COMMON LAW AND NATURAL LAW IN AMERICA

Speaking to today's flourishing conversations on both law, morality, and religion, and the religious foundations of law, politics, and society, *Common Law and Natural Law in America* is an ambitious four-hundred-year narrative and fresh reassessment of the varied American interactions of "common law," the stuff of courtrooms, and "natural law," a law built on human reason, nature, and the mind or will of God. It offers a counter-narrative to the dominant story of common law and natural law by drawing widely from theological and philosophical accounts of natural law, as well as primary and secondary work in legal and intellectual history. With consequences for today's natural-law proponents and critics alike, it explores the thought of the Puritans, Revolutionary Americans, and seminal legal figures including William Blackstone, Joseph Story, Christopher Columbus Langdell, Oliver Wendell Holmes, and the legal realists.

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Common Law and Natural Law in America: From the Puritans to the Legal Realists
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FROM THE PURITANS TO THE LEGAL REALISTS

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314-321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi - 110025, India

103 Penang Road, #05-06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108701815
DOI: 10.1017/9781108576772

First published 2019
First paperback edition 2022

A catalogue record for this publication is available from the British Library

ISBN 978-1-108-47697-3 Hardback
ISBN 978-1-108-70181-5 Paperback

FOR J.R.G.

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Preface

Invocations of natural law in contemporary legal circles are almost guaranteed to generate more heat than light. Proponents frame natural law as essential to the defense of civilization and its critics as perversely denying universally accessible truths; critics regard natural-law discourse as a Trojan horse for the imposition of a minority's conservative religious convictions on an increasingly pluralistic nation. The idea that common law – the stuff of quotidian courtrooms in America – might be in fundamental harmony with natural law, or even structured and justified by it, is accordingly fantastical or nightmarish.

This was not always so. Despite today's prevailing wisdom that common law and natural law are separate and distinct ideas, in reality, a centuries-long stream of American legal thought presupposed – sometimes tacitly, sometimes explicitly – that natural law and common law are intertwined. Natural law, in short, undergirded the development of American jurisprudence. Contemporary debates on law, morality, and religion lack this historical memory and suffer accordingly.

What the concepts of "natural law" and "common law" meant to those who invoked them, however, requires careful delineation. We cannot generalize. The Puritans' "natural law," we shall see, was not the Revolutionaries'. Nor was the "common law" of Joseph Story, the fabled nineteenth-century jurist, altogether that of William Blackstone, its chief eighteenth-century organizer.

Still, we must start somewhere, and initial definitions will be helpful.

By "common law," I mean the system of laws in England and the United States in which laws – whatever their seeming source in a constitution, statutes, orders, or cases – are made explicit through interpretation by judges; judicial decisions in individual cases expound and develop the law.[1] To speak

[1] "Common law" also has narrower meanings. For instance, it can refer to the body of law distinct from "equity," or those areas of the law – contract, torts, and property, etc. – which

of common law is to invoke, too, the institutions, procedures, and conventions that allow for the functioning of a system of case law. For instance, common-law jurisdictions typically have adversarial court proceedings in which lawyers prosecute or defend, a judge impartially determines the law, and a jury decides the facts in a case. These institutions, procedures, and conventions set England and the United States apart from continental Europe's various civilian systems, in which court proceedings are inquisitorial rather than adversarial, with judges playing an active role in the collection of evidence and interrogation of witnesses.

This definition of common law is uncontroversial today. But its easy familiarity – at least to lawyers – is more obscuring than illumining of certain historical aspects of the common-law tradition. Far from the creation of judges, in our seventeenth- through early twentieth-century story, American 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 as *found*, not created, in interpretation.[2] Indeed, it was wholly orthodox, we shall see, for judges and jurists – sharing the same intellectual worlds as philosophers and theologians – to treat natural law as a source or justification for common law.

What, then, is natural law? For its proponents, "natural law" is law that proceeds from or is grounded in – variously – the mind or will of God, nature, or human reason. In the broadly shared Western tradition of moral reflection found in the centuries we will explore, "natural law" is the understanding that there is a *universal morality naturally accessible to all rational people*. Among contemporary common-law legal practitioners and Anglophone legal philosophers, "natural law" often simply refers 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.[3]

How the details of natural law are further specified matters acutely for its relationship to common law. What is natural law's source and content? How is it perceived and enacted? These details are spelled out differently by the Puritans, Revolutionary Americans, and the seminal legal figures we will

having no initial legislative source are instead formed, most proximately, by the reasoned judgments of courts.

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

[3] H. L. A. Hart, "Positivism and the Separation of Law and Morals," in *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon, 1983), 54.

encounter, whether Blackstone, Story, or Christopher Columbus Langdell, the creator of the modern law school.

Ultimately, our story ends with the rejection of natural law by Oliver Wendell Holmes and the "legal realists," a loose group of early twentieth-century jurists and practitioners skeptical about whether legal rules are rational or even coherent. But the narrative of the following pages is not simply a story of the concretion of natural law within common-law thought, followed by the erosion of its significance, even its outright rejection.[4] It is also a story of the history of natural-law reflection not as a linear novel, but as overlapping essays of differing quality and durability, written by common lawyers who – consciously or otherwise – recognized or ignored or fudged the differences between natural law's varied expressions.

