, 2014), 38.

2.1. Instruction and the Case Method

The "entirely original creation" of the case method, as Langdell first imagined it, required students—aided by references given by their instructors—to use the library to find selected cases in the reports of English and American courts and, in reading these cases, to determine the law therefrom. Put another way, the content of the law was to be found in reading the cases, not in principles provided by professors or found in treatises.[21] Directing many students to the same collections of cases, however, had the practical consequence of damaging the library books, and the limited number of copies available to students caused inconvenience and grumbling. Langdell's yearly reports to Harvard's President Eliot record the law school's response in some detail, including the purchase of more copies of case reports. Fortunately, though, Langdell already had an answer: the production of a new form of textbook that reproduced, in one volume, the relevant cases in any area of the law. In 1871, his volume on contract law was commercially published, and with *A Selection of Cases on the Law of Contracts*, the casebook—the dominant tool of legal study to this day—was born.[22]

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[21] M, *Correspondence to the Editors*, 1 Columb. L. Times 4 (October 1887). See also, Bruce Kimball, "*Warn Students That I Entertain Heretical Opinions, Which They Are Not To Take as Law": The Inception of Case Method Teaching in the Classrooms of the Early C. C. Langdell, 1870–1883*, 17 Law & Hist. Rev. 57 (1999).

[22] *A Selection of Cases on the Law of Contracts: With References and Citations: Prepared for Use as a Text-book in Harvard Law School* (Boston: Brown, Little, 1871.)

If Langdell pioneered the common law casebook, canon law preceded him by centuries. In the Christian West, casebooks of "cases of conscience" had been prepared for use of confessors since at least the thirteenth century, and as textbooks for the training of priests since the sixteenth century. See: Albert Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), 141–43; John O'Malley, *The First Jesuits* (Cambridge, MA: Harvard University Press, 1993), 137, 146–47; Johann Theiner, *Die Entwicklung der Moraltheologie zur eigenständige Disziplin* (Regensburg: F. Pustet, 1970), 119–22; Louis

Langdell's method of instruction was co-constituted with the casebook. No longer were students to read treatises and listen to lectures about those treatises. Instead, students were to look at particular cases: digest their facts and decisions, consider the grounds for these decisions, and thereby trace a legal rule.[23] In the classroom, the "Socratic" method made this clear. Consider this example from the earliest days of case-method instruction. Samuel Batchelder, from the vantage point of 1906, recalled Harvard Law School:

> The class gathered in the old amphitheater of Dane Hall—the one lecture room of the School—and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes![24] The lecturer opened his.
> "Mr. Fox, will you state the facts in the case of Payne v. Cave?"
> Mr. Fox did his best with the facts of the case.
> "Mr. Rawle, will you give the plaintiff's argument?"
> Mr. Rawle gave what he could of the plaintiff's argument.
> "Mr. Adams, do you agree with that? . . . "[25]

In principle, students were to determine the law for themselves through direct engagement with the written authorities. The words of individual judges were to be assessed in reference to the development of legal doctrine understood through the reading

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Vereecke, *De Guillaume D'Ockham À Saint Alphonse de Liguori: Etudes d'histoire de la théologie morale moderne, 1300–1787* (Rome: Collegium S. Alfonsi de Urbe, 1986), 495–508.

[23] Samuel Batchelder, *Christopher C. Langdell*, 18 Green Bag 437 (1906).

[24] Headnotes appear at the top of cases and summarize the salient legal rules. Headnotes, however, are not authoritative. They have no precedential value. See, United States v. Detroit Timber & Lumber Company, 200 U.S. 321 (1906).

[25] Samuel Batchelder, *Christopher C. Langdell*, 18 Green Bag 437, 440 (1906).

of a series of the leading cases.[26] Students adopted a judicial, or juridical, standpoint by engaging the very sources of the law, rather than accepting the word of textbook writers or professors. This was active learning.[27]

3. A Legal Science

The case method, however, was not simply a *method*, if by "method" we mean a simple procedure—the reading of cases—for attaining an object: discovering the law. Rather, at least in its origins, the case method was truly a representation of, and the means to create and support, an intellectual discipline: an independent branch of study, a Langdellian *legal science*, which would both build upon, and significantly unsettle, the broadly natural-law foundations of earlier treatments of the legal system.

Langdell, in short, saw law as a science akin to the natural sciences. In the preface to his first casebook, for instance, Langdell follows Blackstone and Story in describing law "as a science," consisting of "certain principles or doctrines" (c.f., CHAPTER 2, CHAPTER 3).[28] "[T]he business of every earnest student of law," Langdell writes, is to

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[26] "The mere *ipse dixit* of the court is never accepted as final. In fact chief justices and chancellors are frequently overruled with surprisingly nonchalance"; M, *Correspondence to the Editors*, 1 Columb. L. Times 4, 25 (October 1887).

[27] Years later, Langdell's great supporter President Eliot would drily suggest that: "Professor Langdell had, I think, no acquaintance with the educational theories or practices of Froebel, Pestalozzi, Seguin, and Montessori; yet his method of teaching was a direct application to intelligent and well-trained adults of some of their methods for children and defectives." Charles W. Eliot, *Langdell and the Law School*, 33 Harv. L. Rev. 518, 523 (1919).

[28] Langdell, *Selection of Cases*, vi. Few commentators note the affinities with Blackstone and Story. They suggest, instead, that Langdell marks a distinct break from

"have such a mastery of these [principles or doctrines] as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs."[29] If law was truly a science, however—or rather, if late-nineteenth-century Anglo-American law, as studied in a university context, were truly *to be* a science—then this legal science needed to consist of a finite number of principles or doctrines, akin to the finite chemical elements or the laws of physics. While the content of the law seemed complex, even messy, Langdell maintained that the number of its core principles or doctrines was "much less than is commonly supposed."[30] The varied guises under which the same legal principles or doctrines had appeared, he thought, concealed relative simplicity: a fog of confusion that the tools of modern science—not least classification and systematization—could dissipate.

A science, of course, has an object of study, and the material on which Langdellian legal science worked was not an abstract concept of justice, or, as for Story, a combination of history and reason (CHAPTER 2, §2.1.). Rather, it was the written cases. The true specimens of legal science were the reported words of judges. Indeed, Langdell maintained that "*all* the available materials of that science are contained in printed

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previous traditions. Thomas Gray does note continuity, but suggests that we find a new rigor with "Langdell and his followers" who "took the view of law as science seriously and carried it out programmatically in a way that had no precedent in the common law world, erecting a vast discursive structure that came to dominate legal education and to greatly influence the practical work of lawyers and judges." Thomas Gray, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 5 (1984).

[29] Langdell, *Selection of Cases*, vi.

[30] Ibid. Notice that Langdell's claim provides an answer to the problem of how to deal with the increasingly large numbers of reported law cases.

books."[31] The research practices and attitudes of legal science rightly related, then, to the discovery and sifting of information from the law library, which he believed was:

> the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.[32]

The law was to be discovered and extracted from its source, the written record of cases—particularly appellate opinions—by *induction*; the legal scientist was to infer principles and doctrines from the particular decisions of the courts. As knowledge of natural science was understood to rightly proceed from observation of particular organisms, or physical science from physical phenomena, so in legal science, the *stuff* of the common law—the written record of judicial opinions—was to be sole source for the law. Accordingly, legal education was to teach the inductive derivation of principles and doctrines, never apart from the cases.[33]

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[31] *The Harvard Law School*, 3 Law Q. Rev. 118, 124 (1887) (emphasis added).

[32] Ibid. Langdell identified the library as the site of scientific inquiry on several occasions, including in his published reports to President Eliot: "The most essential feature of the School, that which distinguished it most widely from other schools of which I have any knowledge, is the library. I do not refer to the mere fact of our having a library, nor even to the more important fact of its being very extensive and complete; I refer rather to the library as an institution, including the relation in which it stands to all the exercises of the School, the influence which it exerts directly and indirectly, and the kind and extent of use that is made of it by teachers and students. Everything else will admit of a substitute, or may be dispensed with; but without the library the School would lose its most important characteristics, and indeed its identity"; *Annual Reports of the President and Treasurer of Harvard College. 1872–73.* (Cambridge: Welch, Bigelow, 1874), 63.

"The work done in the Library is what the scientific men call original investigation. The Library is to us what a laboratory is to the chemist of the physicist, and what a museum is to the naturalist"; *Annual Reports of the President and Treasurer of Harvard College. 1873–74.* (Cambridge, MA: John Wilson and Sons, 1875,) 67.

[33] See, Redlich, *Common Law and the Case Method*, 16.

To teach law in this way, thought Langdell, professors need not be experienced in the *practice* of the law. As *legal scientists*, professors' expertise was rightly "experience in learning law," not in its use.[34] They were to be researchers in the laboratory of the law library. Langdell's student James Barr Ames (1846–1910), for example, was appointed an Assistant Professor immediately following his graduation from Harvard Law School, without any professional experience. In fact, Langdell was "inclined to believe that success at the Bar or on the Bench was, in all probability, a disqualification for the functions of a professor of law."[35]

Despite sharing some vocabulary, Langdell's understanding of law as science conflicted with the prevailing practitioners' view of law as a craft, and with the older collegiate vision of law as an art, rightly studied with philosophy and government as the means to form character (CHAPTER 1). Proponents of legal science insisted instead that law was its own scholarly discipline with its own domain and method.[36] It was neither merely a preparation for practice nor one facet of a humanistic education.

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[34] The skills and purpose of the law professor for Langdell were "not the experience of the Roman advocate, or of the Roman prætor, still less of the Roman procurator, but the experience of the Roman jurisconsult"; *The Harvard Law School*, 3 Law Q. Rev. 118, 124 (1887). A *jurisconsult* gave advice on questions of law as an aristocratic pursuit rather than as his career. He did not try cases or aid parties in their pleadings before courts, but rather give advice to a judge or a party to the case on the state of the law. See, Cicero, *De Oratore.* Loeb Classical Library. (Cambridge, MA: Harvard University Press, 1942–48), 1:212, 148–49.

[35] Eliot, "Langdell and the Law School," 520.

[36] "Dean Langdell thought that English and American law should be studied by itself without admixture of other subjects, such as government, economics, international law, or Roman law"; ibid., 523.

3.1. Law Among the Sciences

Despite the resistance to the case method, the intellectual underpinnings of this new legal science were not unfamiliar to Langdell's contemporaries. "Science" was the emerging commonplace of a powerful new American vision for the research university. Inspired by Germany, not just the natural and physical sciences but even the humanities at Harvard, as elsewhere, were rebuilding on a *scientific* basis.[37] Congruence with observable phenomena, and not metaphysical or other categories, was to be the sole criterion for truth.

To establish the scientific character [*Wissenschaftlichkeit*] of legal study, Langdell's would-be legal scientists insisted both that law has a distinctive object of study (reported cases) and that its method (induction) was suitably objective. We might think that the very bareness of Langdell's casebook offered its own proof: what could speak more of the publicity and replicability of law—necessary for law's scientific character—than the fact that, from its unadulterated materials of study, law students could inductively determine the law? "Under the influence of Germany," Oliver Wendell

[37] Americans' enthusiasm for German universities nonetheless often confused German interest in *pure learning*—research pursued for its own merit, free from state and commercial demands—with *pure science*, the use of experimental methodologies in ever-increasing specialization. Americans generally ignored the contemplative aspects of *Wissenschaft*, and, especially in the *Humboldtsches Bildungsideal*, the integration of humanistic and scientific knowledge in the formation of students as (world) citizens. See: Laurence Veysey, *The Emergence of the American University* (Chicago: University of Chicago Press, 1965), particularly chapter three, "Research," 121–79; and Chad Wellmon, *Organizing Enlightenment: Information Overload and the Invention of the Modern Research University* (Baltimore, MD: Johns Hopkins University Press, 2015), particularly chapter eight, "Berlin, Humboldt, and the Research University," 210–233.

Holmes, Jr. told the assembled crowds at the 1886 celebration of Harvard's 250th anniversary: "science is gradually drawing legal history into its sphere."[38]

Langdell's vision of the law, then, places it among the sciences. And we might be tempted to link this vision to every facet of the nineteenth-century enthusiasm for science and the scientific method. But yielding to this temptation obscures more than illumines. Beyond legal science's general scientific spirit, and its scientifically-inflected building-blocks—its content (legal principles and doctrines), its sources (law cases), its place of investigation (the law library), its method (induction), and its scientists (law professors not lawyers)—the connections between legal science and the natural and physical sciences are difficult to sketch with any exactitude.[39]

Twentieth-century commentators suggest various scientific influences and comparators. Robert Stevens, for instance, calls the case method "somewhat Darwinian," presumably as legal doctrine is refined through a series of cases with only the fittest parts surviving.[40] Bruce Kimball links Langdell with *Baconianism*, at least inasmuch as Bacon's thought was understood through popular mid-nineteenth-century philosophers of

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[38] Holmes continued: "The facts are being scrutinized by eyes microscopic in intensity and panoramic in scope. At the same time, under the influence of our revived interest in philosophical speculation, a thousand heads are analyzing and generalizing the rules of law and the grounds on which they stand. The law has got to be stated over again, and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago." *The Harvard Law School*, 3 Law Q. Rev. 118, 120 (1887).

[39] But see Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 Law & Hist. Rev. 421 (1999).

