NATURAL LAW IN AMERICAN COURTS: FROM THE CIVIL WAR'S END TO THE PRESENT

R.H. HELMHOLZ*

INTRODUCTION

A few years ago, I undertook a study on one aspect of the history of natural law, publishing the results in a book.[1] My hope was to contribute to this controversial subject by discovering what the concept meant to legal practitioners during the extended time period when it was accepted as a legitimate source of decision. Recognition of natural law's existence has influenced law from the time of ancient Rome to the Enlightenment era. Its history and its status during those years have been investigated thoroughly by scholars, but principally on an elevated intellectual level.[2] The subject has been studied with a careful investigation of a large and impressive body of jurisprudential literature written by notable scholars—from Aristotle to Thomas Aquinas to William Blackstone to contemporary defenders of natural law's reach such as Robert George, John Finnis, and Russell Hittinger[3] I respect their contributions and I admire their mastery of the subject, but I wished to take a different tack, one aligned with my own interest in litigation. The research I undertook aimed to discover the concrete purposes and results to which the law of nature had been applied

* Ruth Wyatt Rosenson Distinguished Service Professor Emeritus of Law at the University of Chicago.

[1] *See* R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE (2015).

[2] *See, e.g.*, CHARLES COVELL, THE DEFENCE OF NATURAL LAW (1992); A.P. D'ENTRÈVES, AN INTRODUCTION TO LEGAL PHILOSOPHY (2d ed. 1970); *see also* PAULINE WESTERMAN, THE DISINTEGRATION OF NATURAL LAW THEORY: AQUINAS TO FINNIS (1998) (taking a more critical historical approach).

[3] For more context, see the introduction and essays in RETHINKING RIGHTS: HISTORICAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES (Bruce Frohnen & Kenneth Grasso eds., 2009).

in the ordinary practice of American courts. As a practical matter, this meant discovering whether citations to the law of nature appeared in judicial opinions in cases in which it would have been relevant.

Natural law's existence was known and accepted as a matter of course by virtually all lawyers as a credible jurisprudential source prior to the nineteenth century. The laws of nature were believed to be universal principles that should apply and make a difference in law's application. For instance, because parents—even most birds and animals—care for and nurture their infants, it appeared logical to conclude that human law should also recognize this responsibility as one imposed in human nature. Consequently, it seemed logical to conclude that obligations stemming from such a responsibility, such as parental rights, should be recognized and enforced in courts of law. And this should ideally be evident in concrete results, including results found in judicial opinions. My object was to discover as much as possible about how subjects like parental rights and duties were treated in practice. There was quite a bit of available material, though little of it had been investigated by students of the law of nature.[4] Natural law was actually applied in litigation rather than merely being studied at the theoretical level.

The book I wrote in consequence of this investigation did succeed in raising an interesting question, one that has also attracted the attention of other historians: what was natural law's significance in modern legal history? The scope of my study concluded at the turn of the nineteenth century. The assumption of most scholarly treatments of the subject was that actual use of the law of nature in legal practice became discredited at some point within that century.

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[4] The only direct explorations of my subject were more than one hundred years old and were not always limited to the then-current understanding of the law of nature. *See* John E. Keeler, *Survival of the Theory of Natural Rights in Judicial Decisions*, 5 YALE L.J. 14–25 (1892); Charles G. Haines, *Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617 (1916). George C. Christie, *Judicial Decision Making in a World of Natural Law and Natural Rights*, 57 VILL. L. REV. 811, 811–22 (2012), did not prove to be an exception, despite the promise of its title.

Specifically, in the United States, it was said, natural law disappeared from the tool-kits of practicing lawyers at some point during the years after the Civil War. Although it had been accepted and put to productive use by lawyers and judges in earlier times, so the narrative went, it ceased to serve that role during the 1800s. Eventually, positive law became the necessary source of authority. Of course, natural law then had (and continues to have) admirers among legal scholars of a philosophical bent, but it ceased to be relevant in virtually all American litigation. It was no longer taught in law schools, and while natural law has been a subject of philosophical analysis, it disappeared from American courtrooms.

This decline of natural law in American legal practice was starkly illustrated during Justice Clarence Thomas's confirmation hearings. When nominated for a vacant seat on the Supreme Court, then-Judge Thomas was questioned about his views on the subject, and he was all but forced by circumstances to disavow it as a proper means of constitutional interpretation. Affirming its value would have jeopardized his confirmation. In this, as in most other circumstances, its irrelevance in modern legal practice has been assumed. Indeed, direct invocations of natural law evoked suspicion about its meaning and likely effects. Critics regarded it as a means of smuggling Roman Catholic doctrine into American constitutional law. Such a result would be inadmissible in a modern court. Justice Thomas was all but obliged to take a negative view if he wished to be confirmed.[5] His rejection of natural law's value in constitutional litigation reflects a widely shared contemporary view.[6] When and how did this change in usage and opinion occur? The obvious answer—that natural law was abandoned as

[5] The event is described from the perspective of a proponent of natural law in ELLIS WASHINGTON, THE INSEPARABILITY OF LAW AND MORALITY 241–44 (2002). It did not prevent Justice Thomas from making use of natural law in his dissent in *Obergefell v. Hodges*, 576 U.S. 644, 727 (2015), or in his concurrence in *Zivotofsky v. Kerry*, 576 U.S. 1, 37 (2015).

[6] On the substantively similar hearings for Justice Elena Kagan, see *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 284 (2010).

inconsistent with the tenets of legal positivism—merely announces the result without explaining the process.

The fullest and most direct exploration of this question appeared in a book published in 2021 by Professor Stuart Banner.[7] He offered four explanations for natural law's disappearance in the American case law over the course of the nineteenth century. The first explanation was well known: the existence of the United States Constitution. In substance, that document contains many of the rules and institutions that were traditionally found in the classical law of nature. Combined with the Constitution's ability to produce more tangible legal results than classical natural law could achieve, this overlap may have justified pushing the law of nature aside. In other words, it was not needed as a distinct source of legal authority. Moreover, the Constitution offered lawyers and judges a more powerful tool than natural law had provided. While natural law traditionally did not permit judges to invalidate duly enacted legislation, the Constitution did.[8] Lawyers who had a choice were likely to prefer the latter's more potent provisions if they were available. Thus, the Constitution's superior practical impact was one compelling reason natural law's use fell out of fashion.

There was more. A second change to which Professor Banner pointed was that the apparently religious source of natural law presented an obstacle to its continued application in American

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[7] STUART BANNER, THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED (2021). The following sources are also valuable: ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS 246–90 (2019); THOMAS COWAN, THE AMERICAN JURISPRUDENCE READER 70–91 (1956); GEORG CAVALLAR, THE RIGHTS OF STRANGERS: THEORIES OF INTERNATIONAL HOSPITALITY, THE GLOBAL COMMUNITY, AND POLITICAL JUSTICE SINCE VITORIA 276–84 (2002).

[8] *See, e.g.*, Geer v. State, 161 U.S. 519 (1896). This preference was established at an early date in *Calder v. Bull*, 3 U.S. 386 (1798). For a recent discussion of Banner's third explanation focused on the question, see KENNETH EINAR HIMMA, MORALITY AND THE NATURE OF LAW 9–15 (2019); Helen Michael, *The Role of Natural Law in Early American Constitutionalism*: *Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. (1990); Diarmuid O'Scannlain, *The Natural Law in the American Tradition*, 79 FORDHAM L. REV. 1513 (2011).

courts. Citation to natural law clashed with a growing sentiment that religion belonged to the private sphere rather than public law. One's religion was a matter of individual choice, not a proper foundation for legal decisions. This shift had practical consequences—Sunday closing laws, once justified as applications of natural law, have largely disappeared from American life.[9] While Christianity was, in fact, the religion of almost all American citizens during these years, and prayer had not yet been banished from public events, it had ceased to be a working part of American government. The prohibition on established churches in state and federal constitutions has thus had incidental effects, the disappearance of natural law in America's courts being one. To cite it skated too close to importing religion into an increasingly secular society.

