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THE GRAECO-ROMAN POLITEIA THE CITY OF MEN

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THE study of the institutions of a people—social, economic, political, religious, and cultural—is a legitimate and extremely profitable approach to the understanding of their history and a valid, though partial, measure of their historic achievements and of their place in the progress of posterity. For institutions are externalized embodiments of the prevailing ideas and triumphant purposes of societies and they contain the dynamic forces underlying human relations with sharper definitions than do the other human expressions such as art, literature, and philosophy. These latter indices of national individuality are generally the articulations of the numerically few, of schools, and of the elite who speak either for themselves or as interpreters of a national experience or, in the universality of their art and science, they transcend all boundaries of time, place, and people. The political and juridical institutions, on the other hand, are wider and deeper in their significance and meaning because they issue from a confluence of larger and more numerical factors. Generations of people evolve a national consciousness with a vivid attachment to a historical tradition of centuries issuing in the sense of a conscious participation in and possession of an inherited way of communal life. As it were, a corporate personality develops with a common mental capital and avowed purposes fixed in institutional forms inspired and motivated by the traditions of the past, defining the present and guiding the future. These political and juridical institutional forms are commitments in justice which comprehend the operations of sovereign powers, duties, and rights. The profound import of the functional significance of these moral powers can hardly be constrained on the empirical level—as administration, legislative prescriptions, fiscal exactions, adjudications, and executive enforcements of law and order. Rather, political and juridical institutions are *forms with content*—a content whose roots are deeply embedded philosophical and theological ultimates from which these forms draw their inward essence and vital meaning. We need only call to

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mind the philosophical principles which activated the historical struggles out of which constitutionalism and due process evolved. It is therefore not without reason that today we refer to the political-judicial institutions of a country in somewhat the same way as did Aristotle as a "manner of life."

In the history of the Western world there are basically and in broad terms two large traditions which confront one another as the progenitors of essentially different political and juridical institutions, namely, the Graeco-Roman *politeia* and the Christian polity.¹ These two traditions, embodied in the Roman Imperium and the Christian Commonwealth, were antithetical at the Fall of Rome and at the establishment of the Carolingian dynasty. They set up opposing schools of law for the civilian lawyers and the canonists. They challenge each other at the rise of the modern state. At times they seem to fuse together but this coincidence is more apparent than real.²

The antithesis of these two traditions is founded upon the essential divergence between their theological and philosophical conceptions of man and of society. For better or for worse political and juridical premises, explicitly or implicitly, rest upon our theological or anti-theological estimate of man as related to God and his fellowmen. A man's political outlook on fundamental relations of civic life, of his rights and duties, is undoubtedly influenced by his real thought or thoughtlessness about God and man and the meaning and purpose of human life. Generally, what man believes is more cogent than what he thinks. Nor can the philosopher, in his search for the ultimates of reality, avoid consideration of the gods, the governors of forces of nature and of the lot of men, for the ultimate meaning of human experience

1. A subsequent article will treat of the Christian polity.

2. A scholar of vast erudition, A. J. Carlyle in marshalling facts and events to prove his main thesis, has failed to discern basically different philosophical tenets. He holds for the continuity of doctrine between the Roman Stoics and the Christian Fathers (Vol. 1-2), he sees a basic concordance between the Roman lawyers and the Canonists (Vol. 2-3), discovers grounds for political absolutism in the Papacy (Vol. 4), and while he proves his main thesis that representative government had its origin in medieval times, he joins men of contradictory philosophical principles into one school of political thinking; for example, Bracton and St. Thomas with Marsiglio of Padua and William of Occam. What mars this monumental accomplishment of erudition is the author's conclusion that St. Augustine's concept of the State excludes the quality of justice in its definition and he considers it fortunate that Augustine's definition of justice had no influence on medieval institutions and political theories. CARLYLE, *A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST*, 6 vols. (1903-45). This article and the subsequent one may serve as companion studies to A. J. Carlyle. They may be of assistance to the student who reads the works of Charles Howard McIlwain, and of such Catholic French authors who interpret their Christian inheritance with the bias of Roman law tradition.

is to be discerned on the plane of religion. In moments of challenge, men cling tenaciously to their beliefs, be they intuitive or rationalized, and even among sceptics and agnostics, statesmen try to justify their exactions under some religious claim. "For theological error affects men's ideas on all subjects, and one cannot accept in politics the consequences of a system that he rejects in its religious aspect."³

