IN HIS 1775 PAMPHLET "THE FARMER REFUTED," 20-YEAR-OLD Alexander Hamilton took the leading New York City loyalist Samuel Seabury to task for his enmity "to the natural rights of mankind." Ignorance of natural rights was no excuse in such an enlightened age, but such ignorance did, Hamilton insisted, extenuate one's guilt. His advice to the illustrious Seabury: "Apply yourself, without delay, to the study of the law of nature." To the introductory student of natural law, Hamilton recommended Grotius, Pufendorf, Locke, Montesquieu, and Burlamaqui along with "other excellent writers on this subject." These writers, as well as "[g]ood and wise men, in all ages," taught that "the deity, from the relations, we stand in, to himself and to each other, has constituted an eternal and immutable law, which is, indispensably, obligatory upon all mankind, prior to any human institution whatever." And it is upon this law, Hamilton insisted, that the "natural rights of mankind" depend.

For good measure, he drew at length from the works of William Blackstone, whom all young lawyers read and revered. The law of nature, Blackstone taught generations of attorneys in Britain and America, is "binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this; and such of them as are valid, derive all their authority, mediately, or immediately, from this original." The theoretical framework of natural law was pervasive in colonial America, and it was firmly embedded in the broader tradition of British constitutionalism. The idiom of natural law and natural rights filled the pamphlets and sermons, speeches and treatises, courtroom debates and legal arguments, of a generation of statesmen and lawyers in America. Even when some concept of natural law wasn't explicitly appealed to, it was often implicitly assumed.

WHAT DOES IT MATTER THAT EVERYONE AT ONE TIME SEEMED TO BELIEVE IN NATURAL LAW, AND THAT THE NATURAL LAW TRADITION PROVIDED A BROADLY ACCEPTED PARADIGM FOR THINKING ABOUT THE FOUNDATIONS OF LAW AND MORALITY? This is the challenge Georgetown University law professor Randy Barnett posed at a conference to R.H. Helmholz, the Ruth Wyatt Rosenson Distinguished Service Professor of Law at the University of Chicago. Helmholz, Barnett averred, had proved two things during the course of a presentation about the history of early modern courtroom appeals to natural law: "first, that 'everyone believed in it,' and second, that 'it made no difference.'" After that exchange with Barnett, Helmholz writes, he "set out to discover what place the law of nature had occupied in legal practice in three different arenas: the European courts, the English courts, and the courts of the young American republic." That natural law did in fact make a difference in actual litigation is the thesis Helmholz defends in Natural Law in Court: A History of Legal Theory in Practice.

Unsurprisingly, Helmholz’s preliminary inquiry verified what Barnett had already conceded about the history of natural law: that at one time “everyone believed in it.” Natural law was a ubiquitous part of legal education in continental Europe and Britain from the medieval to the modern period. In
continental Europe, students began studying civil law by reading the Institutes and the Digest of Justinian, the 6th-century Byzantine emperor who codified ancient Roman law into the Corpus Juris Civilis and affirmed natural law as the underlying source of positive law. Students of the English common law almost surely would have read the works of the 13th-century cleric and jurist Henry de Bracton and, later, William Blackstone’s 18th-century Commentaries on the Laws of England. Common law lawyers such as Bracton and Blackstone built on the categories of Roman law and continued to emphasize the fundamental importance of natural law even as they adapted certain categories of Roman law to new circumstances in England.

Beyond these introductory legal texts, there were scores of other books that explicated the law of nature specifically, including the works of Hugo Grotius, Samuel Pufendorf, John Locke, and the others whom Hamilton had commended to Bishop Seabury on the eve of the American Revolution. Although law faculties did not exist at the first American universities, students did encounter the canonical texts of political philosophy in the regular curriculum and would have been well versed in natural law theory before even coming to Blackstone, whose Commentaries “was a point of entry to the common law for virtually every American law student” during the founding era and well into the 19th century. As Helmholz comments, it “is no source of wonder, therefore, that the law of nature should have appeared in the arguments and decisions in cases argued before American courts of law.” Although not discussed by Helmholz, John Quincy Adams’s argument at the bar of the Supreme Court in the Amistad case (1841) provides one high-profile example of a prominent American attorney and politician tying together these various threads during the course of litigation. Drawing from the Bible, Justinian, English common law, the Declaration of Independence, and the U.S. Constitution, Adams defended the rights of enslaved Africans who had overtaken and killed their Spanish captors on board the slave ship La Amistad before sailing the schooner to the coast of New York. The technical legal questions of the case involved points of international law, including colonial Spanish policy in Cuba and a treaty provision that obligated the U.S. to return property recovered from pirates. Yet in the course of a long and learned oration, Adams proclaimed that he knew “of no other law that reaches the case of my clients, but the law of nature and of Nature’s God on which our fathers placed our own national existence.”

In his opinion for the Court in the Amistad case, Joseph Story insisted that the case “must be decided upon the eternal principles of justice and international law.” In this case, according to the Court, the requirements of the positive law happily coincided with the dictates of natural law. When the positive law abrogated natural law principles, however—as it often did in the laws governing slavery—judges like Story confined themselves to the application of the positive law. Indeed, just a year later Story wrote an opinion for the Court in Prigg v. Pennsylvania (1842) that upheld the federal Fugitive Slave Act while overturning a Pennsylvania law designed to protect blacks against arbitrary abduction and violence at the hands of professional slave-catchers.