Third, an explosion in the number of reported cases of all sorts occurred.[10] Official reporters for many American courts were appointed. They diligently performed their duties, making the resulting state and federal reports widely available to practicing lawyers. The West Publishing Company, founded in the 1870s, led the way, greatly expanding the availability of cases reported. This represented a fundamental shift from earlier practice: most cases prior to the nineteenth century had been compiled by individual lawyers, creating inconsistent and incomplete records of uncertain authority that could not claim direct legal force. That situation changed as the number of reported cases multiplied. As the publishing of case law expanded and its authority became more readily available, natural law may have been an incidental casualty. One of its functions had been to provide guidance when no immediate source of positive law could be found. As the number of reported cases multiplied—and more concrete legal authority became increasingly available to practitioners—natural law may have been an unintended casualty.

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[9] *See, e.g.*, McLeod v. State, 180 S.W. 117 (Tex. Crim. App. 1915).

[10] *See* ERWIN SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 40–49 (1990).

Fourth, according to Professor Banner, natural law admitted continuing disagreement among jurists about its actual effect in practice, which discouraged its application. Was slavery outlawed by natural law or consistent with it? That all men were born free was a clear tenet to classical natural law. However, slavery's existence had a long history. Roman law admitted its legality, even though its texts also declared the freedom of all men in the law of nature. Another example: Hugo Grotius (1583–1645) declared the open use of the seas to be a basic feature of natural law, but John Selden (1584–1654) argued for *Mare clausum*—closed seas under national sovereignty. Natural law seemed to many thoughtful observers to have pointed in two different directions. The ensuing disputes among jurists discouraged natural law's use just as its alleged ambiguity undermined its utility.[11] In the end, this long-standing conflict and the uncertainty to which it had led discouraged lawyers from citing natural law in cases before U.S. courts. Its authority and its consequences could too easily be disputed for it to be useful in practice.

These four reasons for the disappearance of the law of nature from law courts in the United States, sensible though they are, omit crucial counterarguments. At the very least there are legitimate questions. It is true, for instance, that jurisprudential disagreements undermined natural law's authority: advocates had sometimes disagreed about the actual consequences of natural law, but such disagreements had persisted for centuries without causing anyone to deny natural law's existence or value. Who today would say that disagreement about the meaning of the terms of the Constitution means that we should abandon its study or its use?

Admirer though I am of the scholarly accomplishments of Professor Banner, I remained unconvinced by his account of the reasons that lay behind the disappearance of the law of nature from the tool-kit of American lawyers. There might be more, I thought, or at least different perspectives worth exploring. This uncertainty

[11] *See also* Raphael Ribeiro, *Hugo Grotius and Samuel Pufendorf on Last Wills and Testaments*, 40 GROTIANA 146–64 (2019).

led me to decide to investigate the history of natural law's actual use in legal practice in the years after the Civil War period—the very era when, according to conventional wisdom, it supposedly vanished from American courtrooms.

THE NUMBER OF AMERICAN CASES 1860–2020

I turned to American case law from the years after our Civil War. It was during those years that the application of natural law has been described as having ceased to play a significant role in ordinary legal practice. Using Westlaw Precision's database,[12] I could easily search for and identify judicial opinions containing the phrases "natural law" or "law of nature." I chose to examine eight ten-year periods. In each, it was not difficult to identify and then to analyze the cases that invoked these terms. These were the results of that automated search:

Date after 12/31/1859 and before 01/01/1870 = 143 cases
Date after 12/31/1869 and before 01/01/1880 = 177 cases
Date after 12/31/1879 and before 01/01/1890 = 221 cases
Date after 12/31/1889 and before 01/01/1900 = 342 cases
Date after 12/31/1899 and before 01/01/1910 = 458 cases
Date after 12/31/1909 and before 01/01/1920 = 568 cases
Date after 12/31/1999 and before 01/01/2010 = 786 cases
Date after 12/31/2009 and before 01/01/2020 = 2,270 cases

Readers are likely to be skeptical of a claim on my part to have read all the cases in this list, and they would be right. I did not. I sought only to read through enough of them to understand what had happened in the American cases. I also assumed that natural law's disappearance from ordinary litigation would certainly have occurred by 1920. I wished only to check the results in the most recent cases to be certain. For each of the time periods listed above,

[12] This database contains all of the state and federal cases that the West Publishing Company has available online.

however, I reviewed a substantial number of the cases listed—between one-third and one-half—enough to believe that I had understood what natural law's common use in practice had been in the relevant period. Common patterns did emerge.

Of course, examining the briefs submitted by counsel in the cases would have provided richer data, but this was not possible. They are not available in any quantity. Judicial opinions were the only option. For each ten-year period I stopped at about halfway through those that were listed. By then, I had continued until I encountered uses of the law of nature that were almost identical with what I had found in cases from the same ten-year period.

One thing should be said first, however. The most immediate surprise was the discovery that natural law appeared with unexpected frequency in more recent judicial opinions, particularly the ten-year period between 2009 and 2020. The earlier increases might be explained by the simple expansion of the nation and the natural and corresponding growth in litigation, but the dramatic increase in the most recent decade seemed too great to ignore. It appears to suggest that during the second decade of the twentieth century there has been a genuine revival of natural law's usage in routine legal practice. However, that appearance turns out to be misleading. The growth is explained by a change in the recording practice adopted by the West Publishing Company. Where once its reports were limited by the number of cases it could include in hard cover book form, in this ten-year period the Company was freed from that practical restraint. The common use of the internet had intervened. The spacing needs of law libraries had long limited the number of cases West Publishing could publish in bound volumes. If all the decided cases were printed, the result would have taken up too much space. That limitation has now disappeared.[13] It is this

[13] Cases can now be accessed online and require no room in a library of printed books. The result has been that in examining case after case from the latest ten-year period, one often reads: "Not reported in S.W.3d: [o]nly the Westlaw citation is currently available." *See, e.g.*, State v. Davis, 2013 WL 4082669 (Tenn. Crim. App. Aug. 14, 2013).

large-scale multiplication of cases which are reported in this fashion that best explains the expansion in the number of cases in which the law of nature appeared.

Even recognizing the consequences of this change, however, the figures still appear to raise doubts about the conclusion that the law of nature had disappeared from American case law in the years following the Civil War. We may apply a discount to the force and meaning of the numbers today, but that cannot wholly eliminate their significance. It has been assumed that during these years natural law had then been thoroughly discredited as an authority in litigation, and that assumption appears to be a mistake. Even applying a discount to the figures for 2000–2020, natural law did still appear in routine litigation throughout all these years. The case law appears to contradict the view that the law of nature had been discredited as a source of law after the Civil War. Can it be that scholars have simply been wrong about natural law's disappearance from American law practice? An answer to that question requires a closer look at representative cases in which natural law was invoked and in which it made an apparent difference in the case's outcome. I started at the beginning, during the years that followed the conclusion of the Civil War.

AMERICAN CASES: 1860–1920

A majority of litigated cases from the second half of the nineteenth century and into the first years of the twentieth century that invoked traditional rules found in the law of nature endorsed its relevance to their decision. References to Continental jurists who endorsed and made use of natural law did not come to an abrupt end during this alleged period of decline.[14] More significantly, some American cases also made express use of the law of nature to reach a result where no source in the positive law could be found. Historically, this had been one of its most significant functions and

[14] *See, e.g.*, Fritz Schultz, Jr., Co. v. Raimes & Co., 164 N.Y.S. 454, 455–56 (N.Y. City Ct. 1917) (citing works by Cicero, Grotius, Pufendorf, and Vattel).

one that clearly survived the Civil War era. In an 1880 case from Maine, for instance, a plaintiff sued to recover monetary damages for a loss he had suffered because of the defendant's perjury. The court approved the claim, holding that "[w]hen the declaration discloses an injury, cognizable by law, though there be no precedent, the common law will judge according to the law of nature and the public good."[15] Similarly, in a federal case from 1872, the court ruled that shipwrecked goods which washed up on shore belonged to their finder. "[T]he law of nature applies," the court held, because the rights of the Crown no longer applied in America, leaving the matter without any positive law.[16] These sweeping endorsements of natural law's utility appeared in some quite ordinary disputes, even in the twentieth century.[17]

The most notable among the cases which invoked natural law to fill what appeared to be gaps in applicable precedents involved the legal aftermath of slavery. Courts at this time faced complex questions: were debts incurred for the sale of slaves that had been left unpaid during the war years and then renewed after the war valid claims? No, they were not. Most American courts refused to enforce these claims. The existing obligation was declared to be a nullity, at least in part because of the apparent incompatibility of slavery with the law of nature.[18]

Natural law was also invoked to deny the validity of some claims that had their origins in times of legal slavery, even while it was

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[15] Golder v. Fletcher, 71 Me. 76, 76 (1880).

