NATURAL LAW IN COURT

A History of Legal Theory in Practice

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Preface

This book is the result of the combination of chance, curiosity, and a challenge. These three spurs to research were later augmented by a gradual realization on my part that its subject also presented an opportunity.

The chance was this. Some years ago, an invitation came my way to attend a conference on the history of human rights and to prepare a talk on their place in the medieval *ius commune,* the amalgam of Roman and canon laws that dominated European legal education and influenced court practice from the Middle Ages through the Age of Enlightenment. I was then familiar in a general way with the concept of the law of nature, as every student of medieval law must be. I knew enough about it to think that it might help me prepare the talk. Natural rights and the place of morality in law have been strong, if contested, parts of the Western legal traditions for centuries, and the link between them and their public assertion in promoting the human rights of men and women enmeshed in Europe's legal systems appeared to be a fruitful subject for investigation in preparing the talk. So it proved to be.

The curiosity arose from a desire to see what the link between the natural law and human rights amounted to in practice—to discover the extent to which the lawyers and the parties they represented actually used the law of nature when they appeared before a judge in a court of law. In other words, did the theoretical rights founded upon the law of nature actually serve to protect the rights of men and women in the day-to-day world of legal practice? Prior work on a project on the history of the privilege against self-incrimination encouraged me to think the *ius commune* would shed some light on what might anachronistically

be called "human rights advocacy" in earlier centuries. My interests as a historian have always focused more on legal practice than legal theory, and I thought that looking at the subject of natural law as it appeared in early case law might present an appropriate area for investigation. This also proved to be true. The evidence is plentiful.

The challenge came after I had considered and described the results of my initial investigations and given a talk at the conference. One of the other participants, having read and heard what I had to say, told me that I had established two things about the history of the law of nature: first, that "everyone believed in it," and second, that "it made no difference." That took me aback. True, he was thinking about American constitutional law, and he probably meant the remark as a joke. If I remember correctly, he laughed as he said it. I did not. I took it as a challenge. It prompted me to look further into the history of the law of nature, extending my survey beyond the subject of human rights. I wanted to see if my friend had been right when he said that the law of nature had no real effect on the development of substantive law. It would be less than candid on my part if I did not admit that I hoped I could show that he was wrong.

The perception of scholarly opportunity came still later. It was a result of my initial forays into modern scholarship on natural law's history. I expected to find many investigations of the place of the law of nature in the world of legal practice. Surely any thorough investigation of natural law's history would turn up accounts of its place in law courts, and concern for what it meant in the everyday world of litigation would therefore appear here and there in the large body of literature on natural law's history. So I thought. However, it soon became evident that except for a few special areas of the law, very little had been done with this aspect of the subject. The relationship between natural law and American constitutional law proved to be the only real exception to this finding, and it was a limited and controversial one. Even there, almost all of what has been written about natural law has been concerned with the great cases decided by the U.S. Supreme Court, not with ordinary litigation in state courts or even the lower federal courts. Continental and English legal historians have done slightly more with the subject, I found, but most of their work dealt with the Middle Ages, and it had not gone very far with investigations of ordinary litigation.

It seemed to me, therefore, that for all that had been written about the law of nature—and there has been a lot—almost none of it dealt

with the subject of its place in law courts. I found this surprising. A few titles I came across did suggest a concern with private law and legal practice, but upon closer examination their contents proved to be unrelated to actual cases.[1] Perhaps this is because, except for the field of international relations, the law of nature today has been pushed aside by the positive law. It is theory—interesting theory perhaps—but largely irrelevant for the ordinary course of the law. Perceiving at length that there might be a scholarly opportunity for me to do something that had not been done before, something that might even prove worthwhile, I set out to discover what place the law of nature had occupied in legal practice in three different arenas: the European courts, the English courts, and the courts of the young American republic. Except for the last of these, I chose the early modern period—that is, from the sixteenth century to the mid-nineteenth century. For the last, I took the first eighty-five years after the establishment of the nation's independence in 1776. All these were periods before natural law had come under general attack from its critics. My hope was that the results would be of at least some interest to legal historians generally and in particular to anyone who has found it worthwhile to know something about the history of natural law.