[40] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 55.

science, such as Samuel Tyler (1809–77).[41] Legal science, accordingly, is inductive and empiricist. Thomas Gray depicts the intellectual world of Langdell and his supporters as *idealist*: the legal scientist—the scholar, or a great judge or lawyer—discovers a previously unrecognized principle of the law, albeit immanent in the cases, and articulates this principle with greater precision than hitherto, thereby furthering the science of the law.[42] Each depiction captures something of Langdell's approach, but risks overly neat interpretation.

However this science is best conceived, we must remember that Langdell's presentation of law-as-a-science—akin to the natural and physical sciences—was, in its time, a contribution to the still-unsettled question of whether law, and other professional disciplines, rightly belonged in the American university. The rhetoric of legal study as scientific investigation served to link university law schools with the prestige then enjoyed by the burgeoning experimental sciences. In his speech marking the 250th anniversary of Harvard, Langdell identified, and measured, the law school's success, past and future, by its ability to prove "that law is a science, and that all the available

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[41] Bruce Kimball, "The Proliferation of Case Method Teaching in American Law Schools: Mr. Langdell's Emblematic 'Abomination,' 1890–1915," *History of Education Quarterly* 46, no. 2 (2006): 192–247, 198; Samuel Tyler, *A Discourse of the Baconian Philosophy*, rev. ed. (New York: Baker and Scribner, 1850); Samuel Tyler, "On Philosophical Induction," *American Journal of Science and Arts,* 2nd series, 5 (1848): 329–37. Francis Bacon had advocated science as the exhaustive survey of experience via induction involving multiple stages of abstraction and invention. Langdell took the induction, at least.

[42] Gray suggests that for Langdell and his supporters, this was understood to occur partly in judicial acknowledgement of the changing needs and conditions of society. While not mentioned by Gray, on this account, there is something of *Hegelian* idealism in Langdell's views: the truth is progressively realized through the working out of societal life (c.f., Joseph Story on history, CHAPTER 2, §2.1.).

materials of that science are contained in printed books."[43] In Langdell's mind, the purpose of university education was *exhausted* by the scientific method, such that "[i]f law be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it."[44] To be worthy of university study, then, the law had to be a science, and the library—not the lawyer's office or judge's chambers—its laboratory.[45]

Of course, natural-law understandings of the American legal system of Langdell's time (and earlier) also understood law to be a science. The creation of Harvard Law School was advocated on the grounds, remember, that law is a "comprehensive system of human wisdom, derived from the nature of man in his social and civil state, and founded on the everlasting basis of natural justice and moral philosophy" (CHAPTER 3, 1.2.).[46] Determining the degree to which Langdell's legal science is in continuity with earlier natural-law treatments of the law, therefore, requires some care, particularly because later critics of Langdell rarely parsed the distinctions between competing nineteenth-century visions (CHAPTER 5).

Josef Redlich (1889–1936)—the Austrian jurist who authored the 1914 Carnegie Endowment report on the case method—was unusual, then, in attempting to clarify the

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[43] *The Harvard Law School*, 3 Law Q. Rev. 118, 124 (1887).

[44] Ibid.

[45] Langdell suggests that if it is a science, as he contends, "it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it"; ibid.

[46] Parker's inaugural address was given in April 17, 1816. This can be found in Charles Warren, *History of the Harvard Law School and of Early Legal Conditions in America* (New York: Lewis, 1908), 302

relation of *Langdell's* "legal science" to other then-contemporary uses of that term. "Legal science," said Redlich, can refer, as it did in Europe, to the study of law as a historical and social phenomenon. But this "sociological, legal-historical, and cultural investigation" is not Langdell's legal science.[47] *Langdellian* legal science, instead, is a science of the *positive* law: a study of those laws instituted or imposed by authority. (For Langdell, we have seen, this refers primarily to the authoritative opinions of English and American common-law judges.)[48] Langdell's legal science, moreover, is a *positivist* account of *positive* law because it does not deal "with physical facts, but with the products of the human will."[49]

Redlich's distinctions are helpful. However, they make precise what was ambiguous in Langdell's writings.[50] Redlich's typology separates Langdellian legal science from the natural and physical sciences—which "rest upon observation, experience, and investigation of natural phenomena"—despite the fact that Langdell favors comparisons with biology and physics.[51] And Redlich emphasizes the *source* of Langdell's law in authoritative legal judgments, while Langdell equally stresses the

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[47] Redlich, *Common Law and the Case Method*, 55.

[48] Statutes too, of course, are a form of positive law.

[49] Redlich, *Common Law and the Case Method*, 56.

[50] Perhaps Redlich captures the logical consequences of Langdell's thought. But Redlich's account does not explain Langdell's own understanding of the law, or how Langdellian legal science was understood in its day.

[51] Redlich, *Common Law and the Case Method*, 56.

common law's internal conceptual coherence.[52] True, Langdell did seem to implicitly agree that in an important sense the normativity of the law comes from command (and thus its commander), but it seemed obvious to Langdell—as much as it is possible to tell, given his silence—that commands are not to be separated from the *principled* content of the common law. At the least, the very possibility of casebooks depends on the idea that the disciplined student of the law can *discover* the law's content in the cases: case law reveals the *coherence* of common law doctrine; to the trained eye, indeed, the pages of the leading cases display the development, even consecutive revelation, of legal principles.

4. Precedent and the Problem of Justification

In its avowal of both *command* and *principle* in common law, Langdellian science has been said to "straddle[] natural law and historical schools."[53] In one sense, Langdell's law is, indeed, historicist. He presents the law developmentally. To refer to a series of cases, after all, is to chart the growth and the refinement of legal doctrines and principles *over time*. In this method, then, Langdell is meaningfully linked to the historical school of

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[52] This distinguishes Langdell's approach from many of his successors, even those employing the case method. The cases worthy of study, in Langdell's view, were those that confirmed doctrine. In today's lecture theaters, Langdell "has been turned on its head," says Martha Minnow (dean of Harvard Law School, 2009–17): the cases worthy of study are precisely those that do *not* readily conform to doctrine. "We have conflicting principles and are committed to opposing values. Students have to develop some degree of comfort with ambiguity." Martha Minnow quoted in David Garvin, "Making the Case: Professional Education for the World of Practice," *Harvard Magazine* (September–October, 2003).

[53] Gray, "Langdell's Orthodoxy," 30.

jurisprudence, best known in the work of Friedrich Carl von Savigny (1779–1861). For historicists, law is the product and reflection of the particular *Volksgeist* of its subjects. Langdell is a historicist inasmuch as he believes—with Joseph Story—that common law fundamentally develops as English and American society develops (CHAPTER 3, §2.1.). But Langdell's law is also natural-law-like. After all, for Langdell, as for natural-law thinkers, it is the *reasonability* of legal rules that is discovered in the common law's development. The act of determining what is the law is an act of human will, yes, but the content identified is rightly coherent with the wider body of law, and thus in accord with reason (at least in its practical, commonsensical guise).

Principle, therefore, has prominence in Langdell's vision of the law, despite his recognition of the importance of precedent and custom. And of great practical significance, moreover, was Langdell's understanding—shared with Blackstone and the Litchfield school—that general principles of the common law transcend borders. Harvard Law School was a *national* law school, for Langdell, not a preparatory school for the Massachusetts bar. It taught a legal system "unitary, self-contained, value-free and consistent," where its students were to identify principle and doctrine through the opinions of the English and American courts.[54]

Unlike his peers, who remained more closely wedded to the language of natural law, however, Langdell has a justificatory problem.[55] *How does a judge's decision in a*

[54] Stevens, *Law School*, 53. Indeed, this denial of difference was a distinct challenge to federalist sympathies that understood each of the states to have a viable legal system, and contributed to the scholarly downplaying of the importance of legislation, which was little taught at Harvard.

[55] Ibid., 22.

case relate to what is right or true? The veracity of theories and practices of the natural and physical sciences receives independent justificatory support from the direct evidences of our senses, which, on the whole, we trust.[56] The modern natural-law theories (CHAPTER 1, §4.1.), known to earlier generations of American lawyers, likewise appealed to depictions of what it means to be human in society in order to ground the rightness of law. (Story spoke, for example, of human nature as motivated toward happiness, human beings as possessors of certain intellectual powers, and human life as consisting in various relations—individual, familial, communal—that are generative of duties [CHAPTER 3, §2.2.].) This was not similarly true for Langdell. He does not appeal to human nature. Instead, the sole content of his legal science is the judicial decisions found in the reported cases. What independent support can be given to justify these judicial decisions?

4.1. Thomas Gray on Langdell's Orthodoxy

The twentieth-century legal scholar Thomas Gray argues that two arguments were available to Langdell to justify his proposed legal principles and doctrines. Langdell could have appealed to *intuition* or *precedent*.[57] On Gray's account, Langdell first could

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[56] The truth of natural and physical science is determined by its correspondence with the realities we perceive. Adherence to the theory of evolution, for instance, first received initial justification through the examination of organism remains and fossil layers, the observation of similarities between living organisms, and the practices and outcomes of artificial selection. The likely veracity of the theory has increased, more recently, with the development of technologies that allow the observation of organisms' DNA similitude.

[57] Gray also notes that *today* we might simply admit the circularity of a practice like the law. We might think that "science" and its methods and epistemology are

have suggested that *intuition* links a judge's decision with an independent justification. Gray sketches three forms this argument might take. Form One is an appeal to some sort of *moral sense*: the "supposed universal human faculty for the direct intuition of right and wrong in concrete situations."[58] Unlike his natural law forebears, however, Langdell did not justify judicial decision on moral sense.

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similarly circular, with no means to step outside our ways of perceiving and measuring the world. *Langdell's Orthodoxy*, 20–22.

[58] Ibid., 22–28. College-educated or well-read judges—those, particularly of an earlier generation, who studied Hutcheson's *Short Introduction to Moral Philosophy*—would recognize the *moral sense* as that which receives approbation or condemnation independent of our will. (See, CHAPTER 1, §4.4.1.)

In America, Hutcheson's thought was often combined—uneasily, in retrospect—with that of Thomas Reid (1710–96). (See, Sydney Ahlstrom, "The Scottish Philosophy and American Theology," *Church History* 24, no. 3 (1955): 257–72; S. A. Grave, *The Scottish Philosophy of Common Sense* (Oxford: Clarendon Press, 1960); Knud Haakonssen, "Scottish Common Sense Realism" in *A Companion to American Thought*, ed. Richard Wightman Fox and James Kloppenberg, 618–20 (Cambridge, MA: Blackwell, 1995).)

For Reid, our initial intuitions concern matters as basic as our consciousness: without any external evidence, we accept, and rely upon, an intuition of our own consciousness. ("The operations of our minds are attended with consciousness; and this consciousness is the evidence, the only evidence which we have or can have of their existence." Thomas Reid, *Essays on the Intellectual Powers of Man*, ed. Derek Brooks and Knud Haakonssen (Edinburgh: Edinburgh University Press, 2002), 41.)

And likewise the "first principles of morals," which are understood to ground our moral reasoning, do not generate a decision in particular cases, but concern: that certain actions merit praise and others blame; that involuntariness and necessity remove moral blame; that omissions may be blameworthy; that we should inform ourselves of our duties; and that we should cultivate our minds for right action. (Thomas Reid, *Essays on the Active Powers of Man,* ed. Knud Haakonssen and James Harris (Edinburgh: Edinburgh University Press, 2010), "Essay V. Of Morals. Chapter 1. Of the First Principles of Morals," 271.)

These first principles of morals govern but do not produce determinations in concrete cases. Even the more particular principles that Reid identifies remain at a sufficiently high level that they cannot reasonably be understood to produce a determination in a concrete case. For instance, Reid argues that we rightly: prefer a greater, though more distant, good to lesser; comply with our constitution as a human being (this being understood as the intention of nature); are born not simply for ourselves; should act toward another as we would judge right for another to act toward us; and that

Form Two Gray calls *common sense*. This is the "generally shared tacit knowledge of the conventional morality of a particular society."[59] Historically, this has been an influential expression of the nature of the common law, and Gray underestimates the tacit support that this common sense—tried by times and experience—receives in Langdell's depiction of the common law.[60] Nonetheless, Langdell did not explicitly justify judicial decisions on the ground of common sense.

The final form of intuition that could have linked judicial decisions to an independent justification is *trained intuition*: "a specialized professional skill developed by lawyers in the course of their apprenticeship, and practice."[61] Here, Gray briefly references Roscoe Pound (1870–1964) as representative of a commonplace view to this effect. But its *locus classicus* is the argument of Edward Coke (1552–1634), who, in disputing Jacobean royal authority, appealed to the superiority of lawyers' "artificial

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"veneration and submission" to God are self-evident to whose who believe in "the existence, the perfections, and the providence of GOD." (Ibid., 272–76, 276.) Now, Reid's self-evident moral principles may be less self-evident than he imagined, but they nonetheless do not straightforwardly suggest determinations on factual grounds. If the emphasis is on Reid rather than Hutcheson, then the thought that judicial decisions should at some basic level accord with *moral sense* is less obscure than Gray seems to suppose.

[59] Gray, "Langdell's Orthodoxy," 23.

[60] "In the common law country, the law appears in the national thought as a quality which to a certain extent comes of itself to men and to the relations which bind men together, as something that is always there and for that reason is known and understood by every one of the people themselves." Redlich, *Common Law and the Case Method*, 37.