[16] Russell v. Proceeds of Forty Bales of Cotton, 21 F. Cas. 42, 47 (S.D. Fla. 1872). For other examples of courts citing natural laws, see *Gilbert & Barker Manufacturing Co. v. Tirrell*, 10 F. Cas. 350 (C.C.S.D.N.Y. 1874); *see also* Lobe v. Cary, 33 La. Ann. 914 (1881); Goodard v. Winchell, 52 N.W. 1124, 1125 (Iowa 1892).

[17] *See, e.g.*, Barrett v. Chi. Bridge & Iron Co., 181 Ill. App. 204, 208 (App. Ct. 1913) ("All persons of mature years and ordinary experience, and endowed with their natural faculties, must be held to understand the ordinary laws of nature."); *see also* Gulf Refin. Co. of La. v. Hayne, 70 So. 509, 514 (La. 1915) (O'Niell, J., dissenting) ("[I]n the absence of any express law . . . we are bound to proceed and decide according to equity, by applying natural law and reason.").

[18] *See* Osborn v. Nicholson, 18 F. Cas. 846, 847 (C.C.E.D. Ark. 1870), *rev'd*, 80 U.S. 654 (1871).

also used to validate a marriage contracted to by two slaves at a time when the positive law had treated that act as a nullity.[19] Natural law's application to slavery's aftermath, however, was not uniformly progressive. In fact, it was sometimes used in the opposite sense—as a justification for racial segregation. A Kentucky statute—enacted in 1904 prohibiting colleges from teaching young people of different races together—was defended in a case involving Berea College's attempt to do such integration. The court held that "all social organization which lead to their amalgamation are repugnant to the law of nature."[20] The College's attempt failed. Similarly, a purchaser of concert tickets could not use slavery's abolition to require the theatre owner to permit him to enter and sit in the orchestra (where he had purchased seats) when he turned up with a black woman as his companion.[21] Reference to natural law's opposition to slavery did not extend that far, and the couple was given no choice but to move to the balcony where they would be less visible.[22] As late as 1916, it was held that racial segregation in society was consistent with the law of nature.[23] Its ubiquity in then-current practice pointed in that direction.

Decisions like these, distasteful as they are today, stand as a reminder that there has always been acknowledged limits to natural law's beneficial effect. Moreover, natural law suffered from another weakness: it was sometimes advanced in argument, but not always with success. An 1886 Maryland case illustrates this limitation. The court held that a man's promise to perform a legal act meant that he was "bound by the law of nature" to fulfill it, but the judge added that "it is equally true that the law provides 'no

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[19] Washington v. Washington, 69 Ala. 281 (1881).

[20] Berea College v. Commonwealth, 94 S.W. 623, 628 (Ky. 1906); *see also* Bowie v. Birmingham Elec. Ry., 27 So. 1016, 1019 (Ala. 1900).

[21] Younger v. Judah, 19 S.W. 1109 (Mo. 1892).

[22] For a thoughtful presentation of the issue, see Christopher Eisgruber, *Justice Story, Slavery and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988); *see also* Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231 (1927).

[23] Axton-Fisher Tobacco Co. v. Evening Post Co., 183 S.W. 269, 276 (Ky. 1916).

remedy to compel performance of an agreement made without sufficient consideration.'"[24] That distinction seems to have been in line with the normal assumptions held by lawyers of the time. Natural law served as a frequent guide to legal analysis and it could also be a spur to action. For some purposes, it was conceded to be a legitimate source of law; it was useful in interpreting ambiguous statutory provisions, and could be applied where no positive law could be found.[25] However, where the positive law was clear on a subject, it prevailed in practice even though doing so could be said to have been contrary to the law of nature.[26] Natural law was not a trump card, and that had consequential limitations. Sometimes it was invoked for plainly unworthy reasons and properly rejected as a result. In one such case, a debtor sought to justify his failure to pay a legitimate debt by asserting that "self-preservation was the first law of nature and that payment would be inconsistent with that principle." That plea was bound to fail, and it did. Perhaps the desperate debtor could think of nothing else to say.[27] The case does illustrate, however, that the law of nature was not used to license behavior that harmed others with a valid legal cause. It was meant to promote the public good, and this plea did the reverse.

These limitations nevertheless left ample room for wider and more appropriate use of natural law in litigation during the latter half of the nineteenth century. Indeed, it was explicitly cited with surprising frequency in American judicial opinions from these years, as the numbers themselves show. A prominent example of its staying power appears in cases involving self-defense—

[24] Foster v. Ulman, 3 A. 113, 114 (Md. 1886).

[25] *See, e.g.*, *Ex parte* Mallon, 102 P. 374, 377 (Idaho 1909).

[26] *See* Orr v. Quimby, 54 N.H. 590, 610 (1874) (Doe, J., dissenting) (stating that the law of nature applied only in the "forum of conscience"); Stephens v. Sherman, 22 F. Cas. 1284, 1285 (C.C.S.D. Iowa 1879) (dealing with the law of mortgages); *see also* HIMMA, *supra* note 8, at 9–15.

[27] Blake v. Sherman, 12 Minn. 420, 423 (1867). In *Byers v. Sun Savings Bank*, 139 P. 948 (Okla. 1914), a man convicted of a felony argued that his contract with a lawyer to seek and secure his parole was invalid under a statute suspending "all civil rights" of convicted felons. The appellate court held that the statute did not apply to "an inherent natural right." *Id.* at 949.

situations where persons under physical attack struck back at their aggressors, using force to defend themselves. Natural law was specifically mentioned and applied in many judicial opinions on this subject. It served as an authority for the defense. An attack justified a forceful reaction, even to the extent of taking the attacker's life by the person who was in danger of the loss of his own. Natural law precluded punishment of the person who had acted in response to such an attack.[28] It was even extended to fathers who had acted in defense of one of his own children.[29] This principle was not under serious dispute. It did not require statutory enactment, although it did sometimes receive one. Natural law was more than occasionally invoked in judicial opinions on this subject.[30] A specific provision stating the rule had been included in the Texas State Constitution, and one state court judge described its inclusion as having been "framed for the purpose of guarding and protecting these rights as we originally had them by the law of nature."[31] Or as another judge put it, the law which allowed a person being attacked to defend himself by taking the life of an assailant was said to have been justified by "the highest law of nature[,]" self-preservation.[32] This principle of natural law even

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[28] *See* District of Columbia v. Heller, 554 U.S. 570, 606 (2008); David Kopel, *The Natural Right of Self-Defense:* Heller*'s Lesson for the World*, 59 SYRACUSE L. REV. 235, 242 (2008); Kenneth Pennington, Moderamen Inculpatae Tutelae*: The Jurisprudence of a Justifiable Defense*, 24 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 27, 27–55 (2013).

[29] *See* Litchfield v. State, 126 P. 707, 713 (Okla. 1912).

[30] *See, e.g.*, United States v. Outerbridge, 27 F. Cas. 390, 392 (C.C.D. Cal. 1868) ("The right to oppose force to force in such case is founded upon the law of nature[.]"); *see also* Parrish v. Commonwealth, 81 Va. 1, 12–14 (1884); People v. Iams, 57 Cal. 115, 118 (1880); People v. Guidice, 73 Cal. 226 (1887); Reed v. State, 11 Tex. App. 509, 517 (Ct. App. 1882); Runyan v. State, 57 Ind. 80, 84 (1877); Patten v. People, 18 Mich. 314, 319 (1869); Mill v. Roulliard, 149 N.W. 875, 877 (Iowa 1914); State v. Albano, 102 A. 333, 334 (Vt. 1917); State v. Middleham, 17 N.W. 446, 447 (Iowa 1883); Short v. Commonwealth, 4 S.W. 810, 810 (Ky. 1887).

