Book Review

R.H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice*, Cambridge, Mass.: Harvard University Press, 2015, pp. 260, $45.00

Reviewed by Stuart Banner

When David Hoffman taught law at the University of Maryland in the 1820s, he devoted his first few classes to the topic he thought would be most practical for future lawyers—"the fundamental principles of Morals and of Natural Law." Students needed to learn natural law, he explained, because as lawyers they would find in court opinions "perpetual references to the elementary principles of that science."[1] Hoffman's students would eventually get a tour of the American legal landscape in all its technical splendor, but that was no way to start, he believed, because the law "is not a system of merely positive and arbitrary rules. It has its deep foundations in the universal laws of our moral nature, and, all its positive enactments, proceeding on these, must receive their just interpretation with a reference to them." How could one interpret a statute or a contract "without knowledge of the general principles on which they are promulgated or entered into?" Why were statutes presumed not to apply retroactively, if not because of "the principle of natural law, or ethicks, that associations are bound only by rules to which they have consented?" What were the rules of evidence "but metaphysical and ethical modes of investigating truth on the one hand, and limiting our deductions by a regard to human rights and feelings, and to our moral constitution, on the other?" In all these respects and many more, Hoffman declared, a lawyer could scarcely practice "without knowledge of the true principles of moral and political philosophy."[2] Hoffman aimed to make his students "practice-ready," as we might put it today. Practicing lawyers used natural law, so law students needed to learn it.

Today, of course, few law schools, if any, begin with natural law. Most students probably graduate without encountering it at all. If students do learn about natural law, it is likely to be in an elective course not advertised as useful for practicing lawyers, such as a course in the philosophy of law or

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1. David Hoffman, A Lecture Being the Second of a Series of Lectures, Introductory to a Course of Lectures Now Delivering in the University of Maryland 15 (1825).

2. David Hoffman, A Lecture, Introductory to a Course of Lectures, Now Delivering in the University of Maryland 44-45 (1823).

the history of legal thought. The reason is not hard to find. Natural law is no longer part of the lawyer's toolkit. If a lawyer were to say, "Your Honor, before I discuss the applicable statutes and precedent, I will begin with the law of nature," the judge would have a puzzled look, and opposing counsel would start planning the victory party. When lawyers stopped using natural law, law schools stopped teaching it.

But was David Hoffman right? What role did natural law actually play in law practice? And was he typical? How did natural law feature in legal education? These are the questions Richard Helmholz sets out to answer in *Natural Law in Court*, not just for the early United States but also for early modern England and continental Europe. As Helmholz points out, no one has ever seriously tried to answer these questions. While philosophers and historians of philosophy have written a lot about natural law, little has been written about natural law as a topic in the history of legal practice or legal education.[3] American lawyers today may know a few prominent examples of the use of natural law in early American legal documents. The Declaration of Independence says that humans "are endowed by their Creator with certain unalienable Rights." The 1798 Supreme Court case *Calder v. Bull*[4] includes a well-known exchange between Justices Samuel Chase and James Iredell regarding the role of natural law in interpreting statutes. But that tells us little about ordinary law practice. How often did lawyers use natural law? How much did students learn about it?

Natural Law in Court answers these questions. The first third of the book covers continental Europe between roughly 1500 and 1800, the middle third covers England during the same period, and the final third covers the United States between the Revolution and the Civil War. Helmholz is one of very few people who could have written all three parts. Each of these three sections is divided into two chapters, one on legal education and the other on litigation. The chapters on legal education rely on treatises and books written specifically for students, while the chapters on litigation focus on published court cases. Each chapter rests on an enormous amount of learning, presented very lightly. While discussing the English treatise literature, for example, Helmholz tosses off a paragraph (pp. 91-92) that cites 85 different authors. A similar paragraph (pp. 139-140) on the American treatises cites 62.

Helmholz shows that in all three contexts natural law was discussed fairly often, both in litigation and in materials intended for students. There is no way to know exactly *how* often. Published records of litigation and legal instruction represent an unknowable and varying percentage, and probably a very small percentage, of the total amount of litigation and legal instruction

3. From philosophers, *see, e.g.*, John Finnis, Natural Law and Natural Rights (1980); Robert P. George, In Defense of Natural Law (1999). From historians of philosophy, *see, e.g.*, Knud Haakonssen, Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment (1996); Brian Tierney, Liberty and Law: The Idea of Permissive Natural Law, 1100-1800 (2014).

