NATURAL LAW AND HUMAN RIGHTS IN ENGLISH LAW: FROM BRACTON TO BLACKSTONE

R. H. Helmholz[†]

Invocation of natural law seems to have passed out of fashion among leaders of the movement for the extension of human rights. One might have expected the opposite. Determining the origins and scope of human rights presents a perplexing and persistent problem,[1] and the law of nature has long occupied a place in Western constitutional traditions.[2] Indeed natural law has become almost fashionable among some philosophers and teachers of jurisprudence.[3] But no! Not a word about it appears in the nineteen-hundred-page *Encyclopedia of Human Rights*, the most current such handbook available.[4] And Brian Simpson's comprehensive account of the genesis of the European Convention on Human Rights says nothing to suggest that the law of nature played any part in his story.[5] There are notable exceptions,[6] but the majority of human rights advocates

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† Ruth Wyatt Rosenson Distinguished Service Professor of Law, University of Chicago.

1. *See, e.g.*, MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS 11-41 (1998) (exploring the philosophical underpinnings of human rights).

2. *See generally* Horst Dippel, *Human Rights in America, 1776-1849: Rediscovering the States' Contribution*, 67 ALB. L. REV. 713, 714 (2004); Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427 (1997).

3. *See, e.g.*, Colloquium, *Natural Law, the Constitution and the Theory and Practice of Judicial Review*, 69 FORD. L. REV. 2269 (2001); Symposium, *Natural Law v. Natural Rights: What Are They? How Do They Differ?*, 20 HARV. J.L. & PUB. POL'Y 627 (1997); Symposium, *Natural Law*, 4 S. CAL. INTERDISC. L.J. 455 (1995); Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992); Symposium, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1 (1990).

4. *See* EDWARD LAWSON, ENCYCLOPEDIA OF HUMAN RIGHTS (1991).

5. A. W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION (2001).

6. Bruce Frohnen, *Multicultural Rights? Natural Law and the Reconciliation of Universal Norms with Particular Cultures*, 52 CATH. U. L. REV. 39 (2002); *see also* Lloyd L. Weinreb, *Natural Law and Rights*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 278 (Robert P. George ed., 1992); EBERHARD SCHOCKENHOFF, NATURAL LAW & HUMAN DIGNITY: UNIVERSAL ETHICS IN AN HISTORICAL WORLD (Brian McNeil trans., Catholic Univ. of Am. Press 2003) (1996); Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989).

today, if pressed, would probably subscribe to the views of the great Oliver Wendell Holmes: "The jurists who believe in natural law," he wrote, "seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."[7] For a lawyer, it is a daunting dictum. At least it daunts me.[8] Who wants to be a naïve generalizer? I don't. Surely it is better to stay connected with the world as it is than to spin out naïve fantasies.

On this account, this article will confine its attention to facts, most of them involving history, although this may be one of those cases where history has potential relevance to modern problems. I have three things to report, or four if one counts a tepid conclusion. The first deals with the place of natural law in the works of English common lawyers between Bracton and Blackstone—roughly speaking, from the mid-thirteenth century to the eighteenth. The second discusses the place of natural law and human rights within the traditions of *ius commune*, the amalgam of Roman and canon law that dominated legal education and much legal thought during the Middle Ages and even into the modern period. Its attempt is to describe the role that natural law played as a source of rights in the learned law of earlier centuries. The third considers English case law, making a connection between the first two subjects. The question in it is whether there is anything to be gained by looking at English cases involving human rights through the lens of natural law. There may be, although how far to push the argument is a more debatable question. As I have said—my intention is to stick as close as possible to facts.

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The first of these three subjects has cost me the most pain, but has also given me the greatest pleasure. It has required attempting to discover the extent to which Holmes's negative attitude towards

7. OLIVER WENDELL HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS 310, 312 (1920); *see also* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 309 (Macmillan 2d ed. 1921) (1909) (describing natural law as "this exploded superstition").

8. Not so daunted, however, have been many others. *See, e.g.*, Symposium, *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003) (the founding volume of this journal including articles by Francis Cardinal George, Robert H. Bork, Stephen F. Smith, Sherman J. Clark, Charles E. Rice, Stephen B. Presser, James Gordley, and Robert John Araujo).

natural law was shared by the common lawyers of past centuries. I asked this question: Have they been similarly suspicious of the claims of natural law and natural rights? Perhaps not quite as suspicious as Justice Holmes was. Open criticism might have involved them in hostility towards the Church. At least it would have been contrary to the great currents of medieval thought. Few men would have chosen to take that public position in earlier centuries, at least if they meant to succeed at the Bar. But still, they might simply have ignored the subject of natural law without incurring anyone's wrath. They might easily have said nothing whatsoever about it in describing English law. That would have been costless. Saying nothing is certainly the most common reaction among modern legal historians writing about the history of the common law. In their work, one finds only the slightest mention of natural law, if indeed one finds even that. Roscoe Pound spoke for many when he dismissed it out of hand, concluding, "English lawyers have never had much concern with philosophy and natural law found little place in their books."[9]

Let us look at the evidence. Some of it supports the exact opposite of Pound's dismissal of natural law. For example, no fewer than nine

9. ROSCOE POUND, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 74 (1957); *see also* J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 210 (4th ed. 2002) (describing St. German's use of the natural law, which he believed voided all laws *contrary* to it, as akin to "abstract statements" which "bore little fruit in the practice of the courts"); C. H. S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 300-01 (1949) (asserting that by the late fifteenth century the common lawyers "would not stomach the vague promptings of Natural Law"); SIR DAVID LINDSAY KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN 295 (8th ed. 1966) ("[N]atural human rights, although assumed as an element in the fashionable contractualist theory of government . . . possessed little practical importance."). There is no entry at all under "natural law" or "law of nature" in the index of the following works on the history of the common law: ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW (1966); W. S. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW (1925); OLIVER WENDELL HOLMES, THE COMMON LAW (1881), *reprinted in* THE COMMON LAW & OTHER WRITINGS (Neill H. Alford, Jr. et al. eds., 1982); JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA (1996); EDWARD JENKS, A SHORT HISTORY OF ENGLISH LAW: FROM THE EARLIEST OF TIMES TO THE END OF THE YEAR 1933 (new issue 1934); F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND (photo. reprint 2001) (1908); S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (Little, Brown and Co. 5th ed. 1956) (1929); J. G. A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY (2d ed. 1987); JOHN REEVES, HISTORY OF THE ENGLISH LAW FROM THE TIME OF THE SAXONS TO THE END OF THE REIGN OF PHILIP AND MARY (Augustus M. Kelley Publishers 1969) (1787); JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (London, Macmillan 1883); RICHARD S. TOMPSON, ISLANDS OF LAW: A LEGAL HISTORY OF THE BRITISH ISLES (2000); R. C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988).

Latin editions and seven English translations of Samuel Pufendorf's most famous work dealing with natural law were published in England between 1682 and 1758.[10] But suppose we stick to English lawyers. Let *them* be our test. One must first determine who counts as an English lawyer. I have taken a hard-nosed approach. I have omitted the English civilians, the lawyers who practiced in the courts of Admiralty, the Church, and many courts of Equity, when they turned their pens to general descriptions of English law. Their ordinary sources of authority were those of the European *ius commune*, so that by training and inclination, they naturally conceded legitimate authority to the law of nature.[11] For present purposes, therefore, John Cowell (d. 1611),[12] Richard Zouche (d. 1661),[13] and Thomas Wood (d. 1722),[14] do not count, although they most certainly did link natural law with what they called the municipal law of the realm and we the English common law. I have also excluded theologians and philosophers, though perhaps unfairly, as not sufficiently legal in profession and outlook. On this slim ground, influential thinkers like Richard Hooker (d. 1600), Thomas Hobbes (d. 1679), and John Locke (d. 1704), all of whom had something to say about natural law, are ignored in this account.

Even with these self-denying restrictions, a largish field remains to be surveyed.[15] Having made that survey, I concluded that some

10. SAMUEL PUFENDORF, DE OFFICIO HOMINIS ET CIVIS IUXTA LEGEM NATURALEM [ON THE DUTY OF THE MAN AND CITIZEN ACCORDING TO THE NATURAL LAW] (London 1673). For the history of publication of the editions, see Klaus Luig, *Zur Verbreitung des Naturrechts in Europa* [*To the Spreading of the Natural Law in Europe*], 40 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS [THE LEGAL HISTORY REVIEW] 539, 548-57 (1972); HANS THIEME, DAS NATURRECHT UND DIE EUROPÄISCHE PRIVATRECHTSGESCHICHTE [THE NATURAL LAW AND THE HISTORY OF EUROPEAN CIVIL LAW] 32-38 (Verlag Von Helbing & Lichtenhahn 2d ed. 1954).