[31] Languille v. State, 4 Tex. App. 312, 317 (Ct. App. 1878).

[32] Board of Comm'rs of White Cnty. v. Gwin, 36 N.E. 237, 243 (Ind. 1894); *see also* Courtney v. Harris, 110 S.W. 665, 667 (Mo. Ct. App. 1908). The importance of the principle of self-defense was also discussed in *People v. Donguli*, 28 P. 782, 783 (Cal. 1891).

served as a legitimate justification for denying a grant of citizenship to a professed anarchist.[33]

A second common invocation of the law of nature found in post-Civil War judicial opinions appears in cases involving what we now call family law. In a world before divorce had become frequent, conflicts sometimes nevertheless arose among members of the same family, typically husband and wife, and in litigation that ensued, natural law was sometimes invoked to state and to justify the result reached. For instance, it was used to support the strong presumption that the husband was the father of a child born to his wife while they lived together.[34] It was also common ground among lawyers that the law of nature imposed a duty on fathers to care for their children's health and safety, which entitled them to custody rights. This rule was applied in practice, and in judicial opinions it was quite often said to have been derived from natural law.[35] It could be lost, as happened when the father was shown to have repeatedly mistreated the child. As with many of the principles found in the natural law, there was room for uncertainty, and even disagreement, about the extent of its reach.[36] An early New York

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[33] *See* United States v. Olsson, 196 F. 562, 565 (W.D. Wash. 1912), *rev'd sub nom.* Olsson v. United States, 201 F. 1022 (9th Cir. 1913).

[34] *Cf. In re* McNamara's Est. v. McNamara, 183 P. 552, 554 (Cal. 1919); Hopkins v. Chung Wa, 4 Haw. 650, 654 (1883); Hamilton v. People, 46 Mich. 186, 188 (1881); State v. Bulecheck, 114 N.W. 891 (Iowa 1908).

[35] *See, e.g.*, Henson v. Walts, 40 Ind. 170, 172 (1872) (awarding custody to the father "in consonance with the laws of nature and the dictates of common humanity"); *see also* McLain v. Zandt, 48 How. Pr. 80, 81 (N.Y. 1874); Banse v. Muhme, 7 Ohio C.D. 224, 225 (Cir. Ct. 1897); Manning v. Wells, 8 Misc. 646, 648 (N.Y. Sup. Ct. 1894); State v. Rogers, 43 A. 250, 251 (Del. Gen. Sess. 1895); Clark v. Gotts, 1 Ill. App. 454, 457 (App. Ct. 1877); Chapsky v. Wood, 26 Kan. 650, 653 (1881); Buchanan v. Buchanan, 144 P. 840, 841 (Kan. 1914); Brison v. McKellop, 138 P. 154, 156 (Okla. 1914); Spencer v. Spencer, 97 Minn. 56, 60 (1906); Baird v. Baird, 21 N.J. Eq. 384, 393 (1869); Alvey v. Hartwig, 67 A. 132, 135 (Md. 1907); Cleveland Christian Orphanage v. Barcus, 1909 WL 659, at *3 (Ohio Cir. Ct. Jan. 11, 1909).

[36] *See, e.g.*, Harrington v. Lowe, 84 P. 570, 577 (Kan. 1906) (criticizing the common law's preference for awarding custody to fathers as contrary to "the laws of nature [which] entitled a woman to display"). For a useful treatment of the issue, see

case had extended the natural law principle to the mother, thus overturning or ignoring the traditional rule.[37] Similarly, an adoptive parent who believed prayer was the sole legitimate means of curing a sick child was tried for criminal neglect when he refused to seek medical attention for the child.[38] Courts also grappled with a grandmother was denied visitation rights with her grandchildren, since such a claim was held to fall outside the remit of natural law. It might even materially have interfered with parental rights, rights that had their origin in the law of nature.[39] But that same source, though limited, did require the parent to support the child, for "[e]ven the brute creation obey this natural law, and civil law will not permit its subjects to be less considerate than they."[40]

A search through cases from the late nineteenth century also produced examples of several controversial uses of the law of nature in this area of the law. Polygamy, for instance, was held to be invalid in an 1873 case from Massachusetts; as part of the reason for this result, the court's opinion stated that allowing polygamous marriage to claim any validity would have been contrary to natural law. On that account it was rightly to be treated as a nullity, and this was so even if no specific statute so stated.[41] Similarly, in a contested 1879 case from Missouri, it was held that under the law of nature, "all marriages between near relatives by blood or

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MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 235–36, 281–85 (1985).

[37] *See* Perry v. Perry, 17 Misc. 28, 29 (N.Y. Sup. Ct. 1896) ("By the law of nature, the father has no paramount right to the custody of his child." The Court also stated that the mother's rights might also be asserted); *see also* Fulton v. Fulton, 39 N.E. 729, 731 (Ohio 1895) ("By the law of nature the responsibility of each [parent] is equal."); Gully v. Gully, 184 S.W. 555, 557–59 (Tex. Civ. App. 1916); Mercein v. People *ex rel.* Barry, 25 Wend. 64, 103 (N.Y. 1840); Stover v. Stover, 66 P. 766, 766 (Utah 1901).

[38] *See* People v. Pierson, 68 N.E. 243, 246 (N.Y. 1903).

[39] *See* Succession of Reiss, 15 So. 151, 152 (La. 1894).

[40] Sanger Bros. v. Trammell, 198 S.W. 1175, 1178 (Tex. Civ. App. 1917).

[41] *See* Commonwealth v. Lane, 113 Mass. 458, 462–64 (1873) (admitting, however, that it might be lawful if adopted in positive law); *see also* Hilton v. Roylance, 69 P. 660, 665 (Utah 1902); State v. Fenn, 92 P. 417, 418 (Wash. 1907).

marriage, are declared to be incestuous."[42] Here, at least, natural law apparently retained its utility well into the last half of the nineteenth century.

That utility appeared in some unexpected circumstances. It was invoked, for example, in the now-infamous Supreme Court decision denying a married woman's application to practice law in the state of Illinois, particularly in the concurrence written by Justice Bradley.[43] Its acceptance and utility also appeared in the famous 1889 New York case *Riggs v. Palmer*.[44] It held that a person could not take property by inheritance from the estate of an ancestor he had killed. This was described as a rule "evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen[.]"[45] No statute or prior judicial decision had established this rule. In a case from Texas during that same year, a court cited natural law as a legitimate reason for a man to carry a gun in public on an election day, despite a statute forbidding it. That statute cannot have been the legislative intent, the judge held, because that would have withheld the right of self-defense where there had been a legitimate need for it. Such an interpretation would have been "unreasonable, and in conflict with natural law."[46]

Several cases involving abortion also appeared in the case law of this period, with judicial opinions sometimes making express use of the law of nature. An 1850 case from Pennsylvania, for example, mentioned and rejected the rule found in prior Massachusetts opinions that the destruction of a fetus before quickening was not a punishable offence. The Pennsylvania Court adopted the opposite rule: abortion was a punishable crime "because it interferes with

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[42] State v. Slaughter, 70 Mo. 484, 485 (1879); *see also* Campbell v. Crampton, 2 F. 417, 426 (C.C.N.D.N.Y. 1880); State v. Fenn, 92 P. 417, 418 (Wash. 1907); Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

[43] *See* Bradwell, 83 U.S. at 141 (Bradley, J., concurring).

[44] 22 N.E. 188 (N.Y. 1889).

[45] *Id.* at 190.