A classic expression of common law as custom is found in Thomas Hedley's parliamentary speech of June 28, 1610: "the Comon lawe tried by tyme, which is wiser then all the Judges in the land. By tyme out of mynde." *Parliamentary Debates 1610*, ed. Samuel Rawson Gardiner (London: Camden Society, 1862), 71–77, 73.

[61] Gray, *Langdell's Orthodoxy*, 23.

reason" over the natural reason of the King or any other. In Coke's argument, the reason necessary for legal determinations is: "an artificial perfection of reason, gotten by long study, observation and experience."[62] Once again, however, Langdell did not justify his legal science in intuition.

Ultimately, neither moral sense, nor common sense, nor trained intuition, nor some combination of the three provided the justification for Langdell's claim that the law is known inductively through the case law. Instead, Langdell looked to *precedent*.[63] Judicial decisions receive justification by following the previous decisions of the courts. Precedent is distinguished from intuition by a particular understanding of *authority*. In England and America, this plays out in the legal doctrine that precedents should be followed because of the authority of the prior decider. Inferior court judges, for instance, must follow the binding opinions of superior courts.[64]

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[62] "[R]eason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason; for *Nemo nascitur artilex*. This legal reason *est summa ratio*. And therefore if all the reason that is dispersed into so many several heads, were united into one, yet could he not make such a law as the law in England is; because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it, *Neminem oportet esse sapientiorem legibus:* No man out of his own private reason ought to be wiser than the law, which is the perfection of reason"; Co. Litt. 97b.

[63] Gray too sharply divides intuition from precedent. Their distinction is not, as it might first seem, about time: intuition as immediate, precedent based on history. *Common sense* and *trained intuition*—that is, societal morality, and lawyers' artificial reason—are themselves creatures of history: formed over time and through deliberation. Apart from Gray's understanding of intuition as *moral sense*—a universal faculty for direct intuition of right and wrong—precedent, therefore, is not distinguished from intuition by its connection to history or the passage of time.

[64] In a legal system where precedent is important, even the top court in a given jurisdiction may feel bound to ordinarily follow its own precedents. This is the doctrine

Gray ultimately argues, then, that it is this resort to precedent that saves Langdell's understanding of the law from a vicious circularity.[65] A decision in a particular case is justified because the decision is based on a rule previously expressed by the court, and this rule itself is understood as binding because the court that expressed the rule is itself recognized as having the authority to determine the law.[66] Gray helps us see the justificatory pressure for Langdell to embrace precedent.

But this appeal to precedent compromises the "universally formal conceptual order" that Langdellian science assumed and promised.[67] To exalt precedent, after all, means to accept that long-standing, widely-followed though seemingly-*un*principled doctrine must be followed, too. The "wrong" gets followed as much as the "right." The role of *consideration* in contract law is a classic example. This is the doctrine that each party must give something up if a promise is to be binding and enforceable. The doctrine of consideration, Langdell recognized, can sometimes cause hardship and seeming

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of *stare decisis* ("to stand by decided matters"). For instance, through much of the nineteenth- and early twentieth centuries, the United Kingdom's top appellate court (the judicial committee of the House of Lords) treated its own previous decisions as binding. This convention was only abolished in 1966. *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).

[65] It seems that neither Gray nor Langdell consider the option that precedent itself may be the fruit of natural-law reasoning. There are obvious goods in the finality offered by precedent. There is a legitimacy gained from settled law that does not change on the whim of judges or other decision-makers. And settled expectations allow people to organize their lives without the anxieties of regular change. For an argument for the "inner morality" of law based off of such considerations, see Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1963).

[66] Most contemporary legal philosophers—following H. L. A. Hart (1907–92)—understand this type of recognition of authority as some form of a *social rule*: a complex practice imposing a duty on officials to follow and apply the rule.

[67] Gray, "Langdell's Orthodoxy," 26.

unfairness, and is unnecessary in principle. Yet, Langdell determined, consideration is simply too well established in common law practice to be abandoned.[68] Precedent seems to win over principle.

5. Remaining Continuities with Natural Law

If, by embracing precedent over reason, Langdell's science of the law—known and perpetuated in the case method—helped to displace natural law forms of thinking about the law, Langdellian legal science nonetheless retained some distinct similarities with the natural-law tradition. In ways strange to twentieth-century positivists, Langdell took for granted that precedent—the historical development of legal principles and doctrines—determined the *right* answers. He viewed the common law, in other words, as having both a precedential authority *and* a *persuasive* authority. Common law's authority comes from rightly guiding *and* commanding action.

The case method, we have seen, both relies upon the tracing of doctrinal development through the leading cases, and presumes—in Langdell's version—that there

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[68] By Langdell's time, in common-law jurisdictions, a valid contract—in its simplest form—was formed where: there was an offer and its acceptance, the parties intended to create a legal relationship, and there was valid consideration. In Langdell's chosen words, consideration is "the thing given or done by the promisee in exchange for the promise": in a contract, the recompense or equivalent for what one party does or undertakes for the other party. As a matter of principle, however, Langdell felt—as have many before and since—that consideration is unnecessary. In European civil law, promises are enforceable without consideration, as they are too in the common-law world where an agreement is undertaken while employing sufficient formalities as, for example, with a deed, where a legal disposition is written, sealed, and delivered; Langdell, *Selection of Cases*, §45, 58.

are, in fact, correct principles that the law student can identify by reading the cases.[69] So Langdell could believe in the superiority of precedent while also being "inexorable in his search for the truth."[70]

Langdell's twentieth-century critics reject this combinative possibility. Indeed, Langdell's commitment to the pervasive reasonability of the law has left many commentators convinced that his legal science is, in fact, a *restatement* of "the natural-law argument for judicial supremacy, albeit with a glossy 'law is a science' label."[71] Certainly, Langdell and his supporters notably offer little philosophical basis for

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[69] "Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied"; ibid. vi.

[70] This was the recollection of his first students. Franklin Fessenden, *The Rebirth of the Harvard Law School*, 33 Harv. L. Rev. 493, 513 (1920).

[71] In the eyes of those influenced by legal realism—who emphasize law as a matter of societal and political power, and not formal principle—the congruence of the *results* of Langdellian legal science with those of earlier natural law approaches show them to be only trivially distinct. Langdellian legal science supports "political beliefs every bit as conservative as those of Joseph Story." Seligman, *High Citadel*, 36.

Intriguingly, the victory of the case method in the early decades of the twentieth century has also led to the reverse: curious readings of evidently natural law visions of American law *as* Langdellian legal science. For instance, Robert Stevens, usually a reliable guide to law schools, presents developments at Catholic University's law school in the 1890s as evidence of Langdell's influence. For William Robinson, the school's reforming dean, "law as a science is a body of fundamental principles and of deductions drawn therefore in reference to the right ordering of social conduct." (Stevens, *Law School*, 122.) Stevens connects this to Langdell. However, Robinson's attention to "logical deductions from immutable and universal principles" combined with his belief in law as "an ethical science [with its] origin in the reason, not in the will," shows greater correspondence with the neo-Thomism of the period than Langdellian legal science. William Robinson, *A Study on Legal Education: Its Purposes and Methods* (Washington, DC: Stormont & Jackson, 1895), 4, 5. Of course, expressions of neo-Thomism are, themselves, linked to the changes in thinking wrought by the scientific revolution.

principles and doctrines. They fail to answer the question, in other words, of how principles are uniform in the legal system if based solely on the decisions of individual judges. The case method is the process for *identifying* principles, not their explanation. Natural lawyers might explain principles as according with shared human inclinations, but for Langdell, it was the historical determinations of judges who provided the material of the law, and not human nature or philosophical reflection thereon.

Langdell's science, therefore, departed from natural law in its clear affirmation of positive law—as promulgated by judges and, secondarily, legislators—as the sole source of the law, rather than morality or even custom. For this reason, Langdell is sometimes listed as pioneer of legal positivism. John Witte, Jr. and Frank Alexander, indeed, treat Langdell as the American *exemplar* of legal positivism.[72]

Yet the commitment to principle and internal coherence in Langdell's science—which generates a normativity of persuasive authority even if precedent is the ultimate practical referent—places it apart from consequentialist visions of the law, whether nineteenth-century utilitarianism, or the twentieth-century models that would come to dominate: where law is justified by its results in good public policy or economic rationalization.

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[72] Witte and Alexander place Langdell beside England's John Austin. Langdell and Austin, they say, believed "Law is simply the concrete rules and procedures posited by the sovereign and enforced by the courts." *The Teachings of Modern Christianity on Law, Politics, and Human Nature*, ed. John Witte, Jr. and Frank Alexander (New York: Columbia University Press, 2006), xxii.

Conclusion

CHAPTER 4 is the second of the three that, together, depict legal education and its relationship to the natural-law tradition in the nineteenth and early twentieth centuries. CHAPTER 4's focus has been the 1870 reforms initiated at Harvard by Christopher Columbus Langdell, particularly the shifts in legal education wrought by the introduction of the case method and Langdell's treatment of law as a legal science.

The figure of Langdell, moreover, has served as a helpful example of the uneasy relationship of natural law and positivism in late-nineteenth-century accounts of common law. Langdell, we saw, affirms case law and statutes as the sources of law, and turns to precedent to ultimately explain the particular content and binding quality of American common law. Yet, Langdell also affirms law's internal coherence. When students engage in the case method, he says, they find principles at the heart of the common law.

Langdell's account of natural law, then, is helpful in offering us an example of an inductionist natural-law account of common law. But it is an account haunted by questions of justification: why should we expect to find case law reasonable? Without an explicit answer to the question, Langdell turned to precedent. Yet he retained a belief—bolstered by his scientific method—that common law is, at its heart, reasonable. In CHAPTER 5, we will see what happened when belief turned to disbelief: For Oliver Wendell Holmes, Jr. and the American legal realists, common law had no intrinsic rationality.

CHAPTER 5

1881, 1930. COMMON LAW'S BREAKS WITH NATURAL LAW: OLIVER WENDELL HOLMES, JR. AND THE AMERICAN LEGAL REALISTS

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Retrospect and Prospect

In this final chapter of PART II, we conclude our treatment of nineteenth- and early-twentieth-century professional legal education in the United States. In CHAPTER 3, we focused on the 1817 foundation of the university law school, and the influence of Joseph Story in historicizing and relativizing natural law. In CHAPTER 4, we considered law as a science, the reformation of university law schools begun by Christopher Columbus Langdell at Harvard University in 1870, and the introduction of the case method (which tenuously held together precedent and reason in the common law). In CHAPTER 5, we explore two fundamental breaks with the natural-law tradition. The first is the skeptical treatment of law's nature (§1.1.), and even morality itself (§1.2), found in the thought of Oliver Wendell Holmes, Jr. (1841–1935), arguably the most significant jurist America has produced. The year 1881 marks the publication of his magnum opus *The Common Law*. The second is the American legal realists' vision of common law as secular, indeterminate, and non-objective (§2.1.). The year 1930 marks the beginning of the decade of the realists' profoundest influence, and the publication of *The Bramble Bush* by Karl Llewellyn (1893–1962): a text that aims to disabuse new law students of any notions that law exists apart from the actions of officials.

What we will see is this: both Holmes and the legal realists rejected Langdell's idea that the law is principled and coherent: legal rules—however well wrought in reason or pedigreed by precedent—underdetermine the decisions in actual judicial cases. Instead, legislative might or social convention, said Holmes, or sociological or psychological factors, said the realists, ultimately determines a judge's decision.

Whatever artificial doctrine holds together the law, the "reality" of law is what the courts *do*; to speak of law, they claim, is just to speak of the *consequences* of judicial decisions. Talk of "morality" or "values" in the law is thus a distraction. Gone, it would seem, is the common law's connection to natural law, in whatever form.

Why bother considering Holmes and the realists? Two major claims can be made at the outset. First, Holmes and the realists remain influential in shaping—if from a remove—American legal education (§3). The details of the realists' thought may now be a matter of historical interest, but their skeptical spirit, we shall see, still animates the ways law students are taught and legal academics think.

Second, contemporary proponents of natural-law treatments of the common law must meet the challenges raised by Holmes and the realists. Unlike the thought of Story, or even Langdell, the thought of Holmes and the realists cannot easily be embraced by those who believe that common law relates to human reason and rightly furthers the flourishing of human life in society, however minimally. One response is to provide a more convincing account of the nature and purpose of human law. This has been the task of legal philosophers who, from the mid-twentieth century onward, have challenged the positivist consensus. Some, like John Finnis (1940–), begin from "classical" reflection on natural law, others—not least, Lon Fuller (1902–78) and Ronald Dworkin (1931–2013)—recast natural law in relationship to contemporary positive law.[1]

A further response, however, well suited to a historical and conceptual investigation of natural-law treatments of the common law, is to engage in immanent

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[1] For surveys, see John Finnis, "Natural Law: The Classical Tradition," 1–60, and Brian H. Bix, "Natural Law: The Modern Tradition," 61–100, in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford: Oxford University Press, 2002).

critique of Holmes and the realists: identifying the contradictions and ideological biases of their thought in relation to what came before and after them. In the conclusion of CHAPTER 5, we will begin that work.

1. The Influence of Oliver Wendell Holmes, Jr.

SUMMARY: Oliver Wendell Holmes, Jr. offers a *skeptical* and *pragmatic* alternative to Christopher Columbus Langdell. While Holmes affirmed aspects of Langdell's educational reforms, he was *skeptical* about the legal rules that Langdell traced through the development of case law. Students should know, thought Holmes, that legal rules do *not* compel particular decisions in particular cases. Rules underdetermine results. The legal system, then, is better understood by its consequences rather than by its coherence.