11. GLENN BURGESS, THE POLITICS OF THE ANCIENT CONSTITUTION: AN INTRODUCTION TO ENGLISH POLITICAL THOUGHT, 1603-1642, at 122-30 (1993).

12. Author of INSTITUTIONES IURIS ANGLICANI [THE INSTITUTIONS OF ENGLISH LAW] (1630).

13. Author of ELEMENTA JURISPRUDENTIAE [THE ELEMENTS OF JURISPRUDENCE] (1629).

14. Author of INSTITUTE OF THE LAWS OF ENGLAND (1720).

15. Among the common lawyers themselves, I think we cannot expect any information, pro or con, about the place of natural law in England from compilers of books of entries and registers of writs. Their subjects did not lend themselves to treatment of any sources of law save those drawn immediately from court practice. Indeed, similar works from the world of the *ius commune* said nothing at all about the law of nature. Therefore, English lawyers like Ralph Hengham (d. 1311), author of RADULPHI DE HENGHAM SUMMAE, 1-50 (William Dunham ed., 1932); John Perkins (d. 1545), author of A PROFITABLE BOOK (1555) (devoted largely to conveyancing); and John Lilly (18th century), compiler of the collection known as MODERN ENTRIES (1723), have not been investigated. We do not know what they thought.

support can be found for the view that natural law played virtually no role in the thinking of common lawyers. The record did not produce any lawyer who spoke disparagingly about natural law, as Holmes did, but there were in fact common lawyers who wrote in a general way about English law and ignored the law of nature entirely. Among them, at least tentatively, I would put Sir Francis Buller (d. 1800),[16] Sir William Scroggs (d. 1683),[17] probably Samuel Carter (d. 1713),[18] and Sir Richard Hutton (d. 1639).[19]

However, the weight on the other side of the balance is a good deal heavier. A list of English common lawyers who described the natural law as being either part of, or else a legitimate source for, the English common law, from the time of Bracton in the thirteenth century to that of Blackstone in the eighteenth, is much longer. Bracton and Blackstone themselves are on it, of course. Bracton was half a civilian and Blackstone perhaps a fifth.[20] But they had lots of company among those who were not. The list of common law jurists who wrote positively about the law of nature as it figured in the law of England includes Sir Francis Ashley (d. 1635),[21] Sir Francis Bacon

16. Author of INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS (1772).

17. Author of PRACTICE OF COURTS-LEET AND COURTS-BARON (1701).

18. *See* SAMUEL CARTER, LEX VADIORUM: THE LAW OF MORTGAGES (1706) (accessed by the author). However, he stated that "in natural Justice and Equity" the interest of a mortgagee was to money rather than the land. *Id.* at 6. *But see* SAMUEL CARTER, LEX CUSTUMARIA: OR, A TREATISE OF COPY-HOLD ESTATES (London 1696), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 841:15 (Univ. Microfilms Int'l). His treatment of the law of custom here does not mention the law of nature.

19. *See* RICHARD HUTTON, THE DIARY OF SIR RICHARD HUTTON, 1614-1639, at 120 n.2 (W.R. Prest ed., 1991) (substituting "law of the realme" for "law of reason" found in the Dialogues of Christopher St. German, which he was following) (original spelling).

20. 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 26 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (containing a section entitled *Quid sit ius naturale*: What natural law is); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 38-44 (Oxford, Clarendon Press 1765) (commenting on the nature of laws). This article takes no position on the controversial question of whether Henry of Bracton was the author of the treatise that goes under his name. *See* Samuel E. Thorne, *Translator's Preface* to 3 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND at v, v-vi (George E. Woodbine ed., Samuel E. Thorne trans., 1977). *See generally* J. L. Barton, *The Mystery of Bracton*, 14 J. LEGAL HIST. 1 (1993). On Blackstone, see DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN 40-55 (1989); WERNER TEUBNER, KODIFIKATION UND RECHTSREFORM IN ENGLAND [CODIFICATION AND LEGAL REFORM IN ENGLAND] 68-73 (1974); Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996); Joseph W. McKnight, *Blackstone, Quasi-Jurisprudent*, 13 SW. L.J. 399 (1959).

21. *Law Lectures on the Liberty of the Subject*, 1616, British Library, London, Harl. MS. 4841, f. 47 ("le ley de nature, customes et statutes sont le matter et forme dont nostre ley":

(d. 1626),[22] Matthew Bacon (d.c. 1759),[23] Henry Ballow (d. 1782),[24] Daines Barrington (d. 1800),[25] William Bohun (fl. 1732),[26] Britton (fl. 1300),[27] John Brydall (d.c. 1705),[28] Robert Callis (d. 1642),[29] Sir Charles Calthrope (d. 1616),[30] William Cawley (fl. 1680),[31] Sir Edward Coke

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natural law, customs, and statutes are the matter and form of our law) (accessed by the author at the British Library).

22. FRANCIS BACON, *Case of the Post-Nati*, *in* 2 THE WORKS OF FRANCIS BACON, LORD CHANCELLOR OF ENGLAND 169 (Basil Montagu ed., Philadelphia 1854) ("[A]s the common law is more worthy than statute law, so the law of nature is more worthy than them both.") (accessed by the author). But see DANIEL R. COQUILLETTE, FRANCIS BACON 288-91 (1992), for a more negative characterization.

23. MATTHEW BACON, THE COMPLEAT ARBITRATOR: OR, THE LAW OF AWARDS 29 (London, Henry Lintot 2d ed. 1744) (voiding bonds to marry entered into under compulsion because "it is so agreeable to the Laws of Reason and the Laws of God, that Marriage should proceed from a free Choice").

24. HENRY BALLOW, A TREATISE OF EQUITY 2 (London, E. & R. Nutt, & R. Gosling 1737) (describing the foundation of all laws as "natural Justice and Equity," and stating that it "corrects and controls them when they do amiss"); *see also* D. J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 216-19 (1999).

25. DAINES BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES 559 (London, W. Bowyer & J. Nichols 4th ed. 1775) (stating that "natural justice" requires interested parties to be given an opportunity of defending their interests).

26. WILLIAM BOHUN, THE ENGLISH LAWYER: SHEWING THE NATURE AND FORMS OF ORIGINAL WRITS, PROCESSES AND MANDATES, OF THE COURTS AT WESTMINSTER 161 (London, E. & R. Nutt, & R. Gosling 1732) ("The Common Law herein imitating the Law of Nature, preserving its Vigour by Rotation and Circuity."). *But see* WILLIAM BOHUN, INSTITUTIO LEGALIS: OR, AN INTRODUCTION TO THE STUDY AND PRACTICE OF THE LAWS OF ENGLAND, AS NOW REGULATED AND AMENDED BY SEVERAL LATE STATUTES 33-35 (London, R & E Atkyns 1708) (mentioning only the general common law, local custom, statute law, and decided cases, which he described as *responsa prudentium*).

27. 1 BRITTON: AN ENGLISH TRANSLATION AND NOTES 194 (Francis Morgan Nichols ed. & trans., London, Clarendon Press 1865) (comparing the law of nature with institution of slavery by the constitution of nations).

28. JOHN BRYDALL, ENCHIRIDION LEGUM: A DISCOURSE CONCERNING THE BEGINNINGS, NATURE, DIFFERENCE, PROGRESS AND USE, OF LAWS IN GENERAL; AND IN PARTICULAR, OF THE COMMON AND MUNICIPAL LAWS OF ENGLAND 10 (London, Elizabeth Flesher et al. 1673) ("The Law of Nature, is next to the Divine Law, in excellency, antiquity, immutability, and severity . . . .").

29. ROBERT CALLIS, THE READING OF THE FAMOUS AND LEARNED ROBERT CALLIS, ESQ. UPON THE STATUTE OF 23 H.8. CAP.5 OF SEWERS 24 (London, M. Flesher 2d ed. 1685) ("And the Laws of this Realm . . . have fetched their Pedigree from the Law of Nature.").