[46] Barkley v. State, 12 S.W. 495, 496 (Tex. Ct. App. 1889).

and violates the mysteries of nature."[47] A comparable 1849 case from New Jersey, however, refused to take that same step, holding instead that "if the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments."[48] Although abortion might have been regarded as an immoral act, in the Garden State it was not a crime—thus illustrating one of the uncertainties found in this corner of early American law. Even the widespread passage of legislation making abortion a criminal offense did not bring that uncertainty to an end. It was uncertain how far it had been meant to extend.[49]

Natural law was also regularly invoked in cases involving patent law, serving a purpose that counted then, and still counts today, in disputes over their validity. The relevant rule was relatively clear:. if a device did no more than apply known principles derived from nature to specific institutions or circumstances, it was not eligible for a patent. So, it was held by the Supreme Court that what the claimant described as "a new and improved method of preserving fish and meats" could not be patented.[50] It entailed no more than freezing the carcasses of wildlife after they had been killed. It did involve work done by a machine, instead of by hand, but its substance was simply another the application of an established process in a slightly different manner. It simply accomplished by the working of a machine what had always been done by hand. Freezing them required no exercise of a man's inventive faculty, and the denial of the patent's validity was an application of this

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[47] Mills v. Commonwealth, 13 Pa. 631, 633 (1850). For a similar case, see *Hatch v. Mutual Life Insurance Co.*, 120 Mass. 550, 552 (1876) (describing abortion as "condemned alike by the laws of nature and by laws of all civilized states"); *see also* Mitchell v. Commonwealth, 78 Ky. 204, 206–08 (1879); State *ex rel.* Gaston v. Shields, 130 S.W. 298, 301 (Mo. 1910); Tabler v. State, 34 Ohio St. 127, 132 (1877).

[48] State v. Cooper, 22 N.J.L. 52, 58 (Sup. Ct. 1849).

[49] *See, e.g.*, Dougherty v. People, 1 Colo. 514, 528 (1872); Hatfield v. Gano, 15 Iowa 177, 178–79 (1863); *Gaston*, 130 S.W. at 300–02; *see also* People v. Van Zile, 26 N.Y.S. 390, 391 (N.Y. Gen. Term 1893), *rev'd*, 143 N.Y. 368 (1894).

[50] Brown v. Piper, 91 U.S. 37, 38 (1875). For a similar application of the law of nature, see *Hammerschlag v. Scamoni*, 7 F. 584 (C.C.S.D.N.Y. 1881) and *Marchand v. Emken*, 132 U.S. 195 (1889) (same).

rule. It was well known, the Justice wrote, that the freezing "must happen according to the laws of nature," and this applicant's invention did no more than apply a slightly different method of securing that result.[51]

A considerable number of cases invoked natural law in what might be called its scientific sense, applying natural principles to establish legal liability. These cases shared a common characteristic: they treated physical and biological laws as legally cognizable "laws of nature" that individuals were presumed to understand and respect. A simple example was that of a man who fired a rifle, shooting upwards into the air. He could not legitimately escape liability when the rifle's bullet caused injury on its way back to earth.[52] Gravity was considered a law of nature. The man who did the shooting would have known that law and he must take responsibility for the unhappy consequences.[53] A party indicted for selling intoxicating liquor contrary to a local ordinance admitted to having sold ale and cider, but he claimed that what he sold had been too weak to cause intoxication. He was rebuffed by the judge. The intoxicating character of what he sold was "nothing more than a manifestation of a law of nature," and that fact could not be denied.[54] The same standard was used in judicial opinions to take account of commonly accepted laws of physics.[55]

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[51] *Brown*, 91 U.S. at 42.

[52] Jewett v. Wanshura, 43 Iowa 574, 578 (1876).

[53] Pointer v. Mountain Ry. Constr. Co., 189 S.W. 805, 810 (Mo. 1916) ("[T]he immutable law of gravity, a law of nature unbending and ever-faithful.").

[54] State v. Biddle, 54 N.H. 379, 380 (1874); *see also* Oleson v. Maple Grove Coal & Mining Co., 87 N.W. 736 (Iowa 1901) ("The employ[ee] 'is bound to take notice of the ordinary operation of familiar natural laws, and govern himself accordingly. Failing to do so, he takes the consequences.'" (quoting Swanson v. Ry. Co., 70 N.W. 978, 979 (Minn. 1897))).

[55] *See generally, e.g.*, Van Wycklyn v. City of Brooklyn, 24 N.E. 179 (N.Y. 1890); N.K. Fairbank Co. v. Nicolai, 66 Ill. App. 637 (App. Ct. 1896), *rev'd*, 47 N.E. 360 (1897); Hamilton v. People, 46 Mich. 186 (1881); Tomlinson v. Greenfield, 31 Ark. 557 (1876); Lockwood v. Twenty-Third St. Ry., 7 N.Y.S. 663 (N.Y. Ct. Com. Pl. 1889); Lawrence v. Burrell, 17 Abb. N. Cas. 312 (N.Y. City Ct. 1885); Christenson v. Rio Grande W. Ry. Co., 74 P. 876, 878 (Utah 1903); Stenvog v. Minn. Transfer Co., 121 N.W. 903 (Minn. 1909).

Natural law so understood had its foundation in the physical world, and physics was sometimes directly invoked to justify results that were reached in litigation. A particularly prominent—and troubling—application of this reasoning appeared with more than occasional regularity during the second half of the nineteenth century in cases involving industrial accidents. These judicial opinions make uncomfortable reading today, as they emerged from an era before workers' compensation acts, and in these accident cases the law of nature was invoked in order to deny compensation to injured employees who had been carrying out their assigned duties, sometimes even when they were acting in response to specific instructions of their employers.[56] The basis for decision in these cases was the assumption that all employees knew what the laws of nature were—every adult did. Workers supposedly needed no special notice of what consequences would follow from their assigned tasks and bore the duty to protect themselves from known natural dangers. If an accident resulted from a law of nature, employers escaped responsibility entirely. So, an employee charged with lowering stones into proper order who was injured when one fell on him was charged with knowledge of the inherent character of heavy objects. The stones had fallen because of their own weight, and he could not expect to be compensated when the law of nature took its course.[57] So must all employees. A man employed to clean out a silo could not complain when he was injured by the grain which fell on him from above after he had cleaned out the silo's

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[56] *See generally* DONALD J. KISER, WORKMEN'S COMPENSATION ACTS: A CORPUS JURIS TREATISE (1917). As it happens, England's law was in advance of that of its former colonies. *See* THOMAS BEVEN, THE LAW OF EMPLOYER'S LIABILITY AND WORKMEN'S COMPENSATION xvii–xix (3d ed. 1902) (describing the Employer's Liability Act of 1880).

[57] Dillingham v. Harden, 26 S.W. 914, 915, 917 (Tex. Civ. App. 1894); *see also* Tex. & P. Ry. Co. v. French, 23 S.W. 642, 644 (Tex. 1893); Reiter v. Winona & St. P. Ry. Co., 75 N.W. 219, 219 (1898); Worlds v. Ga. Ry. Co., 25 S.E. 646, 646 (Ga. 1896); Swanson v. Great N. Ry. Co., 70 N.W. 978, 979 (Minn. 1894); *cf.* Lawrence M. Friedman, *Work Accidents: A Drama in Three Acts*, 40 HOFSTRA LAB. & EMP. L.J. 463, 463–84 (2023).

lower part.[58] The collapse of grain was a result of a natural law: the law of gravity. He would have known that and then should have prudently taken steps to protect himself. If he had not, he had no one to blame but himself. His employer owed him nothing. In reaching this result, early American judges were right in describing the results as disregarding "the imperious laws of nature."[59]

Courts reached similar results in a significant number of cases involving passengers injured while traveling on trains and streetcars. Natural law again played a decisive role in the outcome of disputes that ensued. Accidents were common, but when injured passengers sued operators, most passengers lost their cases; even when jury verdicts initially favored them, these were regularly overturned on appeal. The reason commonly given was that they would have been aware that these vehicles accelerated quickly or swerved sharply while they were in motion. Such "natural movements of this kind" were known by all, it was said; and passengers were injured when they failed to protect themselves—by holding onto bars or sitting in available seats—could not expect compensation for the injury that ensued. These all too frequent accidents often provided the occasion for judicial invocation of natural law. It served as a shield against liability for harms involving the trains of America's fledgling railroads.[60] In this context, courts used "natural law" to describe the ordinary mechanical characteristics of trains and streetcars. It was supposedly "in their nature" to swerve and to accelerate, and this obvious fact—known to all reasonable people—precluded recovery

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[58] Welch v. Brainard, 65 N.W. 667, 667 (Mich. 1895); *see also* Freeman v. Carter, 67 S.W. 527, 528 (Tex. Civ. App. 1902); Yoakum v. Atchison, Topeka & Santa Fe Ry. Co., 199 S.W. 263, 265 (Mo. App. 1917); Mace v. Carolina Min. Co., 85 S.E. 152, 154 (N.C. 1915).