This thoroughgoing legal *pragmatism* animates Holmes's "prediction theory of law." What we call "law," says Holmes, is just the anticipation of courts' decisions. Students, then, should understand the law through the eyes of the "bad man" who seeks to avoid punishment, and not through the eyes of the good citizen who seeks reasons for why things should be this way or another. For Langdell, reasons matter in the law. For Holmes, there are no reasons, only results.

1.1. Holmes and the Nature of Law

Christopher Columbus Langdell's vision of the law did not go unchallenged, even in his own day. The case method, we have seen, remained sufficiently controversial that thirty years after its introduction reports were still written gauging its utility (CHAPTER 4, §2.) An older lecture-driven vision of legal education remained the norm in most university legal education, and apprentices continued to glean professional competency from experienced practitioners and their copies of treatises by Blackstone, Story, and their successors.

Langdell's legal science, however, faced a striking new challenge. Oliver Wendell Holmes, Jr. (1841–1935)—a justice of the Massachusetts Supreme Judicial Court (1882–

1902) and of the U.S. Supreme Court (1902–32)—dismissed Langdell's belief in the principled cohesion of the common law.[2] Holmes's skeptical and pragmatic jurisprudence—known best through his widely-read *The Common Law* (1881) and "The Path of the Law" (1897),[3] together with his famous dissents from the Supreme Court bench[4]—rejected Langdell's "formalism" and articulated a through-going positivism that was embraced by a succeeding wave of legal thinkers. If the effects of Holmes's thought on legal education were minimal at first, his influence was ultimately profound; refracted through the work of the twentieth-century legal realists, Holmes's thought forever changed American teaching of law (§2.).

1.1.1. Pragmatism

Holmes has been called the "hero of American law"; the "great oracle of American legal thought"; and the "most illustrious figure in the history of American

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[2] Holmes's major works are included in Sheldon Novick, ed., *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions*, 3 vol. (Chicago: University of Chicago Press, 1994). Holmes's diaries and letters were edited by Mark DeWolfe Howe: *Holmes-Pollock Letters, The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1872–1932* (Cambridge, MA: Harvard University Press, 1941); *Touched with Fire: Civil War Letters and Diary of Oliver Wendell Holmes, Jr.* (Cambridge, MA: Harvard University Press, 1946); and *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski, 1916–1935* (Cambridge, MA: Harvard University Press, 1953). Recent biographies include: G. Edward White, *Oliver Wendell Holmes, Jr.* (New York: Oxford University Press, 2006); Albert Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (Chicago: University of Chicago Press, 2000); and Sheldon Novick, *Honorable Justice: The Life of Oliver Wendell Holmes* (Boston: Little, Brown, 1989).

[3] *The Common Law* (Boston: Little, Brown, 1881); *The Path of the Law*, 10 Harv. L. Rev. 457 (1897).

[4] Most famously his dissent in *Lochner v. New York* 198 U.S. 45, 74 (1905).

law."[5] Despite his renown as a judge and man of letters, however, in one major aspect his importance is not as a towering statesman or an original thinker, but as the conduit of a broader stream of thought. Holmes was a champion of a certain form of American pragmatism. Despite his overt rejection of philosophical pragmatism as a whole,[6] Holmes's legal thought is inconceivable without C. S. Pierce (1839–1914), William James (1842–1910), John Dewey (1859–1952), and their ilk. Holmes shared their "distaste for formalism, deduction, and abstractions,"[7] and argued for evolution and change over tradition and consistency. He embraced James's commitment to "*look*[] *away from first things, principles, 'categories,' supposed necessities*" and look instead "*towards last things, fruits, consequences, facts*."[8] And Holmes sought to rely not on logic or deduction in the determination of cases, but on what Dewey would call "inquiry, comparison of alternatives, weighing of facts."[9]

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[5] See, Alschuler, *Law Without Values*, 14–15.

[6] Against the pragmatists, he believed in mind-independent reality. And for James's perceived support of religion and cosmic beneficence, he called his ideas "an amusing humbug." "Holmes to Pollock. June 17, 1908," in Howe, *Holmes-Pollock Correspondence*, 1:139.

[7] Wilfred Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968), 6.

[8] *Pragmatism: A New Name for Some Old Ways of Thinking: Popular Lectures on Philosophy* (New York: Longmans, Green, 1907), 29 (italics in original).

[9] *Logical Method and Law*, 10 Cornell L. Rev. 17, 17 (1924).

1.1.2. Prediction

Holmes's attention to consequences is most evident in his "prediction theory of law." Holmes makes the claim that the *nature* of law—and thus the proper "object of study" for the law student and practitioner alike—is simply "the prediction of the incident of the public force through the instrumentality of the courts."[10] The content of the law, in other words, is just what the courts do. Law has no existence apart from a judge's decision. The task of lawyering, therefore, is the prediction of the decisions courts will make.

Holmes's attention to the consequences of court decisions is not a matter of strategy, but ontology.[11] Rather than think that the law concerns duties, say, or "inner states"—intention, recklessness, negligence, and so forth—Holmes looks instead to consequences. Take, for instance, the agreement reached in a contract. Holmes suggests that "[t]he duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—nothing else."[12] Gone in Holmes's account is any reference to promises, or duties as ordinarily understood as obligations, which *ought* to be fulfilled. The "only universal consequence" of entering into a contract, he says, is that

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[10] Holmes, "Path," 457.

[11] No one would dispute that, as a matter of strategy, lawyers offer predictions to their clients. Lawyers try to help their clients understand the strength of their case, and—particularly in civil litigation—help them weigh costs and risks against the potential for success.

[12] Holmes, "Path," 462

"the law makes the promisor pay damages if the promised event does not come to pass."[13]

1.1.3. The Bad Man

If law is best understood as a matter of predictable consequences, then the viewpoint of "the bad man" best apprehends the law's scope and content. Dispelling "a confusion between morality and law,"[14] Holmes argues that "[a] man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can."[15] Hence, if the law student is to know the law, she "must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[16]

Holmes thinks that taking the viewpoint of the bad man clarifies the nature of the law. The law is not "a system of reason," then, or "deduction from principles of ethics or admitted axioms or what not," as *arguably* Blackstone or Story contend (CHAPTER 2,

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[13] Holmes, *Common Law*, 301.

[14] A "confusion," he says, "which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness"; Holmes, "Path," 459.

[15] Ibid., 459.

[16] Ibid.

CHAPTER 3).[17] Instead, law for Holmes is simply "what is decided by the courts of Massachusetts or England."[18] The bad man—and, accordingly, the lawyer and the jurist—do not "care two straws for the axioms or deductions," but "want to know what the Massachusetts or English courts are likely to do in fact."[19] And thus "the prophecies of what the courts will do in fact, and nothing more pretentious" are what Holmes means by "law."[20] Holmes looks solely to the facts of a case and its likely outcome. He removes reasoning on principles as the necessary intermediary.

1.1.4. Common Law

For Holmes, then, to speak of "law" is to speak predictively of the actions of the courts of a particular legal jurisdiction. The common law is thus "the articulate voice of some sovereign or quasi sovereign," and not "a brooding omnipresence in the sky . . . some mystic overlaw that [the U.S.] is bound to obey."[21] Speaking as a legal pragmatist,

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[17] Ibid., 460. As we have seen, however, Blackstone and Story do not neglect the role that courts play in specifying common law. On their accounts, common law does indeed relate to a system of reason and is partially deducible from principles (although not on indifferent matters). But from reason and principle, courts determine what the law is and put it into practice.

[18] Holmes, "Path," 460.

[19] Ibid.; ibid., 461.

[20] Ibid.

[21] Letter of January 29, 1926, to Harold Laski. In Richard Posner, *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.* (Chicago: Chicago University Press, 1992), 235.

The more familiar use of his phrase "brooding omnipresence in the sky" is found in his dissent to *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917): "the common law is not a brooding omnipresence in the sky, but the articulate voice of some

Holmes believes that there is nothing "beyond" or "outside" of the bare practice of adjudication. Law has no independent existence. In one of his famous dissents, Holmes charges that his colleagues on the Supreme Court bench fallaciously used their "independent judgment" to determine the content of "a transcendental body of law outside of any particular state but obligatory within it" when, in fact, "there is no such body of law."[22] There is no *common* common law—no "common law *in abstracto*" accessible by judicial reason[23]— but only the particular common law of Massachusetts, say, or of England.

It remains possible, of course, to ask *why* particular courts make the decisions they do. But this is now a descriptive rather than a normative question. As Holmes puts it at the beginning of his *The Common Law*: "The life of the law has not been logic: it has been experience."[24] It is not enough, as for Langdell, to "show that the consistency of a system requires a particular result."[25] Law is not a matter of "axioms and corollaries of a

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sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact."

[22] *Black & White Taxi Co. v. Brown & Yellow Taxi Co.*, 276 US 518, 533 (1928) (Holmes, J., dissenting). The Supreme Court ruled that, when federal courts sit in *diversity jurisdiction*—most usually when the parties are from different states—they need not apply state common law. Ten years later, in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Court determined that, in fact, it did *not* have the power to create federal common law when hearing state law claims under diversity jurisdiction.

[23] "The late [Justice John Marshall] Harlan, [Justice William R.] Day, and a majority of others have treated the question as if they were invited to speculate about *the* common law *in abstracto*." "To Harold Laski, January 29, 1926" in Posner, ed. *Essential Holmes*, 235.

[24] Holmes, *Common Law*, 1.

[25] Ibid.

book of mathematics."[26] To know the law in Holmes's world—that is, to predict how judges will determine cases—is to consider "[t]he felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men."[27] The "grown-up" legal mind, in Holmes's view, is not concerned with the aptness or otherwise of felt necessities, however, or the rightness or wrongness of moral and political theory, but simply how these might suggest how a judge will decide a case.

1.2. Holmes and Morality

1.2.1. Positivism

Holmes was not new, of course, in distinguishing law and morality. And neither was Holmes new in suggesting that law and morality are not necessarily connected; legal positivism has a long history.[28] (Indeed, the very idea of "positive law" itself is likely the creation of the medieval minds closely associated with the natural-law tradition.[29]) The more proximate genealogy of Holmes's thought, however, included: Thomas Hobbes (1588–1679) and David Hume (1711–76), who stressed political arrangements as conventional; Jeremy Bentham (1748–1832), who suggested an alternative to

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[26] Ibid.

[27] Ibid.

[28] For examples from antiquity of "non-realist" conceptions of law, even divine law, see: Christine Hayes, *What's Divine about Divine Law?* (Princeton, NJ: Princeton University Press, 2015).

[29] See, John Finnis, "The Truth in Legal Positivism," in *The Autonomy of Law*, ed. Robert P. George (Oxford: Clarendon Press, 1996), 195–214.

Blackstone's natural-law vision of English law in utilitarian consequentialism; and John Austin (1790–1859), who, expanding on Bentham, presented law as the traceable command of a sovereign. Holmes used this positivistic inheritance to explain and critique American common law, and has served, thereafter, as the touchstone for an American tradition of legal positivism.

What are the consequences of embracing positivism? Holmes, at times, suggested that his separation of law and morality was simply for analytical advantage. In "The Path of the Law," he argues that, "[w]hen I emphasize the difference between law and morals I do so with reference to a single end, that of learning and understanding the law."[30] Indeed, he stresses that "[t]he law is the witness and external deposit of our moral life. It is history of the moral development of the race."[31]

From these statements alone, we might wrongly assume that Holmes understands legislators, judges, and society at large to have moral and social views, which—consciously or otherwise—find shape in the law, but that students of law, notwithstanding this, should focus on law-proper without backward reference to the moral and social views that brought it into being. But that is not quite right.

1.2.2. Morality as Enemy

Holmes's other writings suggest instead that there is something disingenuous about his brief treatment of morality in "The Path of the Law." In his private letters, Holmes more often than not treats "morality" as an enemy to be defeated. True, by

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[30] Holmes, "Path," 459.

[31] Ibid.

"morality," Holmes seems to have in mind a particular Kantian conception concerned with exceptionless rules. He dismisses, for instance, "ordinary Christian morality" and its "slapdash universal (Never tell a lie. Sell all thou hast and give to the poor etc.)."[32] And in *The Common Law* he is at pains to prove that a "true account of the law as it stands" shows that the law "treat[s] the individual as a means to an end," and therefore does not instantiate (Kantian) morality.[33]

But Holmes does not just reject one articulation of morality, Christian or Kantian. Instead he finds the concept itself at best useless. In this, he is a "naturalist" in morals. A moral statement, for Holmes, does not pick out an independent value in the world, or refer to a truth. A moral statement is rather "an imperfect social generalization expressed in terms of feeling."[34] Even this naturalistic recognition of the nature of moral statements, however, is not enough for Holmes. Even so recognized, moral statements and the system they instantiate are unhelpfully tied to "feeling." It would be far better, in Holmes's view, to "omit the emotion," and, instead, "ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained."[35] Morality is thus known through "the same science as other observations of fact."[36]

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[32] "To Lewis Einstein, July 31, 1906" in Posner, *Essential Holmes*, 58.

[33] Holmes, *Common Law*, 46–47.

[34] "To Lewis Einstein, May 21, 1914" in Posner, *Essential Holmes*, 114.