30. See his Short treatise or Lectura *Of Copieholds*, Cheatham's Library, Manchester, MSS. A.2.23, f. 52, and A.3.99, first 13 folios (describing custom as being "allowed by the lawes of God, the lawes of nature, the lawe of nations, and by the private lawes of everye countrye") (original spelling) (accessed by the author at Cheatham's Library).

31. 5 Eliz. c. 1, § 14, *reprinted in* WILLIAM CAWLEY, THE LAWS OF Q. ELIZABETH, K. JAMES AND K. CHARLES THE FIRST: CONCERNING JESUITES, SEMINARY PRIESTS, RECUSANTS, &C., AND CONCERNING THE OATHS OF SUPREMACY AND ALLEGIANCE EXPLAINED BY DIVERS JUDGMENTS AND

(d. 1634),[32] Michael Dalton (d. 1644),[33] Sir John Davies (d. 1626),[34] Sir John Doderidge (d. 1628),[35] Sir William Dugdale (d. 1686),[36] Thomas Egerton, Lord Ellesmere (d. 1617),[37] Sir Robert Filmer (d. 1653),[38] Heneage Finch, Lord Nottingham (d. 1682),[39] Sir

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RESOLUTIONS OF THE REVEREND JUDGES 47 (London, J. Wright & R. Chriswell 1680), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 134:8 (Univ. Microfilms Int'l) (commenting on the forementioned statute, that "the party attained [arrested] was still under that Protection which the Law of Nature giveth to the King, which he explains to be such a Protection as a person attainted of Felony or Treason is under . . . so that if any man had killed him without Warrant, he should have been punished by Law as a manslayer: And this sort of Protection by the Law of Nature . . . is *indelebilis & immutabilis*, which the Parliament could not take away") (original spelling).

32. 1 J. H. THOMAS, SYSTEMATIC ARRANGEMENT OF LORD COKE'S FIRST INSTITUTE OF THE LAWS OF ENGLAND (photo. reprint, Hein 1986) (1836) (listing the Law of Nature as one of the "divers Laws within the realm of England") (original spelling); *see also* ALLEN D. BOYER, SIR EDWARD COKE AND THE ELIZABETHAN AGE 85-87 (2003) (containing a more cautious characterization); J. W. TUBBS, THE COMMON LAW MIND: MEDIEVAL AND EARLY MODERN CONCEPTIONS 163-65 (2000); Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1691-93 (1994).

33. MICHAEL DALTON, COUNTREY JUSTICE 1 (P. R. Glazebrook ed., Professional Books Ltd. 1973) (1618), (speaking of the common laws as "receiuing principally their Groundes from the Lawes of God, and Nature") (original spelling).

34. JOHN DAVIS, *Preface* to LES REPORTS DES CASES & MATTERS EN LEY, RESOLVES & ADJUDGES EN LES COURTS DEL ROY EN IRELAND [THE REPORTS OF CASES AND MATTERS IN LAW, RESOLVED AND JUDGED IN THE COURTS OF THE KING IN IRELAND] (London, E. Flesher, J. Steater & H. Twyford 1674), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 488:2 (Univ. Microfilms Int'l) ("Law of Nature, which is the root and touchstone of all good Laws . . . .").

35. JOHN DODERIDGE, THE ENGLISH LAWYER: DESCRIBING A METHOD FOR THE MANAGING OF THE LAWES OF THIS LAND 191 (photo. reprint 1973) (1631) (endorsing and giving examples of the force of the law of nature in practice).

36. WILLIAM DUGDALE, ORIGINES JURIDICIALES: OR, HISTORICAL MEMORIALS OF THE ENGLISH LAWS, COURTS OF JUSTICE, FORMS OF TYALL, PUNISHMENT IN CASES CRIMINAL, LAW WRITERS, LAW BOOKS, GRANTS AND SETTLEMENTS OF ESTATES, DEGREE OF SERJEANT, INNES OF COURT AND CHANCERY 3 (London, F. & T. Warren 1666) (approving Sir John Fortescue's view that the common law was grounded upon the Law of God and the Law of Nature).

37. THOMAS LORD ELLESMERE, CERTAINE OBSERVATIONS CONCERNING THE OFFICE OF THE LORD CHANCELLOR 111 (London, 1651) (considering cases in Chancery involving foreign merchants to be determined *secundum legem naturae*).

38. ROBERT FILMER, *Patriarcha: Or, the Natural Power of Kings* 3 (1680), *in* THE FREE-HOLDERS GRAND INQUEST, TOUCHING OUR SOVEREIGN LORD THE KING AND HIS PARLIAMENT § VI (London, 1684) (considering government by kings ordained by the Scriptures, ancient practice, and the law of nature).

39. 2 LORD NOTTINGHAM'S CHANCERY CASES 643 (1677), *reprinted in* 73 PUBLICATIONS OF THE SELDEN SOC'Y 481, 484-85 (D.E.C. Yale ed. 1961) (1677) (considering the parental obligation to provide for children under natural law used to justify the common law's rule that title to land descends but does not ascend).

Henry Finch (d. 1625),[40] Fleta (fl. 1290),[41] Sir John Fortescue (d. 1479),[42] Sir Michael Foster (d. 1763),[43]Abraham Fraunce (d. 1592/93),[44] Sir Geoffrey Gilbert (d. 1726),[45] Edward Hake (d.c. 1604),[46] Sir Matthew Hale (d. 1676),[47] Sir Christopher Hatton (d. 1591),[48] William Hawkins (d. 1750),[49] Sir John Holt (d. 1710),[50] Giles Jacob (d. 1744),[51] David Jenkins (d. 1663),[52] William Lambarde (d. 1601),[53] Sir

40. HENRY FINCH, LAW: OR, A DISCOURSE THEREOF IN FOUR BOOKS, 3-4 (Augustus M. Kelly Publishers 1969) (1759) (defining the Law of Nature as "fixed in man's nature, which ministreth common principles of good and evil") (original spelling).

41. 3 FLETA, *reprinted in* 89 PUBLICATIONS OF THE SELDEN SOC'Y 1, 2 (H. G. Richardson & G. O. Sayles eds. & trans., 1972) (considering the law of possession and ownership of things acquired under natural law).

42. JOHN FORTESCUE, THE GOVERNANCE OF ENGLAND 117 (Charles Plummer ed., Lawbook Exchange 1999) (1885) (Kings do wrong if they do "any thynge ayenst the lawe of God, or ayenst [the] lawe off nature.") (original spelling). He was also the author of a work devoted to the subject, *De Natura Legis Naturae*, printed in SIR JOHN FORTESCUE, THE WORKS OF SIR JOHN FORTESCUE, KNIGHT, CHIEF JUSTICE OF ENGLAND AND LORD CHANCELLOR TO KING HENRY THE SIXTH (Thomas Lord Clermont ed., 1869) (accessed by the author). *See also* E. F. JACOB, SIR JOHN FORTESCUE AND THE LAW OF NATURE (1934) (accessed by the author).

43. MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY 273 (Michael Dodson ed., Dublin, James Moore 2d ed. cor. 1791) (stating that the right to plea in self-defense "in these cases [homicides founded in necessity] is founded in the law of nature").

44. *The Lawiers Logike, Exemplifying the Praecepts of Logike by the Practice of the Common Lawe* 2 (2d prtg. 1969) (1588) (stating that law and logic "must be conformable unto those sparkes of naturall reason . . . appearing in the monuments and disputations of excellent authors") (original spelling) (accessed by the author).

45. GEOFFREY GILBERT, THE LAW OF EVIDENCE 143 (London 2d ed., cor. 1760) (stating rule against self-incrimination and adding, "in this we do certainly follow the Law of Nature") (accessed by the author).

46. EDWARD HAKE, EPIEIKEIA: A DIALOGUE ON EQUITY IN THREE PARTS 108 (D.E.C. Yale ed. 1953) (endorsing the view that "[i]n matters dowbtfull" courts should "resorte thereuppon to the lawe of Nature which is reason and the grownde of all lawes") (original spelling).

47. 1 MATTHEW HALE, HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN 51 (George Wilson ed., Sollom Emlyn 1778) (citing "the law of nature, and necessity" as source of pleas of self-defense in criminal homicide cases).