All of this happened several years ago, and before coming to the subject itself and to the evidence that came gradually out of my research, I wish to mention and thank the people and the institutions that have helped me find my way. For financial support, I am grateful to the Jerome S. Weiss Faculty Research Fund of the University of Chicago. For moral support and probing questions, I am grateful to participants in workshops held in the same law school and also others held at Ohio Northern University, the University of Amsterdam, the University of Wisconsin Law School, the University of Western Ontario, and the Catholic University of America. I also benefited from having been invited to deliver plenary addresses on the history of the law of nature at the 2012 annual meeting of the American Society for Legal History and at the 2013 meeting of the Texas Medieval Association. These proved to be opportunities to test ideas and present research, and I have profited from them.

Several coworkers and friends have also been helpful and encouraging to me in my exploration of the subject. In particular, I wish to acknowledge and thank Bruce Frohnen, whose initiative got me started

and whose support kept me going; Ken Pennington, whose interest in the subject and whose own scholarship have both been enormously helpful; Alison LaCroix, whose familiarity with American history and helpful suggestions gave me a leg up; and Knut Nörr, whose knowledge of the subject and friendship have meant a great deal to me over the past thirty years.

I also thank Randy Barnett, my challenger at the early conference on the history of natural rights, but for a different reason. He motivated me. He thought, probably correctly, that my early paper on the subject had not demonstrated that natural law theory made any substantial difference in fact. In the pages that follow, I hope to have shown that it did, but I cannot help wondering whether anything contained in this book will change his mind. Many of the things I discovered in the course of research did surprise and enlighten me. They convinced me that natural law did count for something. It had concrete results, even if they were not often the dramatic results many of its modern expositors assume must accompany the recognition of natural law's validity. However, I am far from sure that he will agree.

Introduction

An assessment made in the first decade of the twenty-first century concluded that "the study of natural law theories" had proved to be "one of the most fruitful areas of research in early modern intellectual history."[1] I hope this assessment is correct. It is beyond doubt that the subject has given rise to a large body of scholarship. That scholarship has been partly historical, partly theoretical. Rightly so it seems; natural law theory has been shaped by a long history, one that stretches from Aristotle to the most famous Roman jurists, then moves through the works of the commentators of the European Middle Ages and the "Natural Law School" to the era of the Enlightenment, and even into the modern era. It has played a significant part in the history of legal thought.

Although no longer the dominant opinion among lawyers it once was,[2] the law of nature has not entirely lost its adherents among them. A vocal and distinguished minority of legal philosophers has sought to begin with history in order to reclaim natural law's place in the development of Western thought and also to promote its continued recognition today.[3] Professors John Finnis of Oxford University and Robert George of Princeton University are probably the best known among its current defenders,[4] but there are others equally accomplished.[5] A simple lawyer without training in philosophy may read through their accounts with profit, if not always perfect comprehension, in an effort to uncover the main features of natural law's history. Doing so is a useful part of any preparation for research on a study like this one, an examination of the subject's usefulness as it played out in legal practice. A student needs to begin with a grasp of the basic issues at stake, and the modern

works demonstrate that acquiring such a grasp all but requires a starting point in the past.

It is not a labor of Hercules in any event. The prevalent understanding of the law of nature—as presented in the texts of the *ius commune,* as taught in the European universities during the Middle Ages, and as understood in works devoted to natural law from the sixteenth century to the eighteenth—is not difficult to state or to illustrate, at least in outline. Many modern works do this quite well.[6] Ennio Cortese's masterful treatment of the place of juridical principles in the history of European law is enormously helpful for many questions.[7] Virtually every encyclopedia of law and legal theory also contains an entry devoted to the subject.[8] The accumulation of full-length works devoted to the law of nature would also fill many a library shelf, and some at least of what they show has gone into this study. These accounts differ in some ways, but they share the view that law and morality are inextricably connected. The purpose of enacted or positive law is to build upon principles of justice stated in the natural law or, in other words, to make specific the moral principles that are stated generally in legal theory. This is an obligation thought to be binding upon both lawmakers and practicing lawyers, as the following pages show in detail.