[35] *Ideals and Doubts*, 10 Ill. L. Rev. 1 (1915). Morality, he suggested, is best treated "like a physical phenomenon… to be combated or got around so far as may be, if one does not like it, as soon as fully possible." "To Patrick Sheehan, October 18, 1912," in Posner, *Essential Holmes*, 7.

[36] "To Harold Laski, June 24, 1929," in Posner, *Essential Holmes*, 116.

1.2.3. On Truth

Unlike a Bentham or a John Stuart Mill, however, Holmes does not suggest a standard by which to judge the imperfect social generalizations of conventional morality, except perhaps a social Darwinist's belief in "progress."[37] This reticence is ultimately because Homes treats not just morality but truth itself as purely conventional. "Truth," as we know it at least, "is the unanimous consent of mankind to a system of propositions."[38] Or as he archly elaborates: "Do you like sugar in your coffee or don't you?"[39] And answers: "You admit the possibility of difference and yet are categorical in your own way, and even instinctively condemn those who do not agree. *So as to truth.*"[40]

While his positivism suggests the severability of law and morality, Holmes's treatment of both law and morality is highly similar. Both only exist as social conventions. In morals, there is "no superior tribunal to decide" apart from societal agreement.[41] Thus he can write to his friend Harold Laski and suggest that "logically the Germans stood as well as we did" in using chemical weapons in the First World War, despite Allied protestations: "I often think of the way our side shrieked during the late war at various things done by the Germans such as the use of gas. We said gentlemen

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[37] For a relatively sympathetic treatment, see J. W. Burrow, "Holmes in his Intellectual Milieu" in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert Gordon (Stanford: Sanford University Press, 1992), 17–30. For an excoriating treatment, see: Alschuler, *Law Without Values*, particularly chapter 2, "A Power-Focused Philosophy."

[38] "To Harold Laski, April 6, 1920." in Posner, *Essential Holmes*, 115.

[39] "To Lady Pollock, September 6, 1902," in Howe, *Holmes-Pollock Letters*, 105.

[40] Ibid. (emphasis added).

[41] "To Harold Laski, April 18, 1930" in Posner, *Essential Holmes*, 117.

don't do such things—to which the Germans: 'Who the hell are you? *We do* them.'"[42] Likewise, "the first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[43]

But by what standard can he say things are "right" or "wrong"? Critics of Holmes have long suggested that his judicial philosophy tends toward *might makes right*. His supporters cast aspects of this propensity as *judicial restraint*: Holmes acquiesces to the will of the people known through elected government. It would be fairer and more accurate, however, to think that, for Holmes, it is not so much that might makes right, but that might is all there is. There is only the sheer fact of power. Holmes, of course, does have "moral" convictions, however much he presents them as just a matter of efficiency—"every lawyer ought to seek an understanding of economics"[44]—or of taste: "beliefs and wishes have a transcendental basis in the sense that their foundation is arbitrary,"[45] he says, but "[y]ou can not help entertaining and feeling them, and there is an end of it."[46] And the law, he notes, does provide the advantages of convenience and consistency, and channels unruly passions for revenge into a stable public process.[47]

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[42] Ibid.

[43] Holmes, *Common Law*, 41.

[44] Holmes, "Path," 474.

[45] Oliver Wendell Holmes, *Natural Law*, 32 Harv. L. Rev. 40, 41 (1918).

[46] Ibid.

[47] Holmes, *Common Law*, 41–42.

1.3. Holmes and Langdell

Despite his distinctive understandings of the nature of law (§1.1.) and law and morality (§1.2.), Holmes did not wholly disagree with the 1870 reforms of Christopher Columbus Langdell. There was merit to Langdell's teaching method, Holmes believed. He agreed that "the number of legal principles is small," and that "therefore they may be taught through the cases which have developed and established them."[48] At the very least, there were good pragmatic reasons, thought Holmes, for Langdell's case-based instruction: "Why, look at it simply in the light of human nature. Does not a man remember a concrete instance more vividly than a general principle?"[49] And even Langdell's focus on precedent and tradition has some practical value, says Holmes: an inherited body of law has the advantage against other options, at least, "that we know what it is."[50] And in "our short life" it make sense "to take on faith at second hand most of the rules on which we base our action and our thought."[51]

But these are mere concessions to practicalities. Holmes sets aside the idea that the common law progressively develops a body of reason. A long-standing rule, he says, continues in force neither because it captures reason, nor on account of the sheer fact that "our fathers always have followed it," but rather because the rule helps bring about "a

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[48] "The Law. Suffolk Bar Association Dinner, February 5, 1885" in Posner, *Essential Holmes*, 223.

[49] Ibid.

[50] Oliver Wendell Holmes, "Twenty Years in Retrospect. Speech at a Banquet of the Middlesex Bar Association, December 3, 1902," in Posner, *Essential Holmes*, 151.

[51] Holmes, "Path," 468.

social end which the governing power of the community has made up its mind that it wants."[52]

On the other hand, Holmes does not reject Langdell's commitment to the coherence of a body of law. The form of coherence, however, is significantly reframed. Langdell's coherence of precedent and reason is replaced by Holmes's favored *prediction*: "The number of our predictions when generalized and reduced to a system is not unmanageably large. They present themselves as a finite body of dogma which may be mastered within a reasonable time" (c.f., CHAPTER 4, §3.)[53] Gone from Holmesian prediction, however, is any "theological working out of dogma or... [its] logical development as in mathematics."[54] The coherence of a body of laws, therefore, "consists in the establishment of its postulates from . . . accurately measured social desires instead of a tradition."[55] A body of laws coheres if it reflects the will of the people or their rulers, not on account of its rationality.

Nonetheless, some commentators treat Langdell and Holmes as engaged in a similar enterprise, despite Langdell's "internal" focus on doctrine and Holmes's "external" concern for social convention. Both share a "modern," mostly-positivistic project, they say,[56] which broadly rejects a natural-law basis for decision-making, but still

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[52] Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 452 (1899).

[53] Holmes, "Path," 458.

[54] Holmes, "Law in Science and Science in Law," 452.

[55] Ibid.

[56] Stephen M. Feldman, for instance, conceptually divides the law into: a "premodern" variant (concerned with universal, eternal principles); a "modern" variant (anti-traditionalist, proto-individualist, believing in progress through human endeavor);

assumes some principled basis for decisions. Langdell treats law as an internally coherent science, whereas Holmes looks for coherence in history, anthropology, and the politics of his day. Therefore, even if for Holmes morality is arbitrary and the law with it, at an intermediate level, at least, the law makes sense. Legal education, then, can still rightly proceed from the body of developed case law. The law of Massachusetts has its own rules, even if these are only responsive to the economic, social, and political powers of the day. If this is so, Holmes can even seek to "discover whether there is any common [non-moral] ground at the bottom of all liability in tort," for instance, and thus "reveal the general principle of civil liability at common law."[57] Between Langdell and Holmes, the rational underpinnings of legal education may have faltered. But the case method persisted.

2. The American Legal Realists

SUMMARY: "Legal realism" emerged in the twentieth century as a rejection of Langdell's depiction of the common law as principled and coherent. Influenced by Oliver Wendell Holmes, Jr., its adherents were not patient with earlier understandings of the law, and broadly discarded all that had come before, natural-law approaches included.

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and a "postmodern" variant (rejecting foundational knowledge, individual autonomy, and endless social progress). On this account, Langdell belongs to rationalist modernity—creating order from reason—while Holmes and the realists are empiricist moderns who look to the external world (not reason) for truth. *American Legal Thought from Premodernism to Postmodernism: An Intellectual Voyage* (New York: Oxford University Press, 2000).

[57] Holmes, *Common Law*, 77. Holmes likewise also speaks of a general principle of *criminal law*; ibid, 74.

Some contemporary supporters of Holmes see this as a lack of discipline in Holmes's thought and chide the "backslidings to formalism… evident in a number of Holmes's judicial opinions and other writings." Posner, *Essential Holmes*, xi.

The realists rejected the idea that legal rules ultimately decide cases. Students should know, they said, that it is the social, political, and economic patterns of society, or even the beliefs of individual judges, that decide particular cases. These claims seemed to break American common law from any meaningful link to the natural law tradition: the realists offering a *secularization* of the law (§2.1.1.) by stressing the *indeterminacy* of legal rules (§2.1.2.) and the *non-objectivity* of judges (§2.1.3.).

If the case method became more and more the standard medium of university legal instruction in the early decades of the twentieth century, its connection to Langdellian legal science was increasingly unstuck.[58] A profound break came with the rise of the *legal realists*.[59] Their skepticism about the objectivity of legal rules permeates

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[58] The realist Jerome Frank thought that in accepting the reforms of Christopher Columbus Langdell, American legal education had been "seduced by a brilliant neurotic," and argued that "the sole way for those law schools to get back on the main track is unequivocally to repudiate Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers": *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303, 1313 (1947). He makes this argument too in the legal education chapter of his *Courts on Trial: Myth and Reality in American Justice* (Princeton, NJ: Princeton University Press, 1949), 225–46. This chapter collects the thought of his earlier work on the subject, including: *Why Not A Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933); and *What Constitutes a Good Legal Education?* 19 ABA J. 723 (1933) 723.

[59] Even more so than other intellectual "movements," the boundaries of "legal realism" are difficult to define with any exactitude. We will consider key figures—those recognized by all as within the fold of "legal realism"—as illustrative of a broader shift in scholarship and thought. The question of others who might be included in the fold of "realism" is left open.

Some contemporary scholars, however, would reject even this approach. Morton Horowitz, for instance, counts all critics of "formalism" as "realists." He disputes that there was much difference between key so-called "realist" figures and Roscoe Pound, whose "sociological jurisprudence" is usually treated as anticipatory of, and distinctive from, realism. Indeed, Horowitz suggests that seeking precise delineations of the movement wrongly casts the realists in an "academic" light when, in fact, their work was practically directed to administrative reform. See his chapter "Defining Legal Realism" in *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy*, 169–192 (Oxford: Oxford University Press, 1992).

On the other hand, Brian Tamanaha argues that nineteenth-century judges had long held the realists' skeptical views, at least in the practice of day-to-day adjudication.

legal teaching and scholarship to this day, even if the particularities of their position were soon ignored.[60] After the legal realists, Langdell's confidence in a rationally coherent system of law seemed, at best, a quaint relic and, more likely, an obscurantist obstacle to social progress.[61]

Legal realism was an attitude more than a movement: cultivated and explicated most particularly in the 1930s at Columbia and Yale law schools, and the short-lived Johns Hopkins Institute of Law.[62] Legal realists found precursors—even heroes—in Oliver Wendell Holmes, Jr., embracing his skepticism,[63] and Roscoe Pound (1870–1964),

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In other words, there was no revolt against "formalism." *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press, 2010).

[60] Despite the influence of legal realism, its contemporary supporters suggest that it is frequently mischaracterized. See, Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 Tex. L. Rev. 267 (1997): 267–315.

[61] Important secondary literature on the American legal realists includes: Justin Zaremby, *Legal Realism and American Law* (New York: Bloomsbury Academic, 2014); William Twining, *Karl Llewellyn and the Realist Movement* (Cambridge: Cambridge University Press, 2012); Brian Leiter, "Legal Realism and Legal Positivism Reconsidered," *Ethics* 111, no. 2 (2001): 278–301; John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995); Laura Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of Carolina Press, 1986); Edward Purcell, "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory," *American Historical Review* 75, no. 2 (1969): 424–46; Wilfred Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968); and Julius Paul, *The Legal Realism of Jerome N. Frank: A Study of Fact-Skepticism and the Judicial Process* (The Hague: Nijhoff, 1959).

[62] For a helpful collection of primary documents from the leading figures of legal realism, see William Fisher, Morton Horwitz, and Thomas Reed, ed., *American Legal Realism* (New York: Oxford University Press, 1993). In his revisionist account of legal realism, John Henry Schlegel offers a brief preface that outlines the "standard story" of the realists: *American Legal Realism and Empirical Social Science*, 15–21.

[63] Holmes was widely praised by the realists although their interpretation of his thought differed significantly. Roscoe Pound had been Holmes's champion, but the legal

embracing his belief in law as socially engineering a better society. Legal realists' basic orientation was to study law as it "really" functions: Holmes had said that "the life of the law has not been logic: it has been experience"; and Pound distinguished "law in books" and "law in action."[64] The realists agreed that the law is "really" found in the actions of judges and other officials, and not in the pages of law reports or statute books.[65]

The legal realist attitude relies on a number of intellectual commitments rarely spelled out by its adherents. Believing there to be a *distinction* between "law in action" and "law in books" is not enough. This is commonsensical to the point of banality. Indeed, the purported *priority* of law in action over law in books in realist thought, far from an innovation, is common-law orthodoxy. If, in practice, adherents of Langdellian legal science mechanically judged law-in-action against principles recorded in "books," they were nonetheless committed to the priority of the authoritative speech-acts of judges and other officials, albeit recorded in case reports and, perhaps, explained, simplified, and probed in treatises. The realists' break with their predecessors, then, was not the

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realist Jerome Frank (1889–1957) treated Pound as a "right-wing traitor who distorted Holmes' legal teaching." Pound's crime, in Frank's view, was to include people's *ideas* about the law—and not just the empirical consequences of adjudication—in his presentation of the legal system as it *really* is. See, Paul, *The Legal Realism of Jerome N. Frank*, 19, and Jerome Frank, *Are Judges Human?* 80 U. Pa. L. Rev. 17, 18 (1931).