48. CHRISTOPHER HATTON, A TREATISE CONCERNING STATUTES 53 (London, Richard Tonson 1677), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 420:8 (Univ. Microfilms Int'l) ("for Reason hath been so forcible against the words of Statutes, that even in the Prince's Prerogative, the words of Statutes have been controlled").

49. 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 540 (London, 8th ed. 1824) (stating that a prior royal pardon was ineffective to render lawful an act that is *malum in se* "as being against the law of nature").

50. *See* Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091-93 (1994).

51. GILES JACOB, A NEW LAW DICTIONARY (London, E. & R. Nutt, & R. Gosling 1729) (including as part of its definition of "Law" a proposition stating "all is founded on the Law of Nature or Reason, and the revealed law of God") (emphasis omitted).

Thomas Littleton (d. 1481),[54] Walter Mantell (17th century),[55] Sir Thomas More (d. 1535),[56] William Murray, Lord Mansfield (d. 1793),[57] Roger North (d. 1734),[58] William Noy (d. 1634),[59] Sir Roger Owen (d. 1617),[60] Edmund Plowden (d. 1585),[61] Robert Powell (fl. 1609-42),[62] Charles Pratt, Lord Camden (d. 1794),[63] William Prynne (d. 1669),[64]

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52. DAVID JENKINS, THE WORKS OF THAT GRAVE AND LEARNED LAWYER JUDGE JENKINS, PRISONER IN NEWGATE, UPON DIVERS STATUTES CONCERNING THE LIBERTY AND FREEDOME OF THE SUBJECT 139-40 (London 1648), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 108:8 (Univ. Microfilms Int'l) (stating that the acts of Parliament against reason or repugnant or impossible to be performed are void) (original spelling).

53. WILLIAM LAMBARDE, ARCHEION: OR, A DISCOURSE UPON THE HIGH COURTS OF JUSTICE IN ENGLAND 55 (Charles H. McIlwain & Paul L. Ward eds., Harvard Univ. Press 1957) (1591) (stating that the "Law of Humanitie, Reason, and Nature" has preserved mankind from the "shipwracke" of Adam's Fall) (emphasis omitted) (original spelling).

54. THOMAS LITTLETON, LES TENURES DU MONSIEUR LITTLETON, cc. 209, 212 (London 1581), 46-47 (stating the prescriptive usage "si ceo soit encounter reason ceo ne doit ester allowe devant Judges": if it is to encounter reason it is not to be allowed in front of Judges) (accessed by the author).

55. WALTER MANTELL, A SHORT TREATISE OF THE LAWES OF ENGLAND WITH THE JURISDICTION OF THE HIGH COURT OF PARLIAMENT, WITH THE LIBERTIES AND FREEDOMES OF THE SUBJECTS 9-10 (London, Richard Cotes 1644) ("You shall understand that all humane lawes are either the law of Nature, or Customes, or Statutes.") (original spelling).

56. THOMAS MORE, *A Dialogue Concerning Heresies*, *in* 6 THE COMPLETE WORKS OF ST. THOMAS MORE 414-15 (Thomas M. C. Lawler et al. eds., 1981) ("nature / reason / and goddys byheste byndeth") (original spelling).

57. LORD MANSFIELD ET AL., *Letter the Fourth*, *in* TREATISE ON THE STUDY OF THE LAW (London, Harrison, Cluse, and Co. 1797), *reprinted in* 26 CLASSICS IN LEGAL HISTORY 49 (Roy M. Mersky & J. Myron Jacobstein eds., 1974) (making a recommendation to study "the law of nations, which is partly founded on the law of nature, and partly positive").

58. ROGER NORTH, A DISCOURSE OF THE POOR 19-20 (London 1753) (citing Cicero approvingly, for the proposition that reason was a foundation of law and that an Act of Parliament without reason was "void, as being contrary to a Principle of Justice").

59. WILLIAM NOY, THE GROUNDS AND MAXIMS, AND ALSO AN ANALYSIS OF THE ENGLISH LAWS 13 (Charles Barton ed., London 7th ed. 1808) (1641).

60. HISTORY OF THE COMMON LAW, British Library, London, Harl. MS. 1572, fols. 11v-12 (discussing the role of "a natural instinct" implanted in every creature by "the God of nature") (accessed by the author at the British Library).

61. EDMUND PLOWDEN, THE COMMENTARIES *304 ("[W]e ought not to think that the Founders of our Law were remiss in searching after the Law of Nature, or that they were ignorant of it.") (citing Sharington v. Strotton, 75 Eng. Rep. 454 (Q.B. 1565)).

62. ROBERT POWELL, *An Explanation of the Ancient Oath of Legeance*, *in* A TREATISE OF THE ANTIQUITY, AUTHORITY, USES AND JURISDICTION OF THE ANCIENT COURTS OF LEET, OR VIEW OF FRANCK-PLEDGE AND OF SUBORDINATION OF GOVERNMENT DERIVED FROM THE INSTITUTION OF MOSES, THE FIRST LEGISLATOR 169, 169-71 (London, R. B. 1641), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 1676:9 (Univ. Microfilms Int'l) (stating that allegiance and duty to the prince "are part of the Law of Nature, whereto all Nations have consented") (original spelling).

63. *See* ERNEST BARKER, *Natural Law and the American Revolution*, *in* TRADITIONS OF CIVILITY: EIGHT ESSAYS 263, 317 (Archon Books 1967) (1948) (quoting an appeal made by Lord

Ferdinando Pulton (d. 1618),[65] Francis Rodes (d. 1589),[66] Christopher St. German (d. 1540),[67] John Selden (d. 1654),[68] William Sheppard (d. 1674),[69] John Somers (d. 1716),[70] Sir Henry Spelman (d. 1641),[71] Sir William Staunford (d. 1558),[72] William Styles (d. 1679),[73] Sir John Vaughan (d. 1674),[74] William West (d. 1598),[75] Bulstrode Whitelocke

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Camden in the House of Lords in 1766, on behalf of the American colonists, to "the natural law of mankind and the immutable laws of justice").

64. WILLIAM PRYNNE, BRIEF ANIMADVERSIONS ON, AMENDMENTS OF, & ADDITIONAL EXPLANATORY RECORDS TO, THE FOURTH PART OF THE INSTITUTES OF THE LAWES OF ENGLAND, CONCERNING THE JURISDICTION OF THE COURTS 97 (London, Thomas Ratcliffe & Thomas Daniel 1669), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 222:15 (Univ. Microfilms Int'l) ("Because the Law (guided by nature and reason) cannot feign or allow things that are against nature, reason, nor admit of fictions that are contradictory to each other, yea false and impossible . . . .") (emphasis omitted) (original spelling).

65. FERDINANDO PULTON, *Preface* to DE PACE REGIS ET REGNI [ON THE PEACE OF KING AND KINGDOM] (London, Companie of Stationers 1609) (stating the need for specific criminal laws to augment "the lawes of God, of nature, or reason") (original spelling).

66. Francis Rodes, *Preface* to *Reading on Visus Francplegii* (1976), *described in* J. H. Baker, *Rodes*, *in* NEW DICTIONARY OF NATIONAL BIOGRAPHY (2004) (preface on relevance of the law of nature to English law) (accessed by the author).

67. CHRISTOPHER ST. GERMAN, ST. GERMAN'S DOCTOR AND STUDENT, *in* 91 PUBLICATIONS OF THE SELDEN SOC'Y 13 (T. F. T. Plucknett & J. L. Barton eds., 1974) ("And this law ought to be kept as well among Jewes and gentyles as amonge crysten men. And this is the law which among the learned in English law is called the law of reason.") (original spelling).

68. JOHN SELDEN, TABLE TALK OF JOHN SELDEN 69-70 (Sir Fredrick Pollock ed., Quaritch 1927) (1689) (discussing God as the ultimate source of the law of nature). Selden was also author of a treatise on the subject: *De Jure Naturali et Gentium Juxta Disciplinam Ebaeorum* (1640).

69. *See* NANCY L. MATTHEWS, WILLIAM SHEPPARD: CROMWELL'S LAW REFORMER 5 (1984) (citing WILLIAM SHEPPARD, AN EPITOME OF ALL THE COMMON AND STATUTE LAWS OF THIS NATION, NOW IN FORCE 683 (London 1656), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 849:17 (Univ. Microfilms Int'l) ("[Common custom] is founded especially upon certain Principles or Maxims made out of the Law of God, and the Law of Reason.")).