Rome had won world empire by her genius for military and legal organization. By the triple universalism of *religio, imperium, and deditio*, the city-state gradually absorbed entirely or assimilated in part the entire known world from Brittany to the Euphrates and from Mauretania to the Red Sea. Under the aegis of city-magistrates, proconsuls, and praetors the Pax Romana imposed its peace and unquestioned authority and made the citizenship of Rome the envy of foreigners.⁴ Not the least of her "universal" missions was the diffusion of the Hellenic culture which the narrowly confined Achaean League and the cosmopolitan Macedonian Empire had failed to achieve for different reasons. By a chain of cities established on the basis of the Greek conception of the *πόλις* which were connected by an efficient system of communications and commerce, Rome gave to the Western World an abundant life of material prosperity unparalleled in antiquity. For the ancient city, unlike the modern counterpart, existed for the enjoyment of its citizens and it was the center of an active communal life, lived in public and at public expense. There has probably never been an age in which opportunities for living an enjoyable and civilized existence were so widely diffused. All this testifies to a high level of material culture and to an

3. LALLY, AS LORD ACTON SAYS 52 (1942). DE LABRIOLLE, HISTORY AND LITERATURE OF CHRISTIANITY 208 (1925): "No one before Lactantius had better grasped the difference between the two religions, Christian and pagan, the one consisting principally in the reform of the will by adhesion to certain doctrines bound together and entirely dependent on a God conceived as Father and Master; the other resting well-nigh solely on rites in which the fingers alone had a part, and which exacted neither purity of heart, assent of the intelligence, nor a right intention. In the love of God lay the norm of every true Christian. Therefore in order to bring unity to his interior life, the Christian must not suffer the wholly pagan divorce of religion from intelligence. He must not form his philosophy one way, and his religious life another, but must identify his religion with his philosophy, the one interpenetrating the other, the one being the other in its foundation."

4. Yet no other civilized power among the ancients was so little acquainted with the act of conquering without paralyzing the lives of subject peoples. Sallust says of the Republican Roman domination that it was pitiless and intolerable—"imperium ex iustissimo et optimo, crudele intolerandumque factum." Roman capitalists, slave dealers, and tax-gatherers followed upon the victorious arms of the military and ensured the loss of political liberty with unbearable economic exploitations. Tacitus says that the complaints of the provinces were answered by their depopulation—"ubi solitudinem faciunt pacem appellant." Not till the rule of Julius Caesar was an end put to the misrule of the capitalist oligarchy and the tyranny of military adventurers.

admirable development of public spirit on the part of the citizen class; but from the moral and spiritual point of view all the vast development of material prosperity and external display had no substantial purpose. We cannot say this was but the material aspect of a highly complex and advanced civilization. For, both her religion⁵ and her philosophy were the props of this high level of material culture. The religious and philosophical bankruptcy of the Romans was based upon their recognition of the truth that in this earthly life the material seems grimly enough to be the basis from which men have to discover the sources of spiritual adequacy. The philosophical idealism of Stoicism was for the elite only, while the masses moved with the pleasure instincts of the herd. From the accession of Augustus to the death of Theodosius the Great, the Roman Empire, in spite of its greatness, presented a general character of impotence and sterility. Its institutions, its government, its philosophy, its religions bore this sad impress. Neither the Roman genius for statecraft, nor, at the end, the efficient bureaucracy of Diocletian could instill an inner life into the colossus. The brightest culmination of Roman achievement is reached in the splendor of the Augustan Empire. There we find the best expression and fulfillment of the proudest boast of the Romans, namely, their claim to accomplish in terms of a scientific statecraft and creative politics a goal of permanent security, peace, and freedom through political action, especially through submission to the "virtue and fortune" of a political leader. This constitutes the inward essence of *Roma Aeterna*.

Historians have given many explanations of the "Fall"⁶ but almost all of them differ on the basic issues. Belloc, Kornemann, and Ferrero see the solution to the "problem" in the increasing usurpation of all power by the Emperor and the consequent weakening of the senate together with the reduction of police and armed forces. Seeck and Tenney Frank find the cause for Rome's decline in the fact that the upper classes degenerated because of the extermination of the best in civil wars, birth control, and race suicide. Rostovtzeff's opinion is that the educated classes were absorbed by the masses and hence the intellectual, social, and economic life became simplified. There is always the economic

5. Rome's calendar of the civil year had long been the current iteration and reiteration of the sovereign city's pride of conquest and victory, while her gods were themselves the sources and patrons of this form of greatness; her very "religion" was a series of imperialistic anniversaries. The gods of Rome had been essentially political patrons. The official worship of the emperor was in a way the deification of material power. SILLER, *FROM AUGUSTUS TO AUGUSTINE* 306 (1923).