Natural law theory thus began, and still begins, with an assumption of congruence between law and basic features of man's nature as they are thought to have existed from the beginning of time. God himself was natural law's source.[9] In creating the world, He had instilled in all of his creatures a knowledge of certain principles. Most of them were known by instinct. Historically, the protection of one's person against attacks from without—a rule of self-preservation—was a common example, one much discussed by the jurists. The instinct to act in self-defense is part of human nature, the jurists said, unchanged over time. It was shared with animals. It could also be a way of righting wrongs and thus of deterring attacks in the first place. Although the right to act forcibly to defend oneself had been abridged for human beings as a consequence of their entry into society, it had not been abolished. It still made a difference. The plea of self-defense against attacks from without that is found in all systems of criminal law was itself a demonstration of its continued vitality.

Natural law also meant, in what was sometimes often called its secondary sense, congruence with natural reason, with which God had also

imbued his creatures. Men and women knew right from wrong without any special training. The Golden Rule—"Do unto others as you would have them do to you" (Luke 6:31)—was a statement and example of such an instinctively known rule. Right reason had led to its recognition in every age of human history. The Bible and the great texts of Western law provided additional proof of this principle's hold on human thought and action. So stated, it did not change over time, although it might vary in the details of its application to human life, as the conditions of society themselves required. The underlying principle, it was assumed, would always matter in practice, particularly in doubtful cases. Its observance would promote the rule of justice in human life.

Although the two senses of the term *natural* might appear to stands at odds—the one a basic instinct shared by animals and humans, the other a more refined sense of justice—the primary and secondary senses of the law of nature were not then regarded as opposites. Both were necessary.[10] The two complemented each other, and both of them admitted of partial abridgement in the light of circumstances.[11] For example, the Golden Rule did not mean that criminals could not be punished. True enough, no one person would actually wish to be punished himself, but every human being could nonetheless recognize the useful function that condign punishment of criminals served. Reason taught its utility. Society would collapse if all malefactors were given free rein to harm others. Room was therefore found for a nuanced understanding of what the Golden Rule meant in practice. Like many beneficial legal rules, it admitted of exceptions and clarifications derived from a fuller understanding of the requirements of natural justice. Some of them were in fact evident in the instincts shared by man and beast. Animals acted to protect themselves from attacks made against them. They protected their "turf." So could all humans, albeit in a way that responded to the needs of communal peace. Human communities themselves had an equivalent right to protect themselves, and individuals could not assert a right to protect themselves in order to destroy the greater good.

Legal systems of positive law could take different forms consistent with the existence of laws of nature. They had done so in fact. Many varieties in their laws and institutions existed in the world as it was. However, at least in aspiration, the natural law's principles were assumed to underlay them all. Its principles remained intact despite the variety of forms taken by the positive law. They were not subject to abolition, only

to modification in practice in order to meet the needs of human society. Indeed, those needs themselves formed part of the law of nature. Its purpose was to allow all men to live together in peace. The natural law's principle of "sociability" promoted that goal. It could even be regarded as "the great law of social charity."[12]

Some of the claims made for the law of nature in earlier centuries were very high, so high that one must wonder how they could actually have been applied in courts of law. From the assumption of the law's intrinsic and sublime purposes followed the famous dictum, found in St. Thomas Aquinas's *Summa theologiae* and also in many other places, that a law that contravened the law of nature was not a "true law" at all. It was rather a corruption of the law.[13] A textbook example was the decree of Herod requiring the killing of the innocent children (Matt. 2:16). It was a product of Herod's selfish fury, not a decree anyone was obliged in conscience to obey. Indeed, a greater obligation required disobedience. Herod may have been the recognized King of Judea, but it was an illegitimate perversion of his authority to issue a decree like this one and demand obedience to it. No thinking person could obey. Beyond this easy example, it was not so clear just how far that principle went or how it could be realized in fact, but the underlying sentiment illustrates the connection between law and moral reasoning that lay at the heart of the law of nature.