4. 3 U.S. 386 (1798).

that took place. But Helmholz is able to demonstrate that natural law appeared regularly, for centuries, in litigation and in legal education. He presents enough evidence to be able to reject sweeping statements in either direction, either that natural law was ubiquitous or that it was absent. The truth is somewhere in between. Natural law was part of the lawyer's toolkit—not the only part, but part nonetheless. David Hoffman was right, and he was typical.

Much of *Natural Law in Court* is taken up with a description of the settings in which natural law was frequently invoked. Helmholz finds that natural law often figured in procedural matters, such as whether a defendant had received adequate notice of the charge against him. Natural law arose in cases involving marriage and inheritance. It was invoked when individuals alleged that government officials had abused their power, although this role became less important in the United States, where a written constitution took over from natural law as the main vehicle for challenging government power.

The most interesting of these settings from the perspective of a present-day American lawyer is the use of natural law in statutory interpretation, another practice Helmholz shows was common in Europe, England, and the United States. He explains that natural law was not used to "strike down" legislation in the modern sense of judicial review, but rather to interpret legislation. For example, in a case decided by Lord Mansfield in 1771, the King's Bench interpreted a 13th-century statute providing that goods washed up on shore after a shipwreck belong to the Crown, unless a man, a dog, or a cat survived the shipwreck (pp. 114-15). In this case, no one survived the shipwreck, not even any of the dogs or cats, but the goods washed up on shore. They consisted of several barrels of tallow that clearly belonged to the plaintiff—he had sent them on the boat and was trying to recover them. The language of the statute pointed against the plaintiff, but Mansfield determined that awarding the tallow to the Crown would be contrary to natural law. He accordingly looked to the purpose of the statute, which he concluded was to ensure that goods were returned to their true owner. If a survivor of the shipwreck could identify the owner of the goods, or if a surviving dog or cat was seen to recognize the owner, a court could be confident that a claimant was the true owner. When the statute was interpreted in the light of natural law, it was not an arbitrary rule specifically about dogs and cats, but rather an injunction to award shipwrecked goods to claimants only if there was no doubt about the goods' ownership. Mansfield accordingly awarded the tallow to the plaintiff.

The reason such examples are so interesting is that one can readily imagine an American judge reaching the same conclusion today by invoking one of the standard canons of statutory interpretation, without the use, or at least without the explicit use, of natural law. The argument would go: (1) statutes are interpreted so as to avoid reaching absurd results, because we assume that the legislature is composed of rational people trying to pursue sensible goals; (2) it would be absurd to award the tallow to the Crown when we know for certain whose tallow it is; (3) the legislature intended the business about dogs and cats to help resolve cases of uncertainty, not cases like this, in which the legislature

would have wanted to return the tallow to its true owner; and therefore (4) the plaintiff wins. Indeed, a modern lawyer who is accustomed to this sort of reasoning but unaccustomed to natural law could easily miss Mansfield's invocation of natural law, because otherwise Mansfield's reasoning seems so familiar.

We can make the same comparison the other way around as well, by looking for modern examples of statutory interpretation with reference to canons of construction, and then considering how these cases would have been handled in an era when lawyers spoke in terms of natural law. For instance, in a recent case called *Elonis v. United States*, the Supreme Court considered a statute that made it a crime to transmit a threat to injure another person. The defendant argued that despite the menacing tone of his words, he had not intended to threaten anyone—he was merely an aspiring rap artist who intended his violent lyrics as art. The statute did not say that the defendant had to *intend* his words to be a threat. The statute included no requirement of a mental state at all. The Court nevertheless concluded that some culpable mental state was a requirement, based not on the text of the statute but on the background principle that crimes generally require mental states. To show that this truly was a background principle undergirding the criminal law, the Court cited several of its prior opinions applying the principle.[5] Such citations make perfect sense today, when there is no source of law outside of written texts, and when one can believe that somewhere in Congress there are lawyers who draft the precise words of statutes and who are aware that their words will be interpreted in light of this background principle.[6]

How would this case have been decided in the 18th century? A judge could easily have reached the same conclusion, but rather than locating the source of the background principle in the court's own prior opinions, the judge could have identified the requirement of a mental state as a principle of natural law. This natural principle, that conduct is criminal only when the defendant has a blameworthy mind, would not have been invoked to strike down the statute but rather to interpret it, in accordance with the presumed desire of the legislature to accomplish a just result.