6. I *CAMBRIDGE MEDIEVAL HISTORY* 54 (1911): "The two greatest problems in history, how to account for the rise of Rome and how to account for her fall never have been, perhaps never will be, thoroughly solved."

solution. Crushed by taxation, the middle class disappeared. The Italian farmers were ruined by slavery and by the free distribution of bread and supplies imported from Egypt and North Africa, and consequently a free and self-supporting peasantry almost disappeared. Some historians ascribe the reason for the end of the Roman Empire to the fact of the great eruption of the barbarians in the fifth century; but we recall that after the days of Marius and Augustus, these same barbarians had continually menaced this empire in vain. Besides, the thought of antagonism to the Empire and the wish to extinguish it never crossed the mind of the barbarians. The conception of the Empire was too universal, too august, too enduring. The irresistible impulse that drew Alaric was one of glory or revenge, not of destruction: the Hun turned back from Aquileia with a vague fear upon him, the Ostrogoth adorned and protected his splendid prize. These "explanations" imply that a society can be maintained or broken up by the control or loss of the control of positive factors and ignoring what the pagans themselves and St. Augustine (we may add Gibbon and Voltaire) were ready to admit: that the basic energizing force of national life is its religious ethos.⁷

7. This belief was strengthened in Rome by the extent of its efficient organization. The dominion of Rome was universal, so it must be eternal. Even the great empire of Alexander was at most a temporary experiment compared with the Roman achievement. But the empire of Augustus was the culmination of centuries of Roman effort to interpret human existence in terms of an order that could be referred to the eternity of the gods. Religious feelings supported its institutions and continuance. That religious feeling was one of adoration for a present god, sent by the providence of destiny for the ending of war and the saving of the community of the human race. This conception of the universality and eternity of the Roman Imperium was actually embodied with a plenitude and unlimited power in the Emperor. The hatred of the name of King, which their earliest political struggles had left in the Romans, was averted by attaching to their ruler a new and strange title which marked him off from all the other sovereigns of the world. To the provincials especially he became an awful impersonation of the great machinery of government which moved above them and around them. It was not merely that he was the center of power and the dispenser of honor: his preeminence, broken by no comparison with other princes, by the ascending ranks of no titled aristocracy, had in it something almost supernatural. The right of legislation had become vested in him alone: the decrees of the people, and resolutions of the senate, and edicts of the magistrates were, during the last three centuries, replaced by imperial "Constitutions"; his domestic council, the Consistory, was the supreme court of appeal; his interposition, like that of some terrestrial providence, was invoked, and legally provided *the* law,—to reverse or overleap the ordinary rules of law. From the time of Julius Caesar and Augustus his person had been hallowed by the office of chief pontiff and the tribunician power; to swear by his head was considered the most solemn of all oaths; his effigy was sacred even on a coin; to him or to his genius temples were erected and divine honors paid while he lived; and when, as it was expressed, he ceased to be among men, the title of *Divus* was accorded him, after a solemn consecration. The title was not conferred upon Emperors of evil

Any permanent society must rest on a body of belief and on the social will which such a body of belief creates. The viability of a society depends more on its inner laws, its mentality, its creed than upon the strength and depth of its organizational efficiency and coherence. These extrinsic bands of social integration generally derive the power of systemization from the administrative genius and inspiring character of leaders. But the viability of a society, its resilient strength, is in its ethical foundations and in its laws. Perhaps the relation of the two orders of thought and achievement, of human contrivance and motivation, can be designated as the law of moral-material proportion.⁸ There is an "inevitable law" that dooms institutions of any kind as soon as their apparent worth gets beyond their intrinsic value. The logic of the law is clear.⁹ The endurance-value of any institution depends on the balance between its intrinsic moral worth and its external and apparent success. We must therefore undertake an analysis into the character of the highest achievements of the Romans, the Imperium, which succeeded in time to the Greek Πόλις, and preceded the epochs of Christendom and the modern national state. We shall inquire whether the pagan politeia contained within itself such serious flaws as to bring about its eventual dissolution once the extrinsic bands of administrative genius and military power weakened with the passing of the charismatic leader. Was the art of statecraft which had built Rome's Republic and Empire sufficient to maintain her earthly "eternity" or was she bound by the inner laws of her polity to collapse under the weight of her heavy superstructure?