As this example shows, the law of nature as stated by the commentators was thought to have consequences. However, it was equally clear to them that most cases in life were not like the one potentially raised by Herod's decree. Some room for moderation—for the assumption that positive law had a moral force of its own—had to be left. Moreover, the law of nature was never a complete law. It required the creation of positive law if it was to be made fully effective in the world. So, for example, the Ten Commandments' admonition "Thou shalt not bear false witness" was regarded as an expression of one of natural law's principles.[14] Although in practice there were exceptions to this Commandment, as there were to most natural law principles, in general it was thought to be the proper task of the positive or municipal law to put this tenet of the law of nature into concrete form: making perjury a crime, ruling out the testimony of witnesses who purposefully lied, and perhaps even preventing enforcement of contracts tainted by one party's deceit.[15] These instances were regarded as expressions of the Com-

mandment's larger intent. That intent was to provide guidance, ensuring that human law worked to secure fidelity to the aims of justice and the common good. Positive law's role was to put those aims into effect. It might do so in various ways—which is one reason that different systems of positive law existed—but the permissible ways were controlled in scope by the law of nature.[16]

This book is about that process. It deals with how natural law was employed in courts of law and translated thereby into coercive law. Focusing as it does on the practice in courts of law, the following chapters do not enter into the contentious question of what the highest and best statement of the law of nature has been. It deals with the ways in which lawyers understood it and used it in earlier centuries. Whether there has been more progress or a slow decline in the quality of thought about natural law over the centuries has today become a matter of occasional contention. To a relative outsider, the naysayers who see more decline than progress in its history appear today to stand slightly in the majority.[17] That, however, remains an open question.

Scope of the Book's Inquiry

This is a limited study of a large topic. It takes as its focus the evidence found in cases heard and decided in the courts of Europe, England, and the United States. Its coverage is limited to the early modern period for the first two—roughly from 1500 to 1800—and to the period between Independence and the Civil War for the third. Largely a product of the necessity imposed by the availability of evidence, this choice has called for several shifts of emphasis from that found in the general literature on the law of nature written by legal philosophers. Four points about the book's limited coverage require statement and brief explanation.

First, little attention is paid to the special characteristics of individual writers on natural law. The *communis opinio* that emerged from the efforts of many jurists over many centuries has been the measure used for deciding what to include. Most modern commentators regard St. Thomas Aquinas as the classic expositor of the subject, but the cases show that neither Continental nor English lawyers made much use of his treatment of the subject. Aquinas rarely appears among the many citations to authorities found in European accounts of litigation. His authority was invoked just often enough to know that practicing lawyers

did regard citation to his work as of at least occasional relevance.[18] Evidently, however, the eminence of St. Thomas as an expositor of the law of nature among modern commentators was not matched by an equivalent status in the minds of jurists and lawyers in centuries before the nineteenth. I am not sure how much this matters. From the perspective of the law's application in practice, it would actually be an idle exercise to seek out the leading expositor of the law of nature. At least no one writer was so recognized at the time. As was true of the European *ius commune* itself, the law of nature was part of an ongoing tradition, one shared and augmented by generations of jurists and theologians. There were stars among them, no doubt, but like real stars, none of them dominated the sky.