Of course, the presumption of a mental state is hardly the only canon of statutory construction courts use today. But where do these principles come from? Today we say that they come from court opinions, and that courts are justified in applying them because they are so widely known that they form a backdrop against which legislatures write. A couple of centuries ago, lawyers might have said that they are principles of natural law that properly guide our interpretation of statutes because legislators are striving to accomplish just

5. 135 S. Ct. 2001, 2009-10 (2015).

6. On the empirical plausibility of the latter claim, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 Stan. L. Rev. 725 (2014).

ends. In a legal culture that included natural law, the outcomes of cases might well have been the same, but the path of reasoning toward those outcomes would have been quite different.

Natural Law in Court is full of down-to-earth examples like the case of the shipwrecked tallow, examples that should cause present-day lawyers to start thinking about other modern substitutes for tasks that were once handled by natural law. For example, court opinions today often include what are sometimes called "policy arguments," which tend to be appeals to normative principles that are presumably uncontroversial among legal professionals. The common law governing found property, for example, is sometimes justified with reference to the policy goal of returning property to its true owner. That goal is typically not itself found in legislation; rather, it is assumed to be one that everyone wants to advance. In an earlier era, it might have been posited as a principle of natural law.

Helmholz set out to assess the importance of natural law in law practice and legal education between the 16th and 19th centuries. In that respect, *Natural Law in Court* is a smashing success. But the book also achieves an equally important goal that Helmholz may not have pursued: It makes the concept of natural law understandable to the modern lawyer. Today, the idea of using natural law in court seems at first quite foreign and even backward, a practice that smacks of superstition, like witch trials or trial by ordeal. But the lawyers and judges who appear in *Natural Law in Court* are not like that at all. They are people quite like us, making arguments with a different vocabulary than ours but otherwise very similar. On Helmholz's telling, natural law becomes much less strange.

Sometime in the 19th century natural law began a slow decline, until it virtually dropped out of our courts and thus our law schools. Part of the reason must have something to do with the simultaneous separation of religion from public political life. Americans may not have become any less religious, but religion gradually came to be redefined as a private, personal realm, separate from institutions of government. But this is unlikely to be the whole answer, because natural law was not entirely a religious phenomenon. Natural laws are found in nature but they need not be created by a God. Today we still speak of scientific laws as natural laws. In the social domain we speak of the laws of supply and demand, the law of diminishing returns, and the like. Any recurring and non-humanly created pattern of experience could be described as a principle of natural law—the proposition that children tend to be more energetic than adults, for example, or that absolute power corrupts. Human beings are parts of nature. The other parts of nature, even other kinds of animals, are governed by natural laws. "There is nothing in nature which has not its laws," Henry St. George Tucker lectured the law students at the University of Virginia in the 1840s. "If there be a law for all other created things, *why not for man!*"[7] One can easily imagine an alternative legal history in which a non-religious natural law persisted, losing its Christian grounding but acquiring a scientific or social-scientific grounding instead. But that is not

7. Henry St. George Tucker, A Few Lectures on Natural Law 3, 5 (1844).

what happened, at least not in the explicit vocabulary of the legal system. Instead we gradually adopted a new style of argument in which natural law no longer counted as authority.

Helmholz concludes *Natural Law in Court* by suggesting natural law's limitations. "It did not abolish slavery," he notes. "It did not end judicial torture. It did not require payment of a 'living wage.' It did not prevent the oppression of native peoples in the Americas. It did not prevent what by our lights seem to have been serious miscarriages of justice" (pp. 177-178). As he points out, these limitations would not have come as any surprise to the lawyers he discusses, who would not have entertained any such hopes. The principles of natural law that could be put to practical use in litigation were but a small subset of the moral principles to which people aspired in their everyday lives. "Human laws are imperfect in this respect," acknowledged the lawyer-poet Francis Scott Key. "The sphere of morality is more extensive than the limits of civil jurisdiction."[8] Natural law was fundamental, in the sense that it was believed to undergird the legal system, but natural law was also modest in its actual application. *Natural Law in Court* amply demonstrates both propositions.

8. *Laidlaw v. Organ*, 15 U.S. 178, 193 (1817) (arguments of counsel). Key was arguing, successfully, that while it might be immoral for a contracting party to exploit his superior knowledge, it was not illegal.