[64] Holmes used these words on more than one occasion. The best-known instance is in the opening words of *The Common Law*. Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 15 (1910).

[65] William Rumble, Jr.—who tried to capture the genius of legal realism after its post-war fading—answers the question "what was legal realism to its adherents?" with "[t]he best answer is that 'realism' meant to them what it has meant in art and literature. It meant the attempt to represent things as they actually are." *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968), 44.

recognition that law in action differs from its presentation, nor even that this law in action has priority, but rather that this law in action is not necessarily tied to *legal rules*. The law as experienced, thought the realists, is not exhausted by the text of legislation or the argument of a judicial opinion, a position they would condemn as "formalism."[66]

2.1. Understanding the Change

The realist approach is typified, then, by a skepticism toward rules, and a sharp attention to what judges and officials do, irrespective of what they *say* they do.[67] Karl Llewellyn (1893–1962) gives vigorous early expression to the realists' skepticism in *The Bramble Bush* (1930), his lectures to Columbia Law School's incoming students: "*What*

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[66] Richard Posner has offered typological definitions of "formalism" and "realism" that aim that aim to describe rather than evaluate the positions. By "formalism," he means "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect." And by "realism," Posner means "deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis. A 'realist' decision is more likely to be judged sound or unsound than correct or incorrect—the latter pair suggests a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy. Such equity maxims as 'no person shall profit from his own wrongdoing,' which Professor Ronald Dworkin calls 'principles,' are in my analysis 'policy considerations.'" *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 181 (1986).

[67] Brian Leiter gives many examples in the first three chapters of his *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007).

In the context of commercial law case law, for instance, realists suggest that judges reach the "right outcome" not by working through legal rules, but by considering—consciously or otherwise—the standard business culture and practices of their time and place.

these officials do about disputes is, to my mind, the law itself."[68] Rules, in this understanding, are only "important so far as they help you . . . see or predict what judges will do . . . That is all their importance, except as pretty playthings."[69] The challenge to natural lawyers—indeed, to almost all those who preceded—was radical: the legal system, they were told, is not a coherent, principled body of law, but merely the actions of officials.

Scholars have sought to explain the change wrought by the realists to legal education and scholarship in several ways. How did they break with the natural law and Langdellian past? We will consider this change through the language of: secularization (§2.1.1.), indeterminacy (§2.1.2.), and non-objectivity (§2.1.3.).

2.1.1. Secularization

A frequently used metaphor to account for the realist change is *secularization*.[70] Appeals to secularization, however, are often made with little accompanying discussion of what this means. We will see, however, that three main ideas are implicitly at work in the scholarship, whether singly or in combination: first, a turn to utility; second, a turn to clarity; and third, a turn to nonexistence.

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[68] *The Bramble Bush: Some Lectures on Law and Its Study* (New York: Tentative Printing for the Use of Students at Columbia University School of Law, 1930), 3. In the second edition, Llewellyn retreats from this bald statement.

[69] Ibid., 5.

[70] What is meant by "secularization," of course, has animated several waves of scholarship from the nineteenth century to this day. José Casanova notes that scholarship often elides three distinguishable connotations: decline in religious beliefs and practices; privatization of religion; and the differentiation of the secular spheres. See his *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).

In an influential article, Calvin Woodard spells out what it might mean for the law to undergo secularization in the first sense. He suggests that over the last four hundred years three "interrelated propensities" have been increasingly influential in the West.[71] The first two—*rationalism* and the *scientific method*—were evident in Langdell's era. But with the realists' age came something new: an understanding of law as *technology* or *applied science*. This was not Langdell's science. Langdell had emphasized law as an independent, pure branch of study, with its own internal purpose, domain, and method (CHAPTER 4, §3). Nor was this the science of Isaac Parker. He presented the science of law as the studied derivation of principles and rules from human nature and life in society (CHAPTER 3, §1.2.). No, as an *applied* science or technology, law for the realists had a function. It was a technique or set of techniques. On this account, the relevant realist *secularization* of the law, therefore, was the desire "simply to make the law—the science of law—more useful."[72] The legal system is rightly pragmatic, the realists thought, and legal rules and their operation are accordingly judged on their consequences: the "social progress" they afford.[73] What the realists mean by "social progress" receives surprisingly

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[71] Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 Va. L. Rev. 689, 691 (1968).

[72] Ibid., 704.

[73] The realists therefore shared Holmes's commitment to the law as means to "get things done." However, many did not share the Holmesian opposition of utility and morality: "I think 'Whatsoever thy hand findeth to do, do it with thy might,' infinitely more important than the vain attempt to 'love one's neighbor as one's self'; "Speech at a dinner given to Chief Justice Holmes by the Bar Association of Boston, March 7, 1900" in Posner, *Essential Holmes*, 79.

Holmes, of course, *did* have a set of values of sorts, albeit usually expressed in distinction to what he termed "morality": The man who is "true jobbist," he says—who gets practical things done—"will find on the Day of Judgment that he has been a better

little treatment in their work, although most presented the achievements of New Deal progressivism as its fruit. Irrespective of the extract referent, when judged by its social consequences, a definition in the law—said Felix Cohen (1907–53)—is "*useful* or *useless*. It is not *true* or *false*."[74]

A second sense of secularization, however, is never far from discussion of the legal realists. This is the observation that the realists were "hard-headed" or "tough-minded": terms used in approbation, denoting a practical orientation and lack of sentimentality.[75] The purported secularization wrought by the realists that the second account captures, then, is that in rejecting the "transcendental nonsense" of their forebears, they saw the law for what it truly is.[76] The realists' secularity, in this view, is synonymous with seeing aright. Holmes pioneered this rhetoric. He criticized Langdell, for instance, by dubbing him "the greatest living legal theologian."[77] Supporters of the

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altruist than those who thought more about it." "To Harold Laski, December 9, 1921," in Posner, *Essential Holmes*, 115.

[74] *Transcendental Nonsense and the Functional Approach*, 35 Columb. L. Rev. 809, 835 (1935). In Cohen's account, the New York Court of Appeals treated a question of whether a corporation chartered in New York could be sued in Pennsylvania not—as he would have it—by reference to *useful* economic, sociological, political, or ethical considerations, but instead by reference to metaphysical, *truth*, questions: "Where is a corporation? Was this corporation really in Pennsylvania or in New York, or could it be in two places at once?" *Tauza v. Susquehanna Coal Company*, 220 N.Y. 259 (1917).

[75] The term is used with surprising frequency in scholarly work that considers the realists. For just one example, see: Hindy Lauer Schachter, "A Gendered Legacy? The Progressive Reform Era Revisited," in *The Oxford Handbook of American Bureaucracy*, ed. Robert Durant (Oxford: Oxford University Press, 2010). And Woodard uses it too: "Limits of Legal Realism," 6.

[76] Cohen, *Transcendental Nonsense.*

[77] *Book Notices*, 14 Am. L. Rev. 233, 234 (1880).

realists, indeed, frequently adopt an anti-clerical timbre: as human beings mature, they throw-off legal obscurities; "the ghost-world of super-natural legal entities . . . vanishes; in its place we see legal concepts as patterns of judicial behavior."[78] To see aright, then, is to see patterns of behavior empirically through the tools of the social sciences.[79] To see aright is to reject "[*l*]*egal concepts* (for example, *corporations* or *property rights*) [as] supernatural entities which do not have a verifiable existence except to the eyes of faith."[80] If tough-mindedness suggests a concern for epistemology, there were nonetheless truly ontological results: realists, on the whole, rejected that legal doctrines and principles exist.

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[78] Cohen, *Transcendental Nonsense*, 828.

[79] We are all creatures of our times, of course, but there is some irony that Frank's "scientific" framework for attacking formalism is the unprovable tenets of psychoanalysis. Frank famously railed against *the basic myth of law* (that legal rules are certain and exact), and explained it as childish clinging to a Father-Substitute:

> To the child the father is the Infallible Judge, the Maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of family, sits in judgment and punishes misdeeds. The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious anthropomorphizing of Law, in ascribing to the Law some of the characteristics of child's Father-Judge. *Law and the Modern Mind* (New York: Brentano's, 1930), 19.

[80] Cohen, *Transcendental Nonsense*, 828. Holmes typically saw "rights" as an articulation of power, "I always have said that the rights of a given crowd are what they will fight for." "To Harold Laski, July 23, 1925," in Posner, *Essential Holmes*, 141.

This is the third sense of secularization: a rejection that was tantamount to "killing the idea of 'the system' altogether."[81] This is a radical secularization, indeed. If there is no system, the law's "secularization" is, in part, a rejection of the idea that the law possesses intrinsic purposes. The law has no obvious ends. Natural-law approaches to human positive law, we have seen, have suggested that law is capable of aiding the flourishing of community, or, at least—in its limited, modern natural law guise—maintaining a world of peaceable neighbors (CHAPTER 1, §4.1). The realists thought, instead, that ends must always be specified from outside. By itself, the law is merely a set of actors, institutions, and procedures used by individuals to advance their interests. The realists readily embraced political and economic systems to specify ends for which the secularized law was now rightly the handmaiden.[82]

2.1.2. Indeterminacy

Realists posit that legal rules do *not* determine legal judgments. Focusing on *indeterminacy* in legal rules, then, is another way to understand the realists' break with the natural-law past.

The realists' primary focus is *adjudication*—how judges decide cases—and their primary target of critique is *formalism*: the idea, as Jerome Frank (1889–1957) put it, that

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[81] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 156.

[82] Holmes's skepticism was thoroughgoing. He understood human reason as more-or-less the slave of the passions, and thought the law achieved little beyond providing a conventional means to resolve disputes. See, Robert George, "Holmes on Natural Law," in *Nature in Philosophy*, ed. Jean De Groot (Washington, DC: Catholic University Press, 2012), 129. Many of the realists, however, thought that the newly authoritative empirical social sciences offered clear means to judge and channel the law for societal improvement.

"the judge begins with some rule or principle as his premise, applies this premise to the facts, and thereby arrives at his decision."[83] In other words: "formalism"—a mostly pejorative term—holds there to be distinct *legal* rules, which a judge uses to come to a *particular*, correct decision. The realists contend that thinking in terms of this "mechanical jurisprudence" fails to capture what judges actually do, and obscures the reality that the *non-legal* facts of a case (the economic, political, and social dimensions of a particular case, for instance) determine the decision.[84]

While individual realists differed in the details, two claims about the *indeterminacy* of legal rules help explain the realists' position, and thus their rejection of the tradition of natural-law reflection on the common law.[85] Legal rules are, first, on the realists' account, *rationally* indeterminate for deciding a legal case. In other words, the reasons that legal rules provide a court to rule one way or another do not in themselves justify a decision. Applying rules to particular facts does not justify a unique decision.

Legal rules for the realists are, second, *causally* or *explanatorily* indeterminate for deciding a legal case. In other words, the reasons that legal rules provide a court do not

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[83] Frank, *Law and the Modern Mind*, 101. Formalism continues to get a bad name. Karl Llewellyn's *The Common Law Tradition: Deciding Appeals* is the *locus classicus* for the thesis that the common-law courts in the United States changed their opinion-writing style from an early nineteenth-century "grand style," involving broadly stated policy rationales, to a formal style, involving an established rule or doctrine to be applied in mechanical fashion to the facts: (Boston: Little, Brown, 1960), 62–75.

[84] A much used charge, "Mechanical Jurisprudence," is also the title of an influential article by Roscoe Pound: 8 Columb. L. Rev. 605 (1908).

[85] Brian Leiter, "American Legal Realism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Walden, MA: Wiley-Blackwell, 2010), 249–66. And for his more constructive proposals, see his "Rethinking Legal Realism."

suffice to explain why a judge makes the decision she does. Applying rules to particular facts does not generate a unique decision.

The realists differed, however, on how deadly they thought indeterminacy to legal rules. Some thought that problems stemmed from legal rules being written at too high a level of generality, and hoped that specifying a particular rule to a greater degree would reduce, or even remove, the threat.[86] Others, however, agreed with Herman Oliphant (1884–1939) that courts "respond to the stimulus of the facts in concrete cases before them rather than to the stimulus of over-general and outworn abstracts in opinions and treatises," and that *no* level of specification could change this.[87] As true for Oliver Wendell Holmes, the realists' interest was principally in how to *predict* judicial decisions. If the result of a difficult case cannot be predicted by looking at legal rules, then the good legal student, practitioner, or academic must look elsewhere.

How, then, does one predict the result of a case? Or, to put it another way: why do judges determine what they do? The majority of the realists—dubbed the "sociological wing" by Brian Leiter—thought that there were predictable social patterns to judicial decision-making. For Oliphant, Llewellyn, and Cohen, judges' decisions are determined by *social forces*, particularly the prevailing norms of commercial culture or, better, some form of utilitarian calculus as to the "best" overall results for society.[88] The "idiosyncratic

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[86] Central to Langdell's science, of course, was the thought that the number of common law doctrines was "much less than is commonly supposed." *A Selection of Cases on the Law of Contracts: With References and Citations: Prepared for Use as a Text-book in Harvard Law School* (Boston: Brown, Little, 1871), vi.

[87] Herman Oliphant, *A Return to Stare Decisis*, 14 ABA J. 71, 71–76, 107, 159–62 (1928).