To revisit Barnett’s second challenge, then, what did it matter that everyone believed in natural law if they were willing to legally sanction and safeguard practices, such as slavery, that were in contravention of the laws of nature? Helmholz’s answer is that it mattered quite a lot for litigation across a range of issues in Europe and the United States. In concrete cases involving civil
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By Michael Auslin
January 10, 2017
ISBN: 978-0-300212228
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and criminal procedure, family law and succession, property regulations, and statutory interpretation, attorneys and judges explicitly and repeatedly invoked the law of nature or some cognate concept such as natural rights or natural justice. In continental courts these appeals to natural law "served various ends: to create presumptions, to interpret statutes, to evaluate commercial transactions, to solve disputes within a family, and to restrain arbitrary exercises of power." Across the channel, there were evident English parallels to the ways in which lawyers employed the law of nature in Continental courts, and these parallels can be explained by the widely shared belief by lawyers on both sides of the Channel that natural law was an authentic source of law. The same can be said of courts in the young American republic, where the explicit invocation of natural law in the courtroom "comes close to matching in substance and frequency the evidence drawn from the European and English case law."

In nearly all of these cases, Helmholz points out, natural law was subsidiary. Lawyers and judges invoked natural law to supplement but not supplant the established legal rules, customs, and usages of the community in question. Rarely did they invoke the natural law against the positive law. Acknowledging this does not undermine Helmholz's thesis, for he is simply making the case that natural law was relevant to actual legal practice—a limited but important claim given conventional professorial wisdom to the contrary. "Exactly how large a place it occupied in practice within any particular system of government and its legal arm is open to debate," he concludes, "but that it had no relevance whatsoever to the daily events of human life or to the everyday concerns of practicing lawyers is not."


general difficulty with a study like this is that we must be clear, from the outset, about what we mean by "natural law." What exactly is the object of our study? Natural law theorists try to make sense of moral reality by systematically reflecting on the nature of human beings and investigating what is practically required for human beings to live well. When we talk about "natural law," then, we might either be talking about (1) the underlying moral reality that we encounter in our lived experience, which natural law theorists try to understand, or (2) the set of ideas that comprises a particular theory about the moral structure of the universe we inhabit. When Helmholz asks whether natural law had any practical effect on the law in Europe, England, and America during a time when most people professed belief in natural law, he really is asking whether ideas men believed about natural law had any practical effect during this period—not whether the moral reality of natural law itself had such an effect.

The extent to which ideas influence case outcomes is a difficult thing for any historian or social scientist to prove. What we can do is gather evidence, and Helmholz therefore goes in search of explicit invocations of the law of nature during the course of litigation. This is a methodologically safe path to take, and it allows him to contend successfully with the thesis that natural law is merely academic. But it also significantly limits his inquiry and screens from view much of the practical significance of natural law. As we construct legal systems, write constitutions, debate methods of statutory interpretation, and determine which of two parties ought to win in an adversarial proceeding under the rule of law, we appeal (whether explicitly or implicitly) to normative standards of judgment and some concept of practical reasonableness and human well-being.

Understood in this light, natural law will have implications for even those cases in which no one comes forward and says, "Thus saith the natural law." For if what the tradition claims about moral reality is true—that the natural moral law, known on some level to all, just is the starting point for practical reason—then every instance of reasoned argument about good or bad or choiceworthy or fitting courses of action for human beings is in some sense an example (even if confused) of the natural law in practice. Even the argument that a judge ought to be bound by the positive law when it runs counter to the natural law or that it would be unjust for a judge to invoke natural law is an underhanded appeal to the very concepts with which natural law theory deals—justice, obligation, individual well-being, and the common good. Limiting our inquiry to cases in which there are direct appeals to the natural law is like limiting a study of speech to orations in which people first announce that they will be speaking.

With a different methodological lens, the full extent of the practical influence of natural law might start to come into focus. Although Helmholz's case for the practical importance of natural law therefore could have been made even more comprehensively than he makes it, he does marshal enough evidence to put away the old saw about natural law having no practical import. Although today professed belief in natural law is far from ubiquitous, as it once was, we still do appeal implicitly and explicitly to its concepts and terms, although now often in a disfigured guise. Reasonableness, human flourishing and well-being, human rights, human dignity, social justice, and similar concepts developed within this larger natural law framework. Now divorced from that framework, these concepts often are employed simply as linguistic weapons in a power struggle that allows for no meaningful distinction between force and right, and prioritizes will over reason. The proper response is not to seek refuge in legal positivism, which has failed to stem the tide even for a time, but rather to recover and refine the rich moral tradition that guided the statesmen and jurists who built our civilization.

Justin Dyer is associate professor of political science and director of the Kinder Institute on Constitutional Democracy at the University of Missouri. His most recent book, with Micah Watson, is C.S. Lewis on Politics and the Natural Law (Cambridge University Press).
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