70. JOHN SOMERS, JURA POPULI ANGLICANI: OR, THE SUBJECT'S RIGHT OF PETITIONING SET FORTH 30-31 (London 1701) (discussing the right of the people to petition the government for redress of grievances founded on the law of nature); *see also* Hamburger, *supra* note 50, at 2102.

71. HENRY SPELMAN, *Larger Work on Tythes*, *in* THE ENGLISH WORKS OF SIR HENRY SPELMAN 110-11 (Edmund Gibson ed., 2d ed. 1727) (discussing the Law of Nature as source of legal obligations to give offerings to God and, by implication, to the clergy) (accessed by the author).

72. WILLIAM STAUNFORD, LES PLEES DEL CORON [THE PLEAS OF THE CROWN] 53-54 (P. R. Glazebrook ed., Prof'l Books photo. reprint 1971) (1557) (containing a section entitled *De Justice* using language taken from civil law sources based on the law of nature to describe the character of English justice).

73. WILLIAM STYLE, STYLES'S PRACTICAL REGISTER 395 (4th ed. 1707) ("For the Common Law is not contradictory in any thing to the Law of Nature, but agrees with it in all things . . . .").

74. Harrison v. Doctor Burwell (CP 1670), *in* SIR JOHN VAUGHAN, THE REPORTS AND ARGUMENTS OF THAT LEARNED JUDGE SIR JOHN VAUGHAN 226-27 (London, Thomas Roycrost 1677) (defining transgressions when men "violate Laws coeval with their original being" and

(d. 1675),[76] Thomas Williams (d. 1566),[77] Edmund Wingate (d. 1656),[78] Edward Wynne (d. 1784),[79] and lastly (although out of order) Anonymous.[80] The list is long, and no doubt could be made longer.

But wait! The length of the list should not overwhelm us. It should not even convince us that natural law was often on the mind of common lawyers, although the list does seem substantial enough to show that Holmes's dismissive view of natural law was not shared by many of them.[81] On the contrary, they seem to have accepted it as a component part of the laws of England. They did not regard it as an exotic foreign import, but rather as a legitimate source of English law. At the same time, closer examination shows considerable variation in how much attention these English lawyers devoted to natural law. Some of them mentioned it in a quite superficial way, usually only at the start of a treatise. William Sheppard is an example.[82] His many works on specific subjects like deeds or libel and slander made minimal use of ideas taken from the traditions of the *ius commune*. Others, however, went farther into the available learning. They

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referring to Selden's treatment of natural law as "given in the beginning to all Mankind") (original spelling); *see also* J. Gwynn Williams, *Sir John Vaughan of Trawscoed*, 8 NAT'L LIBRARY OF WALES J. 121, 140-41 (1953).

75. WILLIAM WEST, *Of the Chancery* § 2, *in* 2 SYMBOLEOGRAPHY 174 (London, Miles Flesher & Robert Young 1641) (giving examples of general rules given "by the Law of Nature itself, better and more rightfull cannot be given") (citation omitted) (original spelling).

76. BULSTRODE WHITELOCKE, ESSAYS ECCLESIASTICAL AND CIVIL (London 1706) (writing in defense of liberty of conscience in religious matters: "Law of Reason is to do things as near as we can like unto God") (accessed by the author).

77. THOMAS WILLIAMS, THE EXCELLENCY AND PRÆHEMINENCE OF THE LAW OF ENGLAND 9 (London, R. & E. Atkins 1680), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 481:5 (Univ. Microfilms Int'l) ("the Law of Nature, which is the Parent of all good Lawes in the World") (original spelling).

78. EDMUND WINGATE, *Preface* to THE BODY OF THE COMMON LAW OF ENGLAND (London, R. & W. Leybourne 1655), *microformed on* EARLY ENGLISH BOOKS, 1641-1700, at 1493:22 (Univ. Microfilms Int'l) (asserting that the common laws of England are "subject to be altered by two other Laws, viz. the Statute-law, and the Law of Reason") (emphasis omitted).

79. 1 EDWARD WYNNE, EUNOMUS: OR, DIALOGUES CONCERNING THE LAW AND CONSTITUTION OF ENGLAND, 69, Dial. I § 17 (London, 2d ed. 1785) ("The law of nature not only should be studied as the ground of the great and fundamental laws in all societies, but because the state of nature itself does still subsist in many respects.").

80. TRACT ON LAW AND ESPECIALLY THE LAW OF ENGLAND, British Library, London, Stowe MS. 159, fols. 303v-04 (describing the Lawe of Reason as "written in the hartes of all men") (original spelling) (accessed by the author at the British Library).

81. *See* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 20 (1998) (stating that the English view of natural law was carried over to America).

82. *See supra* note 69 and accompanying text.

divided natural law into its two primary aspects and at greater length entered into the task of describing its precepts and limitations. Christopher St. German is an example.[83] Natural law served as a frequent starting point for his analysis of English law. Still others endorsed it and went on to provide examples of how its precepts were expressed in rules and maxims of the common law. Sir John Doderidge is an example.[84] It served his purposes.

One other notable feature worth mentioning arises from examining the lawyers on the list. Several of them made the useful observation that they and other English common lawyers did not customarily use the terms "Law of Nature" or "Natural Law" in so many words. Instead they looked to what "reason" dictated or what would avoid "inconvenience" in practice, thereby applying the same general principles as did the civilians who expressly cited natural law.[85] The words were different, but the substance was not. That attitude is evident in vocabulary used in many of the English cases.

What about these cases? Aren't they what count? And what do they say? Enough of the anemic and abstract legal theories these English lawyers added to their treatises. What about the cases, where the heart of the common law lay—and beat? I do want to come to the case law, but before doing so we must stop for a moment, or maybe more than a moment, to understand the role natural law was *supposed* to play in the adjudication of disputes. This question is particularly important in understanding the protection it offered to human rights, which is the second subject of this article.

NATURAL LAW AND HUMAN RIGHTS IN THE *IUS COMMUNE*

Four points need to be made under the heading of natural law and human rights in the European legal tradition. First, no one can doubt that the concept of a human right occupied a place in the thought of jurists attached to natural law traditions. Englishmen made the connection,[86] and so as a matter of course did the jurists who wrote

83. *See supra* note 67 and accompanying text.

84. *See supra* note 35 and accompanying text.

85. *See, e.g.*, ST. GERMAN, *supra* note 67, at 32-39. For further examples, see JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 149-51 (1991).

86. *See, e.g.*, GRANVILLE SHARP, A DECLARATION OF THE PEOPLE'S NATURAL RIGHT TO A SHARE IN THE LEGISLATURE 17 (l774) (stating that the right of representation of the people is shown by "the first maxims or principles of reason").

about the *ius commune*. Charles Reid's book, which appeared in print just recently, shows this with clarity and detail.[87] Its subtitle is *Rights and Domestic Relations in Medieval Canon Law*, and it has the merit of showing how ubiquitous fundamental rights were in a vital part of the medieval law.[88] The nature and scope of the rights recognized in the medieval Roman and canon laws were not identical with the fundamental human rights we today recognize under the American Constitution or the European Convention on Human Rights.[89] As much has changed as has remained the same. It is nonetheless fair to take it as established that the legal world where the tenets of natural law were taken seriously was one that recognized the existence of human rights.

Second, this tradition contains emphatic statements that any statute, law, or custom that ran contrary to the law of nature was not a binding law. The commentators assumed that all good positive laws "grew out of" or were "emanations" of the law of nature. Statutes should add sanctions and specificity, but their purpose and substance should not deviate from natural law. Hence it followed that if a particular enactment or custom contradicted the law of nature, something must have gone wrong. Gratian's *Decretum* (c. 1140) and its ordinary gloss stated the basic principles. A custom of the people, if an obstacle to reason and truth, cannot be accepted as law.[90] Similarly, a statute that contradicted a fundamental principle of

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87. CHARLES J. REID, JR., POWER OVER THE BODY, EQUALITY IN THE FAMILY: RIGHTS AND DOMESTIC RELATIONS IN MEDIEVAL CANON LAW (2004); *see also* Charles J. Reid, Jr., *The Canonistic Contribution to the Western Rights Tradition*, 33 B.C. L. REV. 37 (1991).