[88] Leiter, "American Legal Realism," 259.

wing" of the realists, on the other hand, thought that the particularities of individual judges determine results: "the personality of the judge," wrote Frank, "is the pivotal factor in law administration."[89] Joseph Hutcheson (1879–1973)—a federal district court judge—influentially suggested that judges act upon a "hunch": an intuitive sense of right or wrong.[90]

If Langdell's legal science looked to the natural sciences for its methods and authority, the realists—in their desire for predictability, and interest in the societal forces that shape judicial decisions—embraced the *social* sciences. For some, the social sciences provided merely the tools to adequately *describe* judicial adjudication by looking at the prevailing social, economic, or political patterns, or the psychology of particular judges. For most, however, the social sciences also provided *norms* for assessing judicial decisions: did a decision promote social progress, they asked. And in the disciplines of sociology and economics, they found tools to provide an answer.

2.1.3. Non-Objectivity

A final way to understand how the realists broke with American law's natural-law past is by noting their rejection of the *objectivity* of legal rules. Langdellian science was purportedly *value-free*. But if, as the realists held, legal rules are dually indeterminate, and thus judges determine cases in reference to factors beyond the law—whether on the basis of prevailing social norms or their own individual idiosyncrasies—then legal rules are not objective. The individual realists differed on whether this *non-objectivity* means

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[89] Frank, *Law and the Modern Mind*, 111.

[90] Joseph Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *Cornell L.Q. 274* (1929).

that legal rules have no independent "existence," or that—in the more colloquial sense—judges' subjective feelings or opinions make their use of legal rules inherently partial. They agreed, nonetheless, that legal rules do not, by themselves, result in particular decisions.

The American legal realists' concern for non-objectivity, however, was mostly practical. While their contemporaries in Scandinavia pursued non-objectivity as non-existence, deploying philosophical criticism—particular semantics and epistemology—to debunk, in their minds, the metaphysical rot—and thus rejecting terms such as "rights" as having no content, as straightforwardly meaningless—the Americans remained lawyers at heart: lawyers concerned to respond to the political situation of their day.[91] They were "technicians" focused on the practical aspects of a political task.[92] Indeed, many of the most prominent were New Deal lawyers serving in the Roosevelt administration: Frank was Chairman of the Securities and Exchange Commission; Oliphant was Chief Counsel of the Treasury Department; and Cohen served in the Solicitor's Office of the Department of the Interior.[93]

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[91] For Axel Hägerströn—a leading Scandinavian realist—rights were "mysterious, supernatural powers and bonds" derived from "archaic magical conceptions," operating as "exterior forces that can be transferred to others through magical means." Patricia Mindus, *A Real Mind: The Life and Work of Axel Hägerström* (Dordercht: Springer Netherlands, 2009), 186. See also, Jes Bjarup, *The Philosophy of Scandinavian Legal Realism*, 18 Ratio Juris 1 (2005). For the similarities between the Scandinavian and American Legal Realisms, see, Gregory Alexander, *Comparing the Two Legal Realisms—American and Scandinavian*, 50 Am. J. Comp. L. 131 (2002).

[92] Woodard, "Limits of Legal Realism," 704.

[93] The standard view is that lawyers trained by the realists "brought their realism" to Washington, DC. But see, Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Oxford University Press, 1995), 155ff.

In the realists' minds, if the law is non-objective it is thoroughly political. It is a tool to be used for good or ill. What this means for adjudication, however, is troubling. Accepting a positivism that rejected the necessary link between law and morality, the realists were left simply with the view that judges often decide cases on the basis of their politics. While this insight convinced some of realists that the law "made no sense," except in "striking resemblance to the more despairing novels of Franz Kafka," for many it presented opportunities for reform.[94] Some saw their primary scholarly task as showing the non-objectivity of the legal system and offering instead an *objective*, social-scientific depiction of the law *as it is*.[95] The majority, though, embraced the law's non-objectivity and proposed politically progressive alternatives. For the latter, if the law is baldly political, then it must be used to achieve the best societal outcomes, determined—as with their skeptical peers—social-scientifically. The law is *instrumental* to the achievement of social causes: "a means to an end, and is to be appraised only in the light of the ends it achieves."[96]

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[94] Grant Gilmore, *The Ages of American Law*, 2nd ed., with a final chapter by Philip Bobbitt (New Haven: Yale University Press, 2014), 73. Gilmore found at least some expressions of realist "nihilism" admirable. Describing Wesley Sturges (1893–1962), Dean of Yale Law School from 1945–54, Gilmore suggests he had "the courage of his bleak convictions. *Ex nihilio nihil.* He wrote almost nothing during the remainder of his long career . . . he was a lonely, great, and tragic figure"; ibid. See also, Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 Yale L.J. 1037 (1961).

[95] John Henry Schlegel claims that realism can be understood as the law's late embrace of empiricism. While "new" disciplines in the nineteenth-century—anthropology, economics, history, psychology, sociology— had sought objectivity through "scientific" empiricism, law already understood itself to be a (non-empirical) science of rational ordering. This differing view of scientificity, delayed the embrace of empiricism. *American Legal Realism*.

[96] Myres McDougal, *Fuller v. The American Legal Realism: An Intervention*, 50 Yale L.J. 827, 834–35 (1941).

3. Legal Realism and the Consequences for American Legal Education

In its narrower form, legal realism—as a specific conversation undertaken by major scholars who self-identified with its aims—barely survived the 1940s. And yet it is "often said—indeed *so* often said that it become a cliché to call it a cliché—that we are *all* realists now."[97] The "we" here is the legal academy, and its near-universal acceptance, since the realists, that adjudication is more than a matter of applying legal rules to circumstances. Law schools came to embrace the idea that there are non-rational "reasons" behind many legal decisions.

The realists, then, successfully brought a new skepticism to the practice and study of law. But they faltered in proposing next steps. New waves of scholarship combined their skeptical attitude with clearer programs for legal and political reform. As a *program of action*, realism was swept from its academic bastion by "policy science." Destructive legal realism was replaced by positive, conscious effort to "apply the best existing scientific knowledge to solving the policy problems of all our communities."[98] Realism had failed to integrate the social sciences toward specific policy ends. Among subsequent shifts in scholarship, the "law and economics" movement has likewise embraced legal realism's understanding of law as a social tool, but judges proposals against bodies of

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[97] Michael Green, *Legal Realism as a Theory of Law*, 46 Wm. & Mary L. Rev. 1915, 1917 (2005).

[98] Myres McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 Yale L.J. 1345, 1349 (1947). See also, Harold Lasswell and Myres McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 Yale L.J. 203 (1943).

defined social-scientific thought, including behavioral economics, game theory, and public choice theory.[99]

Moreover, while the realists treated the beliefs and attitudes of legal officials as distractions to knowing the law, resurgent post-World War II jurisprudence and political philosophy treated belief and attitudes as central to their task. As a *legal theory*, if not a theory of adjudication, then, the legal realism was swept away by the widespread acceptance of works of sophisticated works of legal positivism, such as H. L. A. Hart's *The Concept of Law.*[100] Hart argues that what we recognize as "law" necessarily includes officials' *internal view* of the nature and purpose of the law. The law is not simply the threat of sanctions—as the realists, and earlier positivists maintained—but the imposition too of obligations.

One continuing legacy of legal realism has transformed the law school professoriate. Today, many professors come with doctorates in economics, history, or other disciplines. If the law is not fully explained by recourse to legal rules found in the cases, then experts in human behavior are needed. A more radical inheritance emerged with several waves of scholars who accepted the realist portrayal of the law, but rejected trust in the social sciences. These scholars embraced the instrumentalization of the law heralded by the realists, but not their majority belief that the social sciences could determine ends for this instrumentalization. If the law is essentially political, it must be exposed as such, and directed towards articulated, political ends. Movements such as

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[99] For a recent treatment by one of its founders, see Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (New Haven, CT: Yale University Press, 2016).

[100] (Oxford: Clarendon Press, 1961).

critical legal studies, and its feminist, critical race theory, and postmodern successors challenge current legal rules and norms as benefiting and legitimizing the powerful, and offer alternatives concerned to benefit the powerless.[101]

One pedagogical failure of legal realism is the continued prominence of *casebooks*. Jerome Frank thought that in accepting the reforms of Christopher Columbus Langdell, American legal education had been "seduced by a brilliant neurotic," and argued that "the sole way for those law schools to get back on the main track is unequivocally to repudiate Langdell's morbid repudiation of actual legal practice, to bring the students into intimate contact with courts and lawyers."[102] While clinical legal education has been added to law schools' curriculums to allow for experiential learning, casebooks nonetheless remain texts in "core" common-law courses.[103]

But if law students still turn to *casebooks*—thereby frustrating Jerome Frank and others who sought to pull the study of law from the decisions of appellate courts to the bustle and fact-finding of trial courts[104]—their casebooks are not Langdell's bare extracts,

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[101] Robert Ungar's *The Critical Legal Studies Movement* offers something of a manifesto: 96 Harv. L. Rev. 561 (1983). The realists' emphasis on *facts-in-themselves* appears naïve to post-modernists, of whatever form: the relationship between fact and value is not the clear-cut distinction the realists imagined.

For a critical treatment of the "use" of the law to pursue particular political agendas, see Brian Tamanah, *Law as Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

[102] *A Plea for Lawyer-Schools*, 56 Yale L.J. 1303, 1313 (1947). He makes this argument too in the legal education chapter of his *Courts on Trial*.

[103] See, the website of the *Clinical Legal Education Association*, accessed March 1, 2017, http://cleaweb.org.

[104] "They study, almost entirely, upper-court opinions. Any such opinion, however, is not a case, but a small fraction of a case, its tail end. The law students are like

but books of *cases and materials*: where social scientific and other literature is included to explain the law. Moreover, as Martha Minnow (dean of Harvard Law School, 2009–17) notes, where the case method is used today, it is often to disrupt doctrine as much as confirm it. Where Langdell expected to find coherence in case law, after the realists, law school classrooms make conflicting principles prominent.[105]

Conclusion

CHAPTER 5 is the third of three that, together, offer a depiction of nineteen- and early-twentieth-century legal education and its relationship to the natural-law tradition. We have focused on two common-law breaks with natural law: the first with Oliver Wendell Holmes in the 1880s, and the second with the American legal realists, reaching its peak in the 1930s.

Holmes and the realists alike, we saw, rejected Langdell's idea that common law is principled and coherent. Instead, legislative might or social convention, said Holmes, or sociology or psychology, said the realists, is the deciding factor in legal cases, whatever the details of legal rules might say. To speak of "law," then, is to speak solely of specific legal decisions, not a principled body of doctrine. Legal decisions may be predicted, they say, but if so it is through attention to non-legal issues, not the exercise of internal legal reasoning.

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future horticulturists studying solely cut flowers; or like future architects studying merely pictures of buildings." Frank, *Courts on Trial,* 227.

[105] Martha Minnow quoted in David Garvin, "Making the Case: Professional Education for the World of Practice," *Harvard Magazine* (September–October, 2003).

Holmes and the realists, nonetheless, differ on the basic question of what the law is for. Holmes's skepticism, we have seen, is thoroughgoing: extending beyond the law to morality, even truth (§1.2.). Law, for Holmes, channels the will of the strong, albeit with the helpful benefits of monopolizing legitimate violence and more-or-less efficiently organizing human affairs. We saw, however, that for the majority of the realists, at least, this is not true. For the realists, law is a tool for social engineering (§2.1.3.).

One significant realist legacy in American legal education, accordingly, is to teach law as interwoven with social progress. Whereas Langdell sought value-free science (CHAPTER 4), following the realists, twentieth-century American law schools were increasingly values-driven (§3.). Unlike a Blackstone (CHAPTER 2) or a Story (CHAPTER 3), however, these values were no longer treated as co-constituted by the common law, but rather specified from *outside* it.

Accordingly, those who would appeal to natural-law readings of the American common-law tradition have much to refute in Holmes and the realists if their position is to be tenable. As we noted in the introduction to this chapter, beginning in the later twentieth century, some scholars have sought alternative depictions of the law, often with some success. Their "natural-law" depictions, not Holmes's or the realists', they contend, better capture the nature of law. But this is not the only method of refutation.

Our study of natural law and common law in legal education, moreover, allows for immanent critique of Holmes and the realists. By way of closing, therefore, let us consider three brief critiques as examples of how natural-law proponents of common law might move forward. Each critique, in turn, matches one of the three characterizations of the realists' positions (§2.1.).

First, in discussing realism as *secularization* (§2.1.1.), we ended by noting that the realists must ultimately argue that law has no "existence." Law's meaning, instead, always waits to be stipulated from outside. What needs emphasizing, however, is that the realists formed this view in reaction to Langdellian orthodoxy. Langdell's was the prevailing wisdom they sought to cast off. They rejected Langdell's science as theological, too natural-law-like, in its concern that legal doctrines cohere (CHAPTER 4, §3).[106] It was Holmes, more perceptively than others, who noted that Langdell was "less concerned with his postulates" than he was with them hanging together.[107] Langdell expended little time on the ultimate sources of law and law's authority, and a great deal of time on the interaction of legal doctrines.

Why does this matter? By quickly identifying Langdell with "natural law," the realists did not acknowledge the markedly non-foundational nature of Langdellian legal science. Despite its embrace of scientific methodology, Langdellian legal science did not insist on any particular belief or principle as basic to its pursuit. Instead, it was concerned, we have seen, with logical connections between legal ideas. The result is either that the realists did not fully understand Langdell or that few today appreciate the extent of the realists' rejection of all that preceded them. If it is the latter, then proponents

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[106] Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 156.