Second, no attempt at formulating an exact statement of the tenets of the law of nature is attempted. It was a commonplace among the jurists that all definitions of legal terms were dangerous, and no subject illustrates the truth of their sentiment any better than the law of nature. It was hard to put into exact language and harder still to state completely. The classic authors—Aristotle, Cicero, and Aquinas, for instance—had not tried. None of them ventured to make a list of its tenets. A few authors did try—the young Hugo Grotius (d. 1645), for example.[19] He divided the law of nature into nine rules and thirteen laws, but even those he came up with were quite general statements such as "All persons may acquire and retain those things which are useful for human life" or "No persons may inflict injury upon others." Modern proponents of natural law have occasionally sought to move toward fuller and more accurate statements of its contents, but lawyers in earlier centuries shied away from such efforts at completeness. For them, it would have seemed presumptuous to pretend to state the teachings of the law of nature fully. The effort would probably have been futile in any case. This book follows the lead of the historical majority. It seeks to illustrate rather than to define what the law of nature meant in fact.

Third, little attention is paid to religious differences. Today, interest in the doctrines of natural law has become a characteristic part of Catholic thought and has been abandoned by most Protestants. Atheists usually reject natural law out of hand. This development has sometimes made it a point of sectarian contention. This modern denominational divide, however, did not exist in the centuries described in these pages—at least not on the question of the law of nature's existence and application

to human life. Some of Martin Luther's more dramatic statements can be read to stand for proof of a deep religious divide in approach to moral law, but in fact almost all Catholic and Protestant jurists in earlier centuries accepted the same basic premises ascribed to the law of nature. Many of the great writers on the subject were Protestants.[20] They had not turned their backs on the traditional learning of natural law. Why should they? The Bible itself proclaimed that God had written the law of nature on our hearts (Rom. 2:15). Many of its basic teachings were inscribed in biblical texts.

There certainly were deep theological disagreements between Protestants and Catholics. Their adherents, dealing with the law of nature, sometimes traded insults, many of them quite acrimonious, even painful, to read. However, no fundamental denominational divide in approach to natural law itself marked those bitter exchanges.[21] Court practice in particular shows that the similarities swamped the differences. In the Continental accounts, it is almost always possible to discern on which side of the religious divide a sixteenth-century reporter of *decisiones* stood, but not from the approach to the law of nature found in them. It is not too much to say that the law of nature should be a shared feature of the religious heritage of Western nations.

Fourth, not much is said here about change over time. Although there have undoubtedly been developments in the ways the law of nature was described and treated during the long period covered in these pages, these developments seem not to have affected the basic features of the law of nature as it was understood by lawyers on the European Continent and in England and North America. Unlike many of the recent studies of natural law theory, therefore, this volume's theme is not about legal change. Some of the conclusions Thomas Hobbes drew from the law of nature were, of course, quite different from those of Thomas Aquinas. Cicero's treatment of it was not identical to that of the late Spanish scholastics or of Samuel Pufendorf. However, the differences between these authorities seem to have had no immediately discernible effect in legal practice. The discipline in thought imposed on lawyers by the classic texts in the Roman and canon laws also provided a source of stability throughout the period covered in this book, something that is hard to appreciate fully today. The basic assumptions upon which the law of nature was built—the division of all law into the *ius naturale,* the *ius gentium,* and the *ius civile;* the ascription of the source of the law of nature

to God; and the use of its tenets to interpret and evaluate the positive law—all formed part of a long-recognized tradition. They were constants. They controlled what lawyers could do and what they could say. They limited the possibilities for change. Examination of the case law produces many differences of opinion over time. It also produces some increase in uncertainty about the exact meaning of natural law, but nothing like a "paradigm shift" seems ever to have taken place.[22] Or if it did, as some scholars strenuously contend,[23] it had little discernible effect on natural law's place in courts of law.

The book is organized into three parts of roughly equal length, each of them consisting of two chapters. The three parts deal with different geographical areas and different systems of law. Within each part, the first chapter covers legal education, reviewing the available evidence to discover as much as possible about the place of the law of nature in the training of practicing lawyers. The second chapter in each part moves to the case law, taking the seven subject matter areas in which the most frequent references to principles of natural law appeared. The cases show that considerable overlap existed between the areas of law dealt with in each of the three geographical areas covered. However, it did not amount to identity. The relations between natural law and the law of slavery, for example, figured prominently in the American cases, less so in the English, and scarcely at all in the European. The geographical overlap in usage was never complete.