88. *See also* BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150-1625 (1997); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979); HEINZ-JÜRGEN BÖHME, POLITISCHE RECHTE DES EINZELNEN IN DER NATURRECHTSLEHRE DES 18. JAHRHUNDERTS UND IN DER STAATSTHEORIE DES FRÜHKONSTITUTIONALISMUS [POLITICAL RIGHTS PARTICULARLY IN THE NATURAL LAW DOCTRINE OF THE EIGHTEENTH CENTURY AND THE STATE THEORY OF EARLY CONSTITUTIONALISM] (1993); ARTHUR P. MONAHAN, FROM PERSONAL DUTIES TOWARDS PERSONAL RIGHTS: LATE MEDIEVAL AND EARLY MODERN POLITICAL THOUGHT, 1300-1600 (1994); JOHN T. NOONAN, JR., *Human Rights and Canon Law*, *in* CANONS AND CANONISTS IN CONTEXT 339 (1997); KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION (1993).

89. *See* KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT 5-7 (1996). I have tried to sketch out some of the differences in R. H. Helmholz, *Natural Human Rights: The Perspective of the* Ius Commune, 52 CATH. U. L. REV. 301 (2003).

90. *See* D.8 c.7, *reprinted in* GRATIAN, THE TREATISE ON LAWS 27 (James Gordley & Augustine Thompson trans., 1993).

justice was not a true law.[91] From there it was but an easy step to conclude that the emperor, though given jurisdiction over all men, "had no power to take away those things that were a part of the law of nature."[92] Even the pope, though governor of Christians (and in the view of some, even more), was subjected to limits set by natural law.[93] As Aquinas would put it, "[E]very human law [that] is incompatible with the natural law, will not be law, but a perversion of the law."[94] Thus, it seems, where human rights were based upon the teachings of natural law, they enjoyed a protected status in the *ius commune*. The rights to marry, to basic sustenance, and to some form of legal due process were not rights that could be taken away. Abridged maybe, but not entirely taken away.

Third, despite these strong statements about of the invalidity of laws that contravened natural law, the medieval jurists did not take what seems to us to have been the natural next step. They did not endorse judicial review of legislation. A judge was not allowed to "strike down" a statute that seemed to him to contradict the tenets of natural law. To Americans, that power seems to follow inevitably from the premise. If a custom or statute contrary to natural law is invalid, must not a judge treat it as such? Must he not strike it down? In light of our own constitutional history, the result seems axiomatic. Anything less would be a denial of fundamental human rights enshrined in our basic law.

And yet it was not so for the jurists of earlier centuries. That a statute violated natural law did not mean that it could be declared invalid by a judge. For this there were at least three reasons. One was that it would have stood the right order of government on its head.[95] As Blackstone put it, "[T]hat were to set the judicial power

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91. *See* D.5 c.1, *reprinted in* GRATIAN, *supra* note 90, at 16.

92. *See, e.g.*, PANORMITANUS, *Commentaria in* LIBROS DECRETALIUM ad X 1.2.7, no. 11 (Venice 1615) ("imperatorem non posse tollere ea quae sunt de iure naturae") (accessed by the author).

93. *E.g.*, D.13 c.1, *reprinted in* GRATIAN, *supra* note 90, at 49 (dealing with dispensation from positive laws and chosing the lesser of two evils).

94. THOMAS AQUINAS, SUMMA THEOLOGICA, Part I-II, Question 95, Article 1 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911) [hereinafter SUMMA THEOLOGICA].

95. It was a principle of the *ius commune* that the lesser authority should not sit in judgment over the greater. *See, e.g.*, HOSTIENSIS, SUMMA AUREA, Lib. II, tit. *De Iudiciis* [*On Judgments*], no. 5 (accessed by the author). This principle stood in the way of judicial review of legislation. For an English expression of this view, see RICHARD WOODDESON, ELEMENTS OF

above that of the legislature, which would be subversive of all government."[96] Some laws, it is true, no judge might enforce—a statute directly against God's commands, for example. But this was a small group, one not often encountered. Otherwise, judicial review in the modern sense did not exist.[97] Perhaps the right of remonstrance exercised by the French *Parlements* came close, but even there final authority rested with the monarch.[98] European courts might, it is true, refuse to accept the legitimacy of laws made by other sovereigns—the *Rota Romana* refusing to recognize the validity of a secular law, or the *Parlement de Paris* rejecting an attempt to enforce a canon from the *Corpus iuris canonici*. Sometimes the judges in these courts said they were acting to enforce principles of natural justice, but this was not equivalent to what we think of as judicial review of the legislative acts of the court's own sovereign.[99] Early jurists possessed no clear notion of separation of powers, and judges, as subordinate officers in a commonwealth, were not vouchsafed a right to nullify the considered acts of their governors.[100]

JURISPRUDENCE 81 (Dublin, H. Fitzpatrick 1792) ("[I]f [the magistrate's] proceedings are to be decided upon by their subjects, government and subordination cease.").

96. 1 BLACKSTONE, *supra* note 20, at 91. Lord Ellesmere also observed, "[I]t is *Magis Congruum* that Acts of parliament should be corrected by the same penn that drew theym, thayn to be dasht to peeces by the opinion of a few Iudges," quoted in LOUIS A. KNAFLA, LAW AND POLITICS IN JACOBEAN ENGLAND: THE TRACTS OF LORD CHANCELLOR ELLESMERE 307 (1977) (original spelling). *See also* VAUGHAN, *supra* note 74, at 38 (citing Littleton and Coke holding that law cannot be inconvenient and unequitable, but adding that these "defects, if they happen in the law, can only be remedied by Parliament"). The hesitation of Justice Iredell, in disagreement with the majority's reasoning in *Calder v. Bull* is instructive on this score. Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J., concurring).

97. *See* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 24-27 (2001).

98. *See* FRANÇOIS OLIVIER-MARTIN, HISTOIRE DU DROIT FRANÇAIS DES ORIGINES À LA RÉVOLUTION [HISTORY OF FRENCH LAW FROM ITS ORIGINS TO THE REVOLUTION] 545-47 (1948); J. H. SHENNAN, THE PARLEMENT OF PARIS 160-64 (1968).

99. *See* Laurens Winkel, *A Note on* Regulae Iuris *in Roman Law and on Dworkin's Distinction between Rules and Principles*, *in* CRITICAL STUDIES IN ANCIENT LAW, COMPARATIVE LAW AND LEGAL HISTORY 413, 416 (John W. Cairns & Olivia F. Robinson eds., 2001) (describing the various shades of meaning given to the concept of validity); Hamburger, *supra* note 50, at 2092-93 (1994); Edward Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 375 (1929).

100. For commentary, see Helen K. 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. 421, 427-35 (1991) (examining the writings of Grotius, Pufendorf, Burlamaqui, and Vattel and finding no support for the theory that judges possessed the power to declare statutes void if contrary to natural law). *But see generally* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987) (Michael wrote in response to this article by Sherry).

A further reason is that judicial invalidation of statutes was not treated as a necessary consequence of the law of nature itself. Natural law was not regarded as a constitution in the American sense. It had no written text whose words could be parsed and compared to challenged statutes. It admitted a variety of interpretations and it allowed a range of limitations.[101] Natural law might be restricted and modified.[102] Indeed, the organization of society itself compelled the abridgement of natural rights,[103] and it often happened that men did not live in accord with nature's plan.[104]

Perhaps the cleanest example of the limited effect of natural law is slavery—cleanest because it was the most dramatic and because it is the hardest for us to sympathize with, although several others existed.[105] Men were free by the law of nature,[106] and yet everywhere they were enslaved, kept in slavery by innumerable provisions of the positive law. As Lord Mansfield said in *Somerset's Case*, "[S]lavery is of such a nature, that it is incapable of being introduced . . . but only [by] positive law."[107] That had happened. For the medieval lawyers, Roman law, filled as it was with recognitions of slavery's existence and legality, provided a textbook example of this uncomfortable

101. *See generally* Edward H. Levi, *The Natural Law, Precedent, and Thurman Arnold*, 24 VA. L. REV. 587 (1938). As Levi's article suggests, it would be too strong to say that statutes were ever thought merely "declaratory" of natural law; the law of nature was not so specific in its dictates. *Cf.* Morris S. Arnold, *Statutes as Judgments: The Natural Law Theory of Parliamentary Activity in Medieval England*, 126 U. PA. L. REV. 329, 329 (1977) (The term "natural law" is embodied in the principle that "all legislation is declaratory of pre-exisiting rights" which the author set out to demonstrate as "generally misconceived.") (emphasis omitted).