[107] Ibid.

of natural-law treatments of common law can challenge supporters of the realists: do they really accept that, at a principled level, law can have no cohesion?[108]

Second, we discussed realism as primarily concerned with the *indeterminacy* of legal rules (§2.1.2.). For the realists, remember, legal rules do not logically result in a unique legal decision, nor account for a judge's reasons in so deciding. What we can say now, however, is that even if indeterminacy sinks straightforward claims about the nature of adjudication by Langdell or naïve legal formalists, this is not necessarily true of other natural-law conceptions of the common law. Take, for instance, Blackstone's account (CHAPTER 2, §2.1.). Speaking of adjudication, Blackstone recognizes the steps needed to specify legal rules for particular circumstances. Some laws may be derived from higher "rules" (premises of natural law). But even these require human actors to make the derivation. Some of the laws of particular human communities are supplements to the natural law, which apply general norms to specific situations. And some of the laws coordinate human affairs in purely human terms, where natural law is indifferent.[109] In each circumstance, legal rules are not self-executing.

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[108] World War I marks a boundary, suggests Horowitz, of realists' trust in reason. After the war, their trust was chastened or lost. See, "Defining Legal Realism," 169–192, in *The Transformation of American Law 1870–1960.*

[109] The scholastic tradition of natural law makes these distinctions with more precision. E.g., Thomas Aquinas, *Summa theologicæ*, I-II, q. 95, art. 2.

The relationship between premises of the natural law and their specification in human law is a matter of continuing scholarly debate. See, e.g., Cathleen Kaveny, *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (Washington, DC: Georgetown University Press, 2012): 45–70; Jean Porter, *Ministers of the Law: A Natural Law Theory of Legal Authority* (Grand Rapids, MI: Eerdmans, 2010): 63–141; and Robert P. George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999): 102–11.

The natural-law tradition, therefore, has understood that officials render a rule concrete in particular circumstances, and, in many accounts, suggests that this is rightly guided by a cultivated *prudentia*: a set of qualities that help good reasoning, including memory, insight, teach-ability, acumen, prevision, circumspection, caution, and so on.[110] The natural-law tradition, in other words, has affirmed that judges require prudence in order to identify and evaluate relevant facts, and apply rules in appropriate ways.

The realists had little interest in thinking about how this *casuistry*—the applying of rules to particular instances—could be reasonable and principled. Observing the practice of the law, they thought, showed rules to underdetermine judicial decisions. And that was that. Few of today's supporters of the realists, then, take the time to identify the specific targets of their critique. To be fair, the realists themselves had a tendency to lump together most previous expressions of the nature and purpose of the law. But far from defeating a standard natural-law position, Joseph Hutcheson's identification of a judicial "hunch" as grounding decisions, for example, could be applauded by a natural lawyer, at least if this hunch were understood as the well-cultivated prudence that helps a judge rightly bridge the gap between potential legal-rule indeterminacy and the facts of a particular situation.

The realist attack, then, only directly impacts accounts of law that think it possible for judges to determine cases in *value-neutral* ways by the straightforward application of rules to particular circumstances. This may well describe Langdell's approach in some respects, but it does not necessarily apply to all—or even most—natural-law treatments of common law.

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[110] C.f., John H. Langbein, "Blackstone on Judging," in *Blackstone and his Commentaries: Biography, Law, History,* ed. Wilfred Prest, 65–78 (Oxford: Hart, 2009).

Third, and finally, we discussed realism in relation to *non-objectivity* (§2.1.3.). What can immanent critique say here? The realists, we saw, say that if law is indeterminate, as they contend, then legal decisions are necessarily determined by non-legal political or social considerations. Again, however, the realists' attack was narrowly targeted, whether they realized it or not. They attacked formalism (albeit lumping together as "formalism" almost all previous expressions of the nature of the legal system). The realists, therefore, ignored the distinction that, although natural-law accounts of the law would indeed insist on the objective existence of rules, most natural lawyers, unlike Langdell, would agree with the realists that *value* is always implicated in judicial decisions.

Most natural lawyers, indeed, could even agree with the realists that law is *instrumental*. It is Langdell, once again, who is exceptional. Langdell's exclusion of value from the legal system does, indeed, make law its own end. But for most natural lawyers, the law is its own end only in the sense that law is instrumental to human participation in a form of flourishing in community (emphasized in the classical view) or life in peaceful coexistence with neighbors (in the modern view). When we attend to the history of natural-law reflection on the common law, we find, therefore, that the difference that realism makes is not so much that it correctly recognizes value, but that it claims that the law neither has its own internal ends, as for Langdell, nor is the means to specific ends, as for most natural lawyers. Instead, law points to nothing in particular.[111]

[111] The legal system's ends, then, must always be specified from outside. These ends are in the hands of legal officials. As we have seen, many of the realists advocated using the law to achieve the political ends of the New Deal.

Notice, however, that on a practical level, the realist portrayal suggests significant tensions in the lawyer's job. Before and after the realists, most would agree that a lawyer

in a common-law system must act not as if the law is merely the means to achieve her client's interests, but rather that the achievement of the client's interests is what the law requires. What can the realist say? Some realists argued that lawyers should point to the better societal outcome achieved by a judicial decision made in their clients' interests. But they disagreed about how upfront judges and other legal officials should be about "policy." See, Morton Horwitz, *The Transformation of American Law, 1870–1960*, 208ff.

EPILOGUE

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Retrospect

We now have a fuller narrative and a better account of the changing ways in which common law and natural law have interrelated in American legal education. In the two chapters of PART I, we saw that collegiate education (CHAPTER 1) and the reception of Blackstone's *Commentaries* (CHAPTER 2) served both as sources for natural-law thinking in America and sites for their negotiation with common law. In the three chapters of PART II, we saw the varied uptake and interpretation of these sources in professional legal education: from the origins of law schools around 1817 (CHAPTER 3) through their reformation beginning in 1870 (CHAPTER 4) to two significant breaks with the natural-law tradition in the 1880s and 1930s (CHAPTER 5).

We can now say with some confidence that, in American legal education, from colonial New England through the nineteenth century, the common-law tradition was articulated, even constituted, by reference to natural law. It makes little sense to suggest, then, that American common law has been essentially positivistic, even as twentieth-century legal education diverged from previous expressions; in American legal education, "common law" and "natural law" have interrelated in complex ways.

1. The Changing Faces of "Common Law" and "Natural Law" in American Legal Education

One claim made throughout this study is that attention to American legal education disrupts standard depictions of "common law" and "natural law." The INTRODUCTION began by noting that a standard depiction of common law is "judge-made

law," whereas natural law is law grounded in human reason, nature, or the mind or will of God, not the acts of human lawmakers. If we are open to having these depictions revised, however—if we do not immediately judge "common law" and "natural law," that is, against predetermined standards—then we can see how these standard depictions are distorted, at least as they attempt to explain common law and natural law in America.

Consider just the following examples.

Common law, we saw, can be outlined and explained in reference to natural law (CHAPTER 2). Blackstone and his successors even formed the system of modern common law through reference to natural-law rights and principles. Though elaborated through judicial decisions, common law was nonetheless understood as grounded in natural law.

Natural law changed in its encounter with common law. When put to work in a common-law legal system, it was treated not solely as law's source of authority, but also as the structuring spirit of common law, or the justification for particular enactments, defenses, or punishments. Natural law was called upon to provide ideals or internal yardsticks for common law, or to coordinate moral and civil obligations (CHAPTER 3).

But natural law was also circumscribed in the encounter. Even as natural law rendered common law revisable and contingent, natural law was not always treated as definitive of a result (CHAPTER 2). Human courts put law into action,[1] and judges might diverge from natural-law principles in their decisions. As human courts enact the law,

[1] This idea is not unfamiliar to some theological accounts. Jean Porter, for instance, argues that natural law underdetermines specific results. Human actors must always make choices about how it is applied. See: *Nature as Reason: A Thomistic Theory of the Natural Law* (Grand Rapids, MI: Eerdmans, 2005), 127; and "Reason, Nature, and the End of Human Life: A Consideration of John Finnis's Aquinas," *Journal of Religion* 80, no. 3 (2000): 476–84.

natural law—at least as it applies to common law—is historicized and relativized. It is, in other words, treated as relevant for a particular time and circumstance.

One consequence was that natural law was subsumed into the details of common-law doctrine, whether for good or ill (CHAPTER 3). The result was to cast natural law not as a deductive source of law, but rather one player in an inductive tradition, where specific cases generate general laws and principles (CHAPTER 4). Our understandings of common law and natural law, then, must change by virtue of the interaction of each with the other.

2. Profits and Pitfalls

Making evident both the distortion of the standard depiction of "common law" and "natural law," and the varied ways in which American common law has, in fact, related to natural law in legal education, raises the possibility that natural law can be used today to explain and critique American law, the legal realist critique notwithstanding (CHAPTER 5). The natural-law tradition, after all, has been one continuing way that moral realists of various kinds, and particularly Christians, have evaluated human laws and institutions. For those attracted to the natural-law tradition, therefore, the five chapters of this study have attempted to raise historical issues and challenges for the contemporary use of natural law.

2.1. Natural Law and Public Debate

This is certainly a moment when Christians should seriously consider how to engage "secular" laws. Debates surrounding recent U.S. Supreme Court cases, such as *Hobby Lobby* and *Obergefell*, are only the most obvious examples that suggest continuing tensions about how to reconcile legal commands with individual and corporate religious commitments.[2] The natural-law tradition has historically been one way that Christians have sought to talk beyond their religious communities. In recent years, non-Catholic Christians have once again reached for the natural-law tradition to offer arguments in public debate that they presume can speak beyond those who share their confessional commitments.[3]

Recognizing natural law in the historical evolution of common law, then, raises some possibility for shared places of discussion across confessional and "secular" discourses. Natural law may well be a means for Christians to engage the content of American legal rules. But as this study has shown, natural law offers no shortcut to particular decisions. Even its strongest common-law proponents limit the applicability of natural law to the details of legal rules, and they suggest that, even when natural law does apply, judges may disregard it.

Likewise, we should not exaggerate the ability of natural law to offer uncontested entry to political and cultural debate. Natural law's general commitment to the

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[2] *Burwell v. Hobby Lobby* 134 S.Ct. 2751 (2014); *Obergefell* v. Hodges, 35 S. Ct. 2584 (2015).

[3] See, e.g., Carl Braaten, "Protestants and the Natural Law," in *Being Christian Today: An American Conversation,* ed. Richard John Neuhaus and George Weigel, 105–21(Washington, DC: Ethics and Public Policy Center, 1992); J. Daryl Charles, *Retrieving the Natural Law: A Return to Moral First Things* (Grand Rapids, Ml: Eerdmans, 2008).

normativity of nature, however understood, is not widely shared among secular moralists. Resort to natural law, then, is no panacea; it is only a starting point.

2.2. New Legal and Theological Resources

One advantage of engaging the natural law in this study is that we recover distinctive ways of talking about common law. In CHAPTER 1, for instance, we saw law variously depicted as part of broader political, moral, and theological discourse. Likewise, we have considered treatments of natural law that differ from most contemporary theological accounts. The Puritans, for instance, offer a particular protestant expression of natural law limited to this-worldly affairs, while their successors adopted and developed so-called "modern natural law," with its confidence in human rational capacities.

The specifics of these versions of natural law of course deserve their own treatment. Still, the following seems clear: The decision to embrace a particular version of natural law is not straightforward. Each has distinct consequences for moral theory and theological commitments. Nonetheless, when "natural law" is most often understood solely as a Thomistic project,[4] or perhaps as the "New Natural Law" of Germain Grisez, Joseph Boyle, John Finnis, and their successors,[5] then the examples of this study may

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[4] There are other contemporary options, of course. Stephen Pope suggests five recent expressions of natural law as: revived Thomism; practical reason or public philosophy; revisionist or proportionalist, the New Natural Law; and personalist. Stephen J. Pope, "Reason and Natural Law," in *The Oxford Handbook of Theological Ethics*, ed. Gilbert Meilaender and William Werpehowski, 148–67 (New York: Oxford University Press, 2005).

[5] For an introduction, see: Germain Grisez, Joseph Boyle, and John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 Am. J. Juris. 99 (1987).

serve as helpful resources for those seeking a differing natural-law vision. The Puritans, for instance, offer a theological treatment that may attract Protestants seeking a vision of natural law that more closely adheres to their understanding of Scripture, human corruption, God's sovereignty, and the centrality of Jesus Christ as the revelation of God.

2.3. Natural Law Beyond Legal Theory

We saw that one possibility suggested by tracing the historical relationship between natural law and common law is that natural law is "subsumed" into the details of common-law doctrine (CHAPTER 3). For many, this will render natural law useless as a means to critique or challenge current laws. On the other hand, this way of thinking does open possibilities that have mostly gone unexplored by contemporary legal theorists. Their primary concern has been whether natural law is necessary for law's *legality* (what makes laws legal) or its *normativity* (why we follow the law). If our attention is not solely on natural law as a legal theory, however, then we can ask a whole new set of questions. How do natural-law concepts, for instance, animate specific aspects of American law? We have already seen some answers in Blackstone and Story's organization of the law (CHAPTERS 1, 3). Answers for our current day and its problems await our articulation.

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