[59] De Graffenried v. Savage, 47 P. 902, 903 (Colo. App. 1897).

[60] Cauley v. Pittsburgh, Cincinnati & St. Louis Ry. Co., 98 Pa. 498, 500 (1882); *see also* Yunker v. Nichols, 1 Colo. 551, 553 (1872); Fay v. Chi., St. Paul, Minneapolis & Omaha Ry. Co., 75 N.W. 15, 16–17 (1898); Scanlan v. S.F. & San Joaquin Valley Ry. Co., 55 P. 694, 695 (Cal. 1898); Griffin v. Ohio & Miss. Ry. Co., 24 N.E. 888, 889 (Ind. 1890); Ozanne v. Ill. Cent. Ry. Co., 151 F. 900, 903 (C.C.W.D. Ky. 1907); Tex. & P. Ry. Co. v. Bradford, 2 S.W. 595, 598 (Tex. 1886).

when passengers failed to protect themselves. In similar fashion, the claim of a man injured in a road-crossing accident that he had not heard any sound of the train's approach was considered contrary to the law of nature. Trains make noise, and a claim by the injured man that he had heard nothing would have been contrary to that fact. While this usage may not illuminate much about the character of natural law as we understand it today, it certainly contradicts any conclusion that the laws of nature had entirely disappeared from the professional lives of practicing lawyers during this period.[61]

For modern proponents of the revival of the law of nature, these cases may stand as surprising (and perhaps even disappointing) applications of the subject to their advocacy. All the same, they represent a legitimate part of its history. They also temper the conclusion that the law of nature had disappeared from the world of practice in the second half of the nineteenth century, and they also require a modification of the common view that true natural law was about principles of accepted morality. Many of the cases that cited the law of nature had little or nothing to do with ethics or morality. In them, the term appears to have meant no more than a commonly observed phenomenon, one that was regularly found in the natural world. For the historian, however, the conclusion must be that although invocations of natural law may have lost some of its frequency and some of its appeal after the Civil War, it had not disappeared from the world of litigation. In one sense, decisions in these years had done no more than enlarge the arena and scope of natural law's application.

There is, however, one further descriptive point to be made. It also calls attention to the apparent effect of natural sciences on this corner of legal thought. The second half of the nineteenth century was a time marked decisively by an expansion in scientific research

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[61] *See* Wabash Ry. Co. v. De Tar, 141 F. 932, 933–34 (8th Cir. 1905); *see also* Fiddler v. N.Y. Cent. & Hudson River Ry. Co., 64 A.D. 95, 100 (N.Y. App. Div. 1901); Stone v. Town of Tilden, 99 N.W. 1026, 1026 (Wis. 1904); Yoakum v. Atchison, Topeka & Santa Fe Ry. Co., 199 S.W. 263, 265 (Mo. App. 1917).

and the augmentation of prestige for scientific thought generally. Though not entirely without precedent in ancient and medieval legal thought, science attracted an increased respect during these years—a reverence verging on awe for its place in human life. The familiar names of Charles Darwin (1809–1882), Michael Faraday (1791–1867), and James Clerk Maxwell (1831–1879) represent merely the most prominent figures among many groundbreaking scientists of this era.[62] There were many others. Professor James Whitman has described these years as a time when "the new natural sciences were beginning to set the intellectual tone" in many facets of human life.[63] One of those facets, consistent with many of the cases surveyed above, was the use of rules drawn from science in contested litigation—the laws of thermodynamics or the law of gravity, for instance. They were regarded as legitimate parts of natural law. They were universal and they were found in nature.[64] Scientific phenomena had also become familiar parts of common learning even among practicing lawyers. The influential Harvard Law School Dean, Christopher Columbus Langdell, took the view that law should rightly be "considered as a science,"[65] and

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[62] *See generally* DAVID KNIGHT, THE MAKING OF MODERN SCIENCE: TECHNOLOGY, MEDICINE, AND MODERNITY, 1789–1914 (2009); SCIENCE IN THE MARKETPLACE: NINETEENTH-CENTURY SITES AND EXPERIENCES 1–22 (Aileen Fyfe & Bernard Lightman eds., 2007).

[63] James Q. Whitman, *Rechtsvergleichung als Erkenntnismethode. Historische Perspektiven vom Spätmittelalter bis ins 19. Jahrhundert*, 11 COMPAR. LEGAL HIST. 302 (2023); *see also* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 923 (1993) ("Americans tended to take for granted that natural law had a foundation in the physical world and yet had moral implications."); 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).

[64] *See* Jane E. Ruby, *The Origins of Scientific "Law"*, 47 J. HIST. IDEAS 341 (1986). For historical support, American lawyers often looked to the text in 1 WILLIAM BLACKSTONE, COMMENTARIES *38.

[65] CHRISTOPHER C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871); *see also* Christopher. C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123, 124 (1887); ANDREW FORSYTH, COMMON LAW AND NATURAL LAW IN AMERICA 29 (2019) ("The laws of nature—physical forces—were not divorced from natural law understood as moral philosophy."); GRANT GILMORE, THE AGES OF AMERICAN LAW

that view would have been one part of what many law students absorbed. Perhaps it should not be at all surprising that rules drawn from scientific phenomena should have been treated as relevant in contested litigation. The impact of this development is apparent and more consequential when we take account of the evidence from American cases involving natural law decided in our own day.

AMERICAN CASES: 2000–2020

What changes have occurred in the law of nature's place in the litigation of first quarter of our own century? Was anything left of the place it had occupied in judicial decisions from the second half of the prior century? The number of citations to the laws of nature, as shown above, makes it appear that the application of natural law had survived to a much greater extent than has normally been assumed. In fact, reference to it appears to have lasted well into the twentieth century, having found a significant place in a great many recent judicial opinions. Such appearances can even be said to be present in abundance, a startling circumstance almost waiting to be discovered. The law of nature may have diminished in the relevance and in the frequency of its use in the cases from the last half of the nineteenth century, but the numerical evidence turns out to suggest its continued acceptance. Its apparent use among practicing lawyers emerged as likely from an examination of ordinary litigation. It had not disappeared.

The extent of current academic interest in the subject also matches what the large number of caselaw citations suggests. Revival of the study and scope of natural law has been something of an academic growth injury in these more recent years. A list derived from a search engine of peer reviewed journal articles devoted to "Revival of Natural Law" between 1930 to the present

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78–81 (Vickie Sullivan ed., 1980); WILLIAM LA PIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994); Allen D. Boyer, *Logic and Experience*, 80 CORNELL L. REV. 362 (1995) (reviewing WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994)).

produced 501 unique search results. It seems to have been a favorite among a significant number of American commentators. The number of cases in which natural law figured in judicial opinions also suggests its continued relevance in practice. Indeed, it appears to suggest an expansion in the frequency of natural law's use in the practice of law.

The expansion in reported cases discussed above, explains some of the apparent increase in recent natural law citations, particularly those having little connection to what we think of as morality. But that seems unlikely as an explanation for all of it. The sheer number of judicial invocations of the natural law appears to cast doubt on the conclusion that it had lost its place in the ordinary practice of American lawyers in the twentieth century. A more careful examination of this case law may hold the key to understanding natural law's current status, as the numbers suggest a continuing—even flourishing—role for this ancient source of law.