The claim of the Romans to have discovered the formula for the construction of a lasting order on earth is the culmination of an effort begun centuries before in Hellas. It was a conjunction of ideas and historical experiences in an effort to attain a goal of permanent security through

memory in spite of Vespasian's dying jest, "Ut puto, deus fio." In fact, though instinct craved for personal object of devotion, the grandeur of the Roman State was kept untarnished and independent of any of its personal sovereigns. The cult of *Roman Dea* was to endure through the weak Theodosian line.

8. PIUS XII, SUMMI PONTIFICATUS (Acta Apostolicae Sedis XIII 432): "Of course, it does happen sometimes that the state authority, though banking on such unsteady props, arrives at prosperity by lucky chance. Superficial people marvel. But of necessity that inevitable law triumphs in time according to which all undertakings come to ruin if they are built up, clearly or imperceptibly, in a lopsided way; as for example, when the value of great external success does not match the norms of honesty and decency. . . . That lopsidedness must exist when civil authority denies or rejects the absolute power of the Supreme lawgiver."

9. "For God owes it to Himself, so to speak, to destroy what is built on evil." (Allocution at Secret Consistory) AAS. XXV 114-115.

the science of human control. The *idea* of the Roman Empire was born in the Eastern Mediterranean whereas the historical process of political development which prepared its birth began in the West. The legal genius of Roman citizens gave to the Empire the framework and structure of its institutions. But the *ideas* which the *Imperium* embodied, the ideas of *αυτάρκεια*, *κοινωνία*, and *κόσμος* which made the Imperium more than a structure, and took hold of the minds of men, had evolved in the Lyceum and Academy of Greece. There men learned to believe in a single unified society, and in the government of that society by a ruler who was "as a god among men," indeed somehow a superman.¹⁰ If we may draw an analogy from Plato, the Roman Imperium was the State written large and the Greek Πόλις its diminutive correlative. It is the indebtedness of a people of action to a people of thought. The finality of Greek thought was that it should issue in action and this appealed to the practical-minded Romans.

So close is the connection between the Greek and Roman world that their political developments may be in some respects (as a continuity and application of politics), considered as one. The Romans frankly admired the superior gifts of the Hellenic age and readily accepted their role of agent of transmission of Greek culture. It is not without significant counterpart that Hellenes would eventually (a Posidonius or a Polybius) study with veneration the institutions of the Romans. The Romans believed the Greek forms to have superior efficacy and they adopted them. The Greeks returned the compliment by hailing their Roman conquerors with divine honors. The Roman dominium became a legal framework on which Greek intelligence could be fitted. Though Greek and Roman never became wholly amalgamated, yet the two currents of political endeavor poured into a single channel of achievement. The two peoples developed the same kind of polity—the realization of a good life in and through the State. They carried it out with different aims and with different results. They experienced very different fortunes. But, basically, the principles underlying their political thought and patterns of social construction were a common heritage.¹¹

10. ARISTOTLE, POLITICS 1288a 15 *et seq.* All references to Aristotle's works are to the BASIC WRITINGS OF ARISTOTLE (McKeon ed. 1941): ". . . but when a whole family, or some individual happens to be so preeminent in virtue as to surpass all others, then it is just that they should be the royal family and supreme over all, or that this one citizen should be king of the whole nation. . . . For it would not be right to kill or ostracize or exile such a person, or to require that he should take his turn in being governed. The whole is naturally superior to the part, and he who has this pre-eminence is in the relation of a whole to a part. But if so, the only alternative is that he should have the supreme power, and that mankind should obey him, not in turn, but always."

11. Much political thought is never put into definite statement. It is found tacitly

Both the Graeco-Roman Politeia and the Christian Polity offer a promise of well-being in and through a social order; their credentials are their achievements. Since the promise of the good life is made to the individual and the individual is the middle term between authority and the resultant of the social discipline, that polity will commend itself to us which fulfills its promise by securing the just comparison of the liberty of the individual with the exactions of authority. In order to do this we have tried in this first article to find out what is the inwardness of the pagan conception of polity, what is the logic of its principles, and the grammar of its intuitions. Our major inquiries are to the source of sovereign power and its comprehension, the content of the social order, and the demands it makes upon the individual.