The Book's Sources

Because it concerns legal practice rather than legal theory, this book's conclusions depend mainly on the author's examination of evidence drawn from cases heard in courts of law. For England and the United States, these reports have long furnished the basic building blocks for understanding law's development, and particularly for dealing with constitutional law. They have furnished one means of understanding the role played by the law of nature. For the Continent, however, the relevant sources are not well known, particularly among English-speaking students. Much less has been done with them. They are, however, quite abundant. *Decisiones* and *consilia* exist in profusion, and both of them allow the student to move from theory to practice. The first of these sources were accounts of arguments and decisions in the courts where the

European *ius commune* prevailed. The second were legal opinions written by jurists to be applied to the facts of particular legal disputes, also under the regime of the *ius commune*. They were sometimes solicited and paid for by one of the parties, sometimes solicited by the judges themselves as a way of acquiring more expert help in dealing with difficult cases. The judges were not bound by them, but the *consilia* could be influential in fact.[24] They both provided a kind of bridge between the professoriate and the judiciary.

This work draws most heavily on what is found in the *decisiones*. They usually included the arguments made by each party and the authorities relied upon to decide the case. Although there was variation in the contents found within them, normally they also stated the outcome. The earliest collections of *decisiones*, beginning in the second half of the fourteenth century, came from the papal court, the Roman Rota,[25] and in the following centuries, they multiplied beyond that court as a general class of legal literature. Literally hundreds of collections of *decisiones* are to be found in libraries in Europe and even in the United States. In recent years, they have begun to attract the attention of able scholars.[26] They deserve that attention and more. Like *consilia*, they constitute a bridge between the academic and the practical sides of the law.

Works of *praxis* have also proved useful in the preparation of this study. Normally devoted to description of the law applied in the courts of a particular city or region, many of them open a window onto the place the law of nature played in practice. Of course, general works of law are also essential to beginning any study of this subject. I have made selective use of these works, though the total numbers that exist for all three classes of juristic literature inevitably has meant that I cannot claim to have done more than to have made a sample of what is available.

In conducting that sample, I sought to be conservative in approach, not taking references and citations as relevant to my subject unless the concept of natural law was expressly introduced into argument by an advocate or into a conclusion by a judge. If the *decisio* took a position because it was "the most reasonable" reading of existing law or because the result was said to be the "most consistent with justice," I did not treat the words as a reference to the law of nature. Only express use of the terms *ius naturale, lex naturae,* or a close equivalent such as a reference to *ratio naturalis* or to *iustitia naturalis* counted.

Nor did I count situations in which the term was used purely to describe a natural phenomenon, as for example, when the fermentation and expansion of molasses during warm weather was described as a "law of nature" in one American case.[27] It is true that the term was often used to describe the inherent properties of things and even people. A good case can be made for inclusion of many natural phenomena in a complete study of the subject; it was widely accepted that the law should respect nature, and that maxim that could have real consequences.[28] I have, however, purposefully excluded such usages from consideration unless they were connected to the law of nature as it appeared in contemporary legal treatises and texts. The word *nature* has always carried a variety of meanings,[29] and the perils of enthusiasm were as obvious to me as they would be to my readers.[30]

To this self-denying ordinance, I made one exception. Invocation of a rule or maxim that every lawyer then regarded as a part of the law of nature did count as relevant to the subject. That no man should be a judge in his own cause and that an unjust law was not a true law were both principles found in the law of nature. Their connection with it would have been obvious, indeed inescapable, to any contemporary lawyer. I therefore treated them as relevant in determining the place of natural law in practice. Otherwise, however, I have treated a decision or a legal argument as being connected with the law of nature only where it was invoked in so many words.