But does natural law truly flourish in modern American courts? The fair answer to that question is yes and no, but mainly no. Apart from patent law cases in which some mention of natural law was all but required by statute,[66] and isolated citations to the law of nature's role in our law's historical development,[67] by far the most frequent invocation of the law of nature in recent years has been one aspect of the law of evidence that is relevant in criminal law. Its connection with natural law in the sense used by most of its modern proponents is tenuous, and it is not what they will likely consider its proper role. This modern usage, sometimes called the "physical facts rule," allows challenges to the lawfulness of criminal convictions based on testimony that contradicts natural laws. As one judge put it, "[w]hen a witness's testimony 'cannot possibly be true, is inherently unbelievable, or is opposed to natural laws,'" it

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[66] *See, e.g.*, Mayo Collaborative Serv. v. Prometheus Lab'ys., Inc., 566 U.S. 66, 70–71 (2012). *See generally* Sanofi-Aventis v. Sun Pharm. Indus., 2011 WL 1899789 (S.D.N.Y. May 11, 2011).

[67] Al Bahlul v. United States, 767 F.3d 1, 54–57 (D.C. Cir. 2014) (Brown, J., dissenting in part).

cannot form the basis of a lawful conviction.[68] If evidence had been admitted which "the witness could not possibly have observed or to events which could not have occurred under the laws of nature," a guilty verdict was open to challenge as having been wrongfully obtained.[69]

What sort of testimony could be challenged under this heading? Here are two relevant examples. In one case, a witness observed two women fighting and saw one die after being struck with a knife, though the fatal blow occurred outside his view. The witness had shouted "[y]ou killed her" at the time, and so he testified at the trial.[70] While this seemed a reasonable conclusion, the validity of the jury's guilty verdict was challenged on appeal. The defendant's lawyer, however, described that testimony as being inconsistent with the law of nature because the witness had not actually seen the killing and therefore could not give a trustworthy first-hand account of the way she had died.[71] The argument was that allowing what the witness had said to be put in evidence was contrary to a principle said to be drawn from nature. He could not have seen what he testified to. That was the argument, but the guilty verdict was affirmed nonetheless. The judge wrote that the witness had "provided sufficient circumstantial evidence to establish" the defendant's guilt.[72]

A similar result emerged in a challenge to a rape conviction which was alleged to have occurred in a trailer, one with very thin walls between its rooms. The key testimony came from a couple in an adjoining room who claimed the victim had not consented and was not a willing participant, and a guilty verdict was upheld. Their

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[68] State v. Dotson, 450 S.W.3d 1, 88 (Tenn. 2014); *see also* United States v. Gachette, 382 F. App'x 821, 822 (11th Cir. 2010); Bd. of Comm'rs of Cnty. of Park v. Park Cnty. Sportsman's Ranch, LLP, 45 P.3d 693 (Colo. 2002).

[69] United States v. Thompson, 945 F.3d 340, 347 (5th Cir. 2019) (quoting United States v. Robertson, 110 F.3d 1113, 1118 (5th Cir. 1997)). *Thompson* is almost identical to *Commonwealth v. MacArthur*, 2016 WL 1250214, at *4 (Pa. Super. Ct. Mar. 30, 2016).

[70] Commonwealth v. Sellers, 2013 WL 11248442, at *2 (Pa. Super. Ct. Dec. 13, 2013).

[71] *See id.*

[72] *Id.*

testimony counted, even though the attack had occurred when they were asleep and they admitted that they had heard nothing. What they testified to was alleged to have been "testimony so clearly at odds with natural law" that no jury verdict could credit it."[73] This argument failed, however. They had merely testified as to what they heard and seen when they awoke. The guilty verdict stood. That has proved to be the most common pattern found in the reported cases on criminal law. The law of nature was often invoked in attempting to overturn a criminal conviction. Most of them failed.

Cases like these are also not easy to fit within most current depictions of natural law's true purposes. At least, they are not when set alongside most modern descriptions of the purposes served by the law of nature. Of course, it has often been said that natural law "is a conception which is constantly taking new form,"[74] and ensuring that anyone on trial for a criminal offense receives a fair trial is within natural law's legitimate purposes. However, many of the arguments advanced in the recent cases appear to have been quite farfetched. They appear to have been the artificial products of lawyerly ingenuity rather than a means of protecting the innocent. The two just discussed fit that description, and they are representative of many others.[75]

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[73] Linville v. Commonwealth, 2012 WL 2362489, at *4 (Ky. June 21, 2012); *see also* United States v. Toro, 359 F.3d 879, 883 (7th Cir. 2004); United States v. Feliciano, 761 F.3d 1202, 1206 (11th Cir. 2014); United States v. Thompson, 945 F.3d. 340, 347 (5th Cir. 2019); United States v. Hunter, 145 F.3d 946, 949 (7th Cir. 1998); Commonwealth v. Rolland, 744 A.2d 745, 751 (Pa. 2018); United States v. Durham, 491 F. App'x 169, 172 (11th Cir. 2012). Donald v. State, 700 S.E. 2d 390, 392 (Ga. 2010); Simington v. Menard Inc., 2012 WL 3288745, at *1 (N.D. Ind. Aug. 9, 2012); Commonwealth v. Lawrence, 2016 WL 5645218, at *11 (Pa. Super. Ct. Aug. 22, 2016); United States v. Monell, 2017 WL 5564572, at *5 (D.R.I. Nov. 17, 2017).

[74] Haines, *supra* note 4, at 617.

[75] *See, e.g.*, Weltmer v. Bishop, 71 S.W. 167, 169 (Mo. 1902); United States v. Hunter, 145 F.3d 946, 949 (7th Cir. 1998); Commonwealth v. Widmer, 744 A.2d 745, 751 (Pa. 2000); Donald v. State, 700 S.E.2d 390, 392 (Ga. 2011); People v. Rivera, 2014 WL 3974333, at *7 (Virgin Is. Super. Ct. May 1, 2014); United States v. Harper, 2018 WL 10704433, at *1 (E.D. Wis. Apr. 12, 2018); Johnson v. Curtin, 2012 WL 1229975, at *5

Why did they appear in such numbers in the recent past when compared with the nineteenth century cases, where they seldom did? One possible answer is derived from the famous Supreme Court case of *Gideon v. Wainwright*.[76] It held that as a matter of right under the Constitution defendants in criminal prosecutions in state courts were entitled to be represented by a lawyer.[77] These modern cases—including some that contained express invocations of natural law to assess the adequacy of proof—appear to have been one of the inevitable, if unplanned, results of that decision. It has mattered in contested cases. It has led to attempts to overturn convictions allegedly obtained by the introduction of testimony which could not physically have been justified. It is sometimes described as a "physical facts rule," one derived from what nature tells us about the worth of testimony introduced in criminal trials. I doubt that it is what most modern advocates of natural law's utility would consider to be its true role.

Apart from these cases, most positive invocations of the law of nature during these years have appeared in family law contexts. Judicial opinions have sometimes made mention of the law of nature alongside other sources of legitimate authority, as in referring to a parental duty to care for children as one "imposed by the laws of nature and of the state,"[78] or in describing sexual relations with very young children as violations of the natural order

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(E.D. Mich. Apr. 12, 2012); Commonwealth v. Brown, 2013 WL 11250790, at *2 (Pa. Super. Ct. Nov. 7, 2013); State v. Bolinger, 2010 WL 2384889, at *6 (Tenn. Crim. App. June 15, 2010); Bedwell v. Menard, Inc., 2012 WL 5207540, at *3 (N.D. Ind. Oct. 22, 2012).

[76] 372 U.S. 335 (1963).

[77] *Id.* at 340–44.