Our procedure is twofold: first, we will review the characteristic qualities of the actual administration of law and justice and inductively infer the notions underlying the practice; secondly, we will evaluate the best expressions of law and government of the leading political philosophers. The validity of this process rests on two generally accepted assumptions, namely, that the actions and institutions of a people embody ideas, and secondly, a people ought also to be judged by the merits of their great men. The twofold procedure will be applied first to Greece, to her city-state, the Πόλις, and to the political philosophy of Plato and Aristotle; and then to the Roman Imperium—its administration of justice and its Stoic philosophy as an explanation of the Civitas Romana. The understanding and administration of justice is a valid measure of the endurance-value of an institution. If the State is the individual "writ large," then the life of the State must draw strength from the life of the citizen. Out of his liberty must flow the vigor of the State.

Our inquiry begins with the city-state, the Πόλις, and its principles by accepting the Greek claim to have realized "justice" in her public life and by analyzing this "justice" as it took place in the courts.

underlying the form of actual organization and methods. For procedure is a purposively defined operation and the exercise of power itself involves at its best a spiritual motive apprehended and acted upon by the mind. The political thinking of a people should be distinguished from the political theories of political philosophers. Popular political thought fashions historical events and in this more significant sense can it be said that people get the government they deserve. Whereas, political theory, the product of the conscious speculation of *individual* minds, is distinct from the historical process inasmuch as it evaluates the current process. Yet it too is a determining factor in history because thinking of any sort which is directed to human conduct becomes a factor in human action. It is idealistic with the intent of immediacy in the practical order. The validity of the two assumptions mentioned above depends on the legitimacy of distinguishing between these two thought influences even though more often than not they concur as motive forces of national events.

GREEK POLITICAL PRACTICE

Beginning with the classical times of Greek history (500 B. C.), we get an insight into the Greek concept of the supremacy of justice by observing that Athenian law and justice had come to turn essentially on a jury-system. Under the system instituted by Solon, as it ultimately developed, an Athenian trial was entirely in the hands of non-professionals. The presiding magistrate was selected by lot, the jurors were drafted from the whole citizen body, *any* citizen could be prosecutor, and the defendant conducted his own case. There were magistrates who supervised the preliminary proceedings; but at the trial, the magistrate was no more than a chairman of a public assembly. There was no presiding judge to declare the law authoritatively. The citizens were the whole court—the judges of law and fact, without control. Their assembly thus constituted the supreme body of the State, from which there was no further reference; their *Dikasteria* were also courts of final reference from which there was likewise no appeal whatever. There was no jury deliberation. After the evidence and speeches came to a close, all filed out to cast their votes in the verdict urn as they departed.¹² This unique institution of a bench of lay-citizens, a virtual mass-meeting doing justice as judges both of fact and law, naturally raises a question as to their competency and into the nature of the justice dispensed. Whatever inferences we may make as to the practical merits of this jury-system, its distinctive constitutional feature was unique, in that this popular jury was the all powerful tribunal of law and justice. Aristotle records his opinion that in his day (B. C. 325) “the democracy has made itself master of everything, and administers everything by its votes in the assembly and in the law-courts, in which it holds the supreme power.” And a modern critic emphasizes this diagnosis in terms significant to a “democrat” of the present day.

“The real power of the *Athenian demos*, as he himself well knew, lay in the courts of law. There was his throne, and there his sceptre. There he found compliment, court, and adulations rained upon him so thick, that his imagination began at last to believe what his flatterers assured him, that he was a god and not a man. *And a god in some sense he was; for to no earthly tribunal lay there an appeal from him; his person was irresponsible, his decrees irreversible; and if ever there was a despotism complete in itself, ‘pure, unsophisticated, dephlegmated, defecated’ despotism, it was that of an Athenian court of judicature.*”¹³

12. Cf. ARISTOTLE'S GOVERNMENT OF ATHENS cc. 63-9 (*Atheniensium Respublica*) (Kenyon's transl. 1920).

13. The reference to the Athenian Court is from Mitchell's edition of ARISTOPHANES' WASPS, cited in 1 WIGMORE, A PANORAMA OF THE WORLD LEGAL SYSTEMS 312 (1928) (*Italics mine*).