102. *See* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGE 76 (Frederic William Maitland trans., 5th ed. 1987); Walter Berns, *Foreword: Natural Law, Natural Rights*, 61 U. CINN. L. REV. 1, 3 (1992).

103. *See, e.g.*, Losee v. Buchanan, 51 N.Y. 476, 484 (1873).

104. John Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004 WIS. L. REV. 905, 930.

105. For example, it was said that a child's right to inherit from a parent was one that a statute or custom could diminish but, unless there was good cause, not wholly take away. *See* PANORMITANUS, *supra* note 92, at X 3.26.16 (accessed by the author).

106. DIG. 1.1.4; J. INST. 1.3.2; DIG. 12.6.64.

107. Somerset v. Stewart, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1722).

position.[108] Roman law recognized slavery's reality, but at the same time stated that it was contrary to natural law.[109]

How could the two be reconciled? This is not the occasion for examining the variety of possible answers, but a couple will show something about the relationship between human rights and the natural law.[110] The standard response to the apparent contradiction was to assert that wars were responsible for slavery. It was undoubtedly preferable to be alive and enslaved than to be dead and free, and slavery was the inevitable and preferable result.[111] To the objection that the law of nature was immutable and that continuation of slavery seemed to mock that quality, it was said that the law of nature indeed remained true, because some men had always remained free. The law of nature could be remitted as to some, the jurists said, but never as to all men.[112] By such forms of reasoning, a measure of harmony between human laws and the dictates of natural law was preserved. It left little space for judicial invalidation of statutes permitting enslavement of human beings. And, of course, little occurred.

A final reason that judicial invalidation of statutes did not happen was that it was unnecessary in most instances. Much less legislation existed in earlier centuries, of course. And when it did, other, less dramatic, means existed to do justice and to implement the substance of the law of nature. Judges acting within the traditions of the *ius commune* enjoyed a limited, but real, autonomy to give sentences *secundum naturalem aequitatem* rather than *secundum rigorem iuris*.[113] They interpreted statutes to avoid clashes with natural law

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108. *See* R. Aubenas, *Inconscience de juristes ou pédantisme malfaisant? Un chapitre d'histoire juridico-sociale XIe-XVe siècle* [*Inattentiveness of Jurists or Pernicious Pedantry? A Chapter from the Juridico-Social History of the 11th-15th Centuries*], 56 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 215 (1978) (accessed by the author).

109. *See* DIG. 1.1.4.

110. *See generally, e.g.*, John B. Killoran, *Aquinas and Vitoria: Two Perspectives on Slavery*, *in* INTERNATIONAL CONGRESS OF MEDIEVAL STUDIES, THE MEDIEVAL TRADITION OF NATURAL LAW 87 (Harold J. Johnson ed., 1987) (finding a common foundation in Thomas Aquinas's and Francisco de Vitoria's otherwise contrasting views on slavery in their "moral appraisals" of it).

111. *See, e.g.*, J. INST. 1.3.3; DIG. 1.1.11; HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 435-47 (A.C. Campbell trans., M. Walter Dunne 1901) (1625).

112. PANORMITANUS, *supra* note 92, at X 3.30.34 ("[I]llud ius naturale quod omnes homines ab initio sint libri . . . immutatum est in quibusdam, sed non in omnibus; hoc enim fuit impossible quod omnes essent servi propter naturam correlativorum.") (accessed by the author).

113. CODE JUST. 3.1.8, DIG. 50.17.90; *see also* 1 ENNIO CORTESE, LA NORMA GIURIDICA [THE LEGAL NORM] 90-93 (1962).

principles.[114] The possibilities inherent in this approach are perhaps easiest to appreciate by taking the example of papal commands. It was not easily assumed by medieval lawyers that papal statutes were intended to work injustice. Exceptions were therefore read into statutes precisely because jurists took it for granted that the popes had wished to act in accordance with the principles of natural and divine law.[115] If one assumes that the sovereign wishes to have statutes read in light of natural law, that the legislator could not have intended to deviate from its paths, then there is rarely a need to invalidate the statutes themselves. Their interpretation provides the way to seeing that justice is done. It is the fact: "[I]nterpretation makes the law."[116]

The absence of judicial invalidation of statutes did not mean, therefore, that natural law played no part in the development of human rights. Natural law came into play at several points in the *ius commune*. It was a guide to the legislator, framing the objectives that statute law ought to achieve. It filled gaps in the law, places for which the law giver had made no provision but for which judges had to find answers. It gave the best means of construing unclear or "open-ended" commands from the legislator. It could determine whether a custom among those subject to the law passed the test of reasonability necessary to validate it. And it might even permit individuals to ignore the commands of a statute that violated natural law, although under quite limited circumstances. In other words, despite the absence of judicial review of legislation by which judges declared statutes invalid in the name of the law of nature, natural law

114. *See* Dr. Bonham's Case, 8 Co. Rep. 114, 77 Eng. Rep. 646 (K.B. 1610) (the most familiar example in the English common law). It is often cited as standing in favor of modern judicial review, but in fact it illustrates one way in which natural law was used in the interpretation of statutes; *see also* Day v. Savadge, Hob. 85, 87a, 80 Eng. Rep. 235, 237 (C.P. 1614) (stating that "even an act of parliament, made against natural equity, as to make a man Judge in his own cause, is void in itself, for *jura naturae sunt immutabilia*"); J.W. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 30-47 (1955); Charles M. Gray, *Bonham's Case Reviewed*, 116 PROC. OF THE AM. PHIL. SOC'Y. 35 (1972); S. E. Thorne, *Dr. Bonham's Case*, 54 L.Q. REV. 543 (1938); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 HARV. L. REV. 30 (1926).

115. Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 NW. U. J. INT'L HUM. RTS. 3, ¶ 20 (2004), *at* http://www.law.northwestern.edu/journals/JIHR/v2/3 (using the happy phrase "presumption of righteous intentions" to describe judicial interpretation of statutes passed by the English Parliament); *see also* Louis L. Jaffe & Edith G. Henderson, *Judicial Review and the Rule of Law: Historical Origins*, 72 L.Q. REV. 345, 362-64 (1956).

116. *See* John T. Noonan, Jr., *Foreword: A Silk Purse?*, 101 MICH. L. REV. 2557, 2558 (2003); *see also* Sheffield v. Radcliff, Hob. 334, 346, 82 Eng. Rep. 36 (K.B. 1615) (containing a pertinent statement to this effect).

still played an important role in the administration of justice and the enforcement of human rights.

This approach was particularly effective in securing procedural safeguards for litigants: natural law guaranteed to the parties an opportunity to be heard, a privilege not to be forced to incriminate themselves, and the chance to present evidence and legal argument on their own behalf.[117] They were entitled to an impartial judge; otherwise, their trial was not justice at all. Rules and statutes were interpreted so as to protect these rights. And it went beyond procedural due process, even to the case of slavery. Statutes and private documents dealing with slavery were read to resolve doubts in favor of freedom. Hence arose the famous *favor libertatis* in the law. For instance, a master might prevent his slave from being ordained and thereby become entitled to his freedom, but he had to do so promptly and expressly, else his power over the former slave would be gone. The law provided many ways a slave might attain freedom,[118] but the jurists of the *ius commune* did not conclude that positive laws recognizing slavery could be declared void and slaves freed by judicial fiat. In the course of time, the argument would be made.[119] But even then, few men contended that judges could "strike down" the ordinances upon which that iniquitous institution was founded. The law of nature did not work that way, and only in an age of legal positivism could it be supposed that it must have.

You may also think, as I do, that the *favor libertatis* endorsed in the law of nature and applied in the *ius commune* therefore left something to be desired as a way of protecting human freedom. It was not inconsequential; it was not theoretical froth, but neither was it a constitutional trump card. Say all we can about the existence of natural rights under the *ius commune*, "[s]till, the limitations stand

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117. *See, e.g.*, Kenneth Pennington, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, 3 A ENNIO CORTESI 59 (Domenico Maffei ed., 2001) (accessed by author); R. H. Helmholz, *Origins of the Privilege Against Self-Incrimination: The Role of the European* Ius Commune, 65 N.Y.U. L. REV. 962 (1990).