[78] Southwick v. Crownover, 2014 WL 1028876, at *7 (Cal. Ct. App. Mar. 18, 2014) (referring to parental duty as imposed by a statute which "rests on fundamental natural laws."); *see also* In the Interest of A.M., 2017 WL 2022704, at *1 (Kan. Ct. App. May 12, 2017) (per curiam); Burak v. Burak, 168 A.3d 883, 909 (Md. 2017); *Ex parte* S.L.J.F. v. Cherokee Dep't of Hum. Res., 165 So.3d. 614, 616 (Ala. 2014) (Moore, C.J., dissenting from denial of writ of certiorari); Lloyd v. Butts, 37 S.W.3d 603, 605 (Ark. 2001); *In re* S.S., 2013 WL 793222, at *1 (Ohio Ct. App. March 4, 2013); Windsor v. Khora, 2010 WL 4816085, at *7 (Cal. Ct. App. Nov. 29, 2010); Torres v. Jones, 448 S.W.3d 719, 722–23 (Ark. App. 2014).

of things, as well as being part of the enacted criminal law.[79] Also found in recent decisions, however, has been the widespread displacement of natural law as the rule of decision in child custody disputes by one based explicitly on the best interest of the child.[80] This has meant that in some of the modern cases in this area natural law has been mentioned, but principally as a matter of history. Of course, historical associations are sometimes useful, even impressive. Nothing may be lost by their citation. However, natural law has not necessarily counted as authoritative in drawing legal conclusions, and that is how it appears in some of the judicial opinions in this field.

There is just one more area in which natural law appears with any frequency in recent cases. That is its introduction by one party to a dispute in order to justify, or at least to strengthen, an argument that the law of nature required a specific outcome. There have been comparatively few of these cases in recent years, but they did sometimes occur. The natural law of self-preservation was used in a 2017 case from Delaware to nullify a regulation that anyone carrying firearms into a state park must first acquire a state license.[81] It also appeared in a case from Kansas to affirm the custody of parents who had been judged unfit by social workers—a decision said to be reflective of "natural law and divine providence."[82] And it proved useful in permitting the application of a new method of analysis for determining the outcome of a

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[79] *See* State v. Bokisa, 2011 WL 676153, at *3 (Ohio Ct. App. Feb. 24, 2011).

[80] The subject is explored in MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 121–160 (1994).

[81] Bridgeville Rifle & Pistol Club, Ltd. v. Small, 176 A.3d 632, 647–48 (Del. 2017); *see also* Grace v. District of Columbia, 187 F. Supp. 3d 124, 136. (D.D.C. 2016) (holding that the right to bear arms comes from "the natural right of resistance and self-preservation"), *vacated and remanded sub nom.* Wrenn v. D.C., 864 F.3d 650 (D.C. Cir. 2017).

[82] *In the Interest of A.M.*, 2017 WL 2022704, at *1; *see also In re S.S.*, 2013 WL 793222, at *2.

criminal trial in Georgia, said to be because the experiment "rests upon the laws of nature."[83]

However, similar arguments have also been rejected in many of the recent cases, seemingly the majority. One Ohio case illustrates this pattern clearly: a man convicted of possessing child pornography was prohibited from residing in his house because it was within 1,000 feet of an elementary school. He argued that this prohibition violated "a fundamental right to utilize property as one desires as a part of natural law,"[84] buttressing this argument with citations to the works of Thomas Aquinas, Hugo Grotius, Samuel Pufendorf, and John Finnis. The court's opinion brushed his argument aside, holding that "the Court does not perceive" any such right in natural law. Property rights were treated as "a human creation that, at most, accords with natural law,"[85] and as such, they could not override legitimate concern for the safety of the school's children. A Maryland case from 2015 involving delayed reporting of a sexual assault provides a more recent example. Older cases had held that her delay meant that she must have consented, but this judge brushed their relevance aside as "reflecting the 'natural law' view of women's role in society that predominated in the late 1800s."[86] To him, it appeared that such an application of natural law had become outdated. As a case from California expressed this negative attitude towards natural law, today American law is "a product of affirmative human choices rather than a form of 'natural law' that exists somewhere in the ether."[87] Such language reflects

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[83] Jefferson v. State, 720 S.E.2d 184, 188 (Ga. Ct. App. 2011).

[84] United States v. Greenberg, 894 F. Supp. 2d 1039, 1042 (S.D. Ohio 2012).

[85] *Id.*; *see also* Comstock v. Child Protective Servs., 2019 WL 7882397, at *1 (W.D. Wash. Nov. 19, 2019).

[86] Muhammad v. State, 115 A.3d 742, 748 (Md. Ct. Spec. App. 2012).

[87] Doe v. Nestle, S.A., 748 F. Supp. 2d 1057, 1126 (C.D. Cal. 2010), *rev'd and vacated sub nom.* Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014), and *vacated sub nom.* Doe I v. Nestle USA, Inc., 738 F.3d 1048 (9th Cir. 2013), *order withdrawn*, 766 F.3d 1013 (9th Cir. 2014), and *rev'd and vacated sub nom.* Doe I v. Nestle USA, Inc., 766 F.3d 1013 (9th Cir. 2014).

how far natural law has fallen from its once-authoritative status in American jurisprudence.[88]

Finally, among the cases in which occasional use of the law of nature appeared were some in which one of the parties claimed to have possessed a natural law right to take the steps he or she had chosen, even though currently accepted positive law contained no support for it. A party sought to avoid conviction for having conspired with others to distribute heroin by claiming that he was merely asserting his "common and natural law rights" is one example.[89] Appearing *pro se*, he must have chosen what he hoped would help his case. That claim went nowhere, however, and a few others like it were also summarily dismissed.[90] Why the judges involved chose to mention the law of nature at all is anyone's guess. Their easy rejection of claims based upon it scarcely allows us to count them as evidence of natural law's continuing presence in American courtrooms.

CONCLUSION

Four findings on the law of nature's place in American legal history have emerged from a survey of the cases in which it has been mentioned. First, I had begun my examination of the American cases with the assumption that it had disappeared from the world of legal practice shortly after the Civil War, but the evidence from the case law showed that it had not. It is true that today it has lost the place it had once held. However, its disappearance took much longer than has been assumed from the opinions of leaders like Justice Oliver Wendell Holmes and Dean Christopher Langdell. It was a slower, more gradual, train of events. Second, the protean character of the terms "law of nature"

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[88] *See id*.

[89] United States v. Pullum, 2016 WL 11677772, at *1 (E.D. Ky. Sept. 23, 2016); *see Comstock*, 2019 WL 7882397, at *1.

[90] *See* Krieger v. Brown, 496 F. App'x 322, 325 (4th Cir. 2012); *see also Comstock*, 2019 WL 7882397, at *1; Rodriguez v. Salvation Army Marshall House, 2015 WL 1919602, at *1 (Conn. Super. Ct. Mar. 26, 2015).

and "natural law" is amply confirmed in the evidence found in the existing judicial opinions from this period. These two terms came to mean something rather different from what they did in the classic works by Cicero, Thomas Aquinas, and Hugo Grotius, not to speak of the opinions of most modern scholars who call for a revival of natural law's recognition and application. Its scope and its effect have been effectively limited in decided cases. Third, the connection between science and the law of nature stands out as especially noteworthy in most of the recently decided cases. The term "natural law" has often come to be commonly treated as a "physical facts rule" when it has appeared in American judicial opinions. As such, its appearance has been relatively frequent, enough to have given rise to the increase in numbers given earlier in this article. Perhaps Dean Langdell might have been pleased to find that so many of this century's judicial opinions employ this term, even though it falls far short of standing for an increase in respect for natural law that its modern proponents desire. Fourth, in many of the cases—even some of very recent date—natural law has been mentioned with apparent approval, even though it had little or no effect on the case's outcome. Disputes involving family law have provided particularly numerous examples of its invocation, even where positive statutory law itself may have dictated the outcome. The same can be said of some of the cases invoking the right of self-defense. The law of nature is credited with having been the origin of a rule that has since become established in our positive law. So widespread has been that acceptance that natural law's mention is almost ornamental in judicial opinions. These events and changes are certainly worth noting, but with the exceptions just noted, scholars such as Professor Banner have been right to speak of natural law's disappearance from the working lives of today's American lawyers. Whether it will ever stage a true "comeback" in our law courts is the hope of some scholars, and also the fear of others. What the future may hold, however, is beyond the scope of this investigation. Its subject has been natural law's gradual decline in the professional lives of American lawyers, and

the evidence shows that the decline took longer to occur than has often been asserted.