* * *

A word on my choices may be helpful. My focus is a connected set of American conceptions of natural law and common law that form a specific tradition of moral and legal inquiry, from the seventeenth-century Puritans to the early twentieth-century legal realists. I do not replicate available studies – for example, on Revolutionary era discussions of natural law and natural rights (its sometime cousin) – but dust off lesser known discourses and debates.[5] I do so not for antiquarian reasons, but because contemporary proponents and critics of natural law alike miss the potent materials at hand by too readily accepting the distinctions between natural law and common law drawn by the legal realists. Otherwise vibrant twentieth-century visions of natural law – whether the rise of universal human rights discourse, Martin Luther King, Jr.'s appeals to natural law, or the "new natural law" of John Finnis and others – spend little if any time on the sweep of American legal reflection before the realists. Those who care about the relationship of law, morality, and religion in contemporary America will benefit from knowing how natural law and common law were connected and parsed over four hundred years of

[4] Earlier critiques of this narrative include Charles Grove Haines, *The Revival of Natural Law Concepts: A Study of the Establishment and of the Interpretation of Limits on Legislatures with Special Reference to the Development of Certain Phases of American Constitutional Law* (Cambridge, MA: Harvard University Press, 1930).

[5] For studies of natural law and natural rights in the thought of the founding fathers, see, e.g., Carl Becker, *The Declaration of Independence: A Study in the History of Political Ideas* (New York: Harcourt, Brace, 1922); Susan Ford Wiltshire, *Greece, Rome, and the Bill of Rights* (Norman: University of Oklahoma Press, 1992); Michael Zucker, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Princeton, NJ: Princeton University Press, 1996); Mark David Hall, *The Political and Legal Philosophy of James Wilson, 1742–1792* (Columbia: University of Missouri Press, 1997).

American history, as, too, will those who study the history of moral philosophy or who seek to advance or critique religious arguments for natural law.

I do not argue, to be clear, that readers adopt a natural-law interpretation of American law, of whatever variety. This is not a political tract or religious pamphlet. Instead, I show how and why Americans appealed to natural law. Some appeals may convince you. Others will not. Needless to say, natural law has its detractors and opponents across disciplines and topics. Many philosophers reject wholesale the idea that the goodness of actions relates to claims about human nature and flourishing. Many lawyers see no need to talk of law beyond the social fact of its existence. Many theologians dismiss natural law for a perceived lack of emphasis on the authority of God's will and commands. The chapters that follow are not shaped to convince them – or you – otherwise.

Nor will I 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 necessarily worth their attention. This is a consequence of refusing to appeal to or incorporate a predetermined standard for "natural law." I do not take for granted, for instance, that the natural law of Thomas Aquinas is normative and then judge all other expressions against it. Instead, by giving proper attention to the changing connections between American law both common and natural, I show the pitfalls and trade-offs of embracing any particular historical appeal to natural law. The Puritans' natural law, for instance, was chastened by their belief that human reason is necessarily corrupted by sin. Blackstone's influential rooting of common law in natural law shared this basic assumption, at least to some degree. This is missed by many contemporary champions of Blackstone, who assume he shares the more epistemologically ambitious natural law of Hugo Grotius and Samuel Pufendorf that was influential at the time of the Revolution.

And so, even as we recognize that American understandings of common law, natural law, and their relationship have changed, whether for good or ill, we can see that for much of American history it was assumed that common law – far from wholly detached from moral considerations – was, indeed, not just in fundamental harmony with natural law, but structured and justified by way of reference to it. Or put another way: When we consider law, morality, and religion in America today, we can freshly pull upon or push against the long-standing if variegated tradition of lawyers and legal thinkers who said that to know or interpret our laws is first to determine how things ought to be.

Acknowledgments

It is a pleasure to record my thanks to the Louisville Institute for fellowships in 2016–17 and 2013–15, and to recognize its funder, the Lilly Endowment, Inc.

Jennifer Herdt has read well-nigh everything I have written, at least since 2011. Her comments have improved papers and presentations and this book a good deal. She is both generous and precise, a model to emulate. I thank her.

I am grateful, too, for careful readings of earlier versions of this text, not least from Jerry McKenny, Olivia Stewart Lester, Kathy Tanner, and, particularly, Cathy Kaveny, whose comments helped frame and focus the project. Judicious advice was received from Marie Griffith and other participants in the 2017 Louisville Institute winter seminar. Chapter One was honed in conversation with members of a 2015–16 Yale law and humanities working group.

My thanks to John Berger and Cambridge University Press for shepherding this project to print. I am pleased to be counted in the Law and Christianity series edited by John Witte.

In New Haven, Rona Gordon was a sterling editor. Josh Goodbaum's edits have been essential and his patience remarkable. He likely knows this project too well by now. I have accepted *nearly all* his counsel. The book, however, is dedicated to him and not to Mungo, the dog.