The Book's Theme

Any theory of law or philosophical approach to law will be subjected to compromise when it comes into contact with the complexities of human life. Principles of human liberty or statements affirming the equality of all persons, no matter how praiseworthy they are and no matter how universally they are admitted, cannot be absolute. Their limitations will show up in many spheres of human life, and not least in the arena of litigation, where claims in favor of their restriction will always be made. Minds differ. Circumstances vary. So do the interests of the parties and their lawyers. It is particularly likely that variation and compromise will appear in applying abstract and general ideas such as those drawn from the law of nature to the facts of individual cases. It certainly was so in the case law that is the subject of this book. The cases heard in the courts

of Europe, England, and America surveyed in the pages that follow repeatedly illustrate the practical limitations that stood in the way of full implementation of natural law's dictates. This book is descriptive in character, but insofar as this book has a unifying theme, this is it. For many and varied reasons, arguments based upon natural law did not always prevail in court. Readers of the chapters that follow will find this theme repeatedly illustrated in many different circumstances.

On this account, it may seem tempting to dismiss the significance of natural law in the history of our law. Very likely, its mixed effectiveness in practice will seem disappointing to its modern adherents. I may be mistaken on this point, but it appears to me that natural law did not achieve what they have expected it to achieve. And as for natural law's detractors, their "take away" may be that natural law did not after all really make much of a difference in the real world. They may take comfort from its very limitations in practice.

I believe this would be a mistaken conclusion. Law is not an "all or nothing" sort of discipline. It is true that the law of nature did not turn out to be a "higher law" in the sense that it swept all competing sources of effective law from its path. It is also true that the law of nature did not provide judges in earlier centuries with a roving permission to bring statutes and customs into conformity with its principles. But these limitations did not mean that the law of nature was inconsequential. Nor did not mean that one can disregard the law of nature simply as a kind of appeal to vague notions of fairness to which desperate lawyers were driven when they lost on the law.

To treat it that way, concluding that it had little effect in practice, runs into three counterarguments. First, it is the opposite of what contemporaries thought. Even while they recognized limitations of the law of nature's scope, lawyers and commentators of the medieval and early modern periods of history believed that it played an important, indeed essential, part in their legal system. They said so repeatedly. That is shown in Chapters 1, 3, and 5. To set aside their opinion makes a poor choice for anyone trying to understand the past. It comes close to asserting that lawyers of prior centuries did not themselves understand what they were saying.

Second, the negative conclusion actually stands in conflict with a considerable amount of evidence. To disregard natural law arguments because they were not sure winners is also a poor choice for historians. It

looks at only one side of the evidence. One rarely knows for sure which arguments counted the most in practice, but natural law arguments seem to have made a real difference in the outcome of disputed cases at least as often as they made none. That much is shown in Chapters 2, 4, and 6. Natural law did appear to have an effect on their outcome. Some of its successes were admittedly less than earth shattering. But for the litigants and for the law itself, they did matter.

Third, dismissal of natural law arguments robs us of one source of insight into the character of law before the modern era. A great deal has been written in recent years about the "real" purposes and meanings of litigation in past centuries. Some historians have reduced it to a contest for prestige or a forum for harassing one's enemies. Starting with an examination of the premises of the law of nature offers a different and, I think, a better understanding of what litigation accomplished (and did not accomplish). To neglect the chance it offers of a special vantage point on the nature of court practice in the past may not always be objectionable in itself. Certainly other approaches are useful. It would be a loss nonetheless.

In what follows, I have sought to present the relevant evidence about natural law's place in the law courts as fairly as I could. Its real but limited success in determining the outcome of contested cases is the theme that has fastened itself most firmly upon my mind as I worked through the case law. In some ways its very malleability made it more useful in practice. This is the theme that has most surprised me and also most informed my understanding of the subject. It seems right to state it at the outset. It will be illustrated repeatedly in what follows.