118. *See, e.g.*, HOSTIENSIS, SUMMA AUREA, Lib. I, tit. *De servis non ordinandis* [*On the fact that slaves should not be ordained*], no. 5 (Venice 1574), 232 ("Qualiter servus fiat liber? Multis modis" (going on to list several ways)) (accessed by the author); s*ee also id.* at no. 11 (stating an alternate formulation on eleven different forms manumission could take) (accessed by the author).

119. BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW 212-28 (1931).

out."[120] In discussing statutes that contradicted natural law principles, we will do better to stick with a minimalist description of a particular law's unlawful character when not in harmony with natural law. As the philosophers said, a custom or statute contrary to natural law cannot be law "in the fullest sense,"[121] or as Aquinas put it, such a statute will be "a perversion of the law."[122]

THE ENGLISH CASE LAW

The third topic is case law. This section will be very brief, in part because I have more work to do. The question is whether the acceptance of the law of nature by English common lawyers, considered in the context of then contemporary understanding of natural law, meant anything in practice. Did natural law have any impact on the English case law? And, in particular, did natural law play any role in the assertion of human rights in the common law?

The evidence on the point is equivocal. An anonymous late thirteenth-century commentator on Bracton said, "In England less attention is paid to natural law than anywhere else in the world."[123] However, there is also evidence on the other side. Norman Doe has made a careful study of the Yearbooks, the principal source of English case law from the end of the thirteenth century to the first third of the sixteenth, finding some express recognition of the law of nature as playing a part in English law. For example, in a case from 1468, William Yelverton, one of the judges of the King's Bench, was recorded as speaking of the *ley de nature* as "the ground of all laws" and therefore to be adopted in cases where no settled rule existed.[124] The English law also incorporated a *favor libertatis* very much like

120. Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117, 127 (2004).

121. *See* BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 72-73 (1996) ("[I]t is normally a mistake to try to evaluate the discussions of writers from distant times with the perspective of modern analytical jurisprudence.").

122. SUMMA THEOLOGICA, *supra* note 94, Part I-II, Question 95, Article 2.

123. *Select Passages from Bracton and Azo*, *in* 8 PUBLICATIONS OF THE SELDEN SOC'Y 125 (F.W. Maitland ed., 1894) ("[I]n Anglia minus curatur de jure naturali quam in aliqua regione de mundo.").

124. Y.B. (1468) Mich. 8 Edw. IV, f. 12b (pl. 9) ("ley de nature que est le ground de touts leys") (accessed by the author); *see also* NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 70-71 (1990); S. B. CHRIMES, ENGLISH CONSTITUTIONAL IDEAS IN THE FIFTEENTH CENTURY 196-211 (1936); GOUGH, *supra* note 114, at 12-29; D. J. Ibbetson, *Natural Law and Common Law*, 5 EDINBURGH L. REV. 4 (2001); THIEME, *supra* note 10, at 32-38.

that endorsed as part of the law of nature in the *ius commune*.[125] And natural law thinking played a role in some of the common law's most famous cases: *Calvin's Case*,[126] *Somerset's Case*,[127] and *Moses v. Macferlan*,[128] for example.

However, nothing is conclusively proven by these examples. The *favor libertatis* may be coincidence, and Doe also found that express invocation of the law of nature was not particularly frequent in the medieval cases. My own study of the cases from the post-Yearbook era, although still far from complete, supports Doe's conclusions. The common lawyers used the concept of reason in interpreting statutes and deciding cases more often than they made explicit reference to the law of nature. The former was exactly what St. German said the common lawyers did in making use of ideas from the traditions of natural law,[129] and the habit endured long after 1500.[130] But it may be that the common lawyers were simply using a practical tool they had at their disposal without the slightest thought of the law of nature.

On the other hand, the matter ought to be looked at without anachronism. And the opposite has sometimes happened in the study of the history of the establishment of freedom from arbitrary government in England during the seventeenth century. It is commonly asked whether the lawyers who argued for these rights

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125. *See, e.g.*, William Hawkins, *The Old Tenures*, *in* EDWARD COKE & WILLIAM HAWKINS, THREE LAW TRACTS 313 (London, His Majesty's Law-Printer 1764) (noting a procedural rule and commenting, "for the law is such in favour of liberty") (original spelling). For modern commentary, see PAUL HYAMS, KINGS, LORDS AND PEASANTS IN MEDIEVAL ENGLAND 201-19 (1980); R. H. GRAVESON, STATUS IN THE COMMON LAW 26-29 (1953); PAUL VINOGRADOFF, VILLAINAGE IN ENGLAND 83-85 (Oxford, Claredon Press 1892); J. H. Baker, *Personal Liberty under the Common Law of England, 1200-1600*, *in* THE ORIGINS OF MODERN FREEDOM IN THE WEST 178, at 185-87 (R. W. Davis ed., 1995).

126. *See* Calvin v. Smith, 7 Co. Rep. 1, 77 Eng. Rep. 277 (K.B. 1608); *see also* KEECHANG KIM, ALIENS IN MEDIEVAL LAW: THE ORIGINS OF MODERN CITIZENSHIP 176-99 (2000) (discussing *Calvin's Case* in the present day context); Polly J. Price, *Natural Law and Birthright Citizenship in* Calvin's Case *(1608)*, 9 YALE J.L. & HUMAN. 73 (1997).

127. Somerset v. Stewart, Lofft 1, 19, 98 Eng. Rep. 499, 510 (K.B. 1772) ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral, or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it, but positive law.").

128. 2 Burr. 1005, 97 Eng. Rep. 676, 681 (K.B. 1760) ("[T]he gist of this kind of action [action to recover debt] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.").

129. *See* ST. GERMAN, *supra* note 67.

130. Examples are found in FREDERICK POLLOCK, ESSAYS IN THE LAW 62-79 (1922).

were relying on natural law or instead on the traditional common law. If they mentioned both in the course of argument, some modern historians have accused them of getting mixed up or of becoming "muddled" in their own thought.[131] They ought to have kept their authorities straight.

In truth, there was no muddle. If we look at the matter from the perspective of a lawyer who accepted the existence and the application of the law of nature, as so many English common lawyers did, justifying a civil right would not have been regarded as requiring a choice between the teachings of natural law and common law. Their assumption would have been that the two laws were harmonious, that the natural law stood behind and supported the English common law. When looking for the reasoning underpinning a particular rule of law, they would have believed that both positive law and fundamental law supported it. Perhaps this was "naïve" in the sense that our great Justice Holmes used the term. Even if that is true, it was the ordinary way for an English (or Continental) lawyer of the time to have thought about a legal right. The lawyer would not have seen any inconsistency in relying on *both* the law of nature and the law of England as protectors of human rights. He would have assumed that, under ordinary circumstances, they complemented each other. The history of human rights should recognize this perspective.

CONCLUSION

A word remains to be said in conclusion. I should at least raise the question of whether this evidence makes any difference today. Is anything to be gained by considering the origin and nature of human rights within the context of the law of nature? The modern notion that rights derive from the principle of the autonomy of the individual is the dominant view, but other voices are being heard, or at least raised. Some scholars believe there is something to be gained, although to an outsider it appears that most of them are concerned with American constitutional law than with international human rights. Still, concrete advantages might come by recognizing the force of the older conception. It might help work towards avoiding the

131. *See, e.g.*, POUND, *supra* note 9, at 51-53; Thorne, *supra* note 114, at 543.

confusion caused by the contemporary inflation of rights.[132] Natural law once provided a base from which argument proceeded, and it might do so again.

However, the absence of reference to natural law in the contemporary human rights literature speaks loudly enough to be discouraging. Treaties and international conventions, not the dictates of natural law, provide the normal starting point for discussion and progress. More basically, the tradition of natural law has long depended in some measure upon acceptance of the idea of God's providential care for mankind. Such acceptance is bound to be suspect to those who accept the view the law should embrace a strict separation from the sphere of revealed religion.

Perhaps the most that can be said with assurance, therefore, is that the history of rights within the Western tradition ought to take note of the place of natural law in the writings and assumptions of English common lawyers. In a project devoted to "rethinking rights," history has a place. At least it ought to have one. To assert anything more than that would enter the realm of speculation or contention, and it has been my intention to stick as close as possible to facts.

132. *See generally* Wiktor Osiatyński, *Human Rights for the 21st Century*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 29.