Whatever may have been the advantage for justice and equity in particular cases, because of the flexibility of the Athenian jury's power, still on the whole the result of its freedom was to destroy anything like an objective truth in adjudication and to resolve all difficulties in virtue of the absolute discretionary powers of the assembly. They had no professional judges to declare the law that covered the facts. The juries, identical more or less with the body of citizen-legislators at large, were easily swayed by merely emotional considerations. The Greeks never conceived of an independent body, voicing the settled law, to be a check upon the citizens either as jurors or as legislators. The result upon Athenian law, a popular, not a technical, body of rules, has well been characterized by a modern historian, speaking of the period of Socrates trial:

"The sole guardian of the laws was now the popular courts. . . . The jury courts at Athens were so empanelled (by the drawing by lot of a large group locally distributed) *that the justice emanating from them was the justice that animated at the moment the Athenian people. The unlikeness in deciding like cases which is the essence of injustice* must, in these circumstances, have vitiated legal decisions, if a national familiarity with law had not been cultivated and sustained by the democratic judicial system. It also served to steady the action of the courts that, as a result of discussions carried on for two centuries, citizens had come to possess a valuable stock of juridical ideas. Except for the uniqueness of their legal education, equity must have broken with strict law altogether. . . . *Neither* in legal records nor in the training, learning, and experience of those who held court was there much hope of *previous decisions making themselves felt in determining verdicts*. . . . Precedents had no legal standing in Attic courts. They could not be invoked authoritatively to restrain the predatory instincts of the jurors when the Athenian people, as in B. C. 410-405, had become embittered against its citizens of wealth and standing, by injury, suspicion, and misery."¹⁴

Practically the same judgment is expressed by R. J. Bonner:¹⁵

"The key to the [Athenian] popular control of the judiciary was the principle that each panel, being a plenipotentiary committee of the sovereign people, was supreme and independent in its sphere; its authority could not be shared with a chairman or judge or curtailed by any other court. It follows that no body of case-law in equity or authoritative interpretations of statute law or binding precedents could be developed as in the English and American systems."

Another insight into the Greek concept of law and justice is had by studying their process of legislation. Demosthenes' speech *De Corona* serves to illustrate the unique machinery of legislation which had de-

14. Ferguson, *Athenian Juries*, in 5 CAMBRIDGE ANCIENT HISTORY 349 (1927) (Italics mine).

15. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 74 (1927).

veloped in Athens under government by mass-rule without senate or judiciary. Its peculiarity was this. Instead of a system of checks and balances supplied in modern times by separation of departments, second chambers, and constitutions controlling statutes, the expedient was devised of making the mover liable to prosecution at a later assembly for proposing unconstitutional legislation. It was in a prosecution of this kind that Demosthenes delivered his great oration on the Crown. He was defending the author of a resolution awarding him a gold crown for his patriotic services. The unconstitutionality might consist either in the character of the legislation or in the failure to observe the procedure provided by law.¹⁶ After the expiration of a year the mover was free from personal liability, but the law could be attacked at any time.

There is a twofold approach to an evaluation of these juristic practices of the Greeks: first, we look beyond them and review their notion of the State; secondly, we can draw the conclusions from the legal procedures themselves.

GREEK POLITICAL THOUGHT

The Greek Πόλις was like the Roman Respublica, the "common thing" τὸ κοινόν. It was "common" because it embraced universally or entirely the private and public lives of its citizens. It was the "thing" because it was the most tangible reality in their daily experiences. The Πόλις is the sum of all its citizens and of all the aspects of their lives. It gave the citizen much, but it could demand all in return.¹⁷ It imposes its way of life on each individual. From it are derived all the norms which govern the life of its citizens. There was no accepted moral standard other than the enduring existence of the state and its stability. Since then, as Plato said, every type of constitution produces its own type of man, the Πόλις governed every means in the formation of the individual.¹⁸ The thoughts, speech, actions, civil and religious, were entirely under

16. *Id.* at 98.

17. JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE 106 (Hight's transl. 1939).

18. FUSTEL DE COULANGES, THE ANCIENT CITY 293-8 (Small's transl. 1899). In the chapter on The Omnipotence of the State he stated: "The state considered the mind and body of every citizen as belonging to it; and wished, therefore to fashion this body and mind in a manner that would enable it to draw the greatest advantage from them." *Id.* at 296. FOWLER, THE CITY STATE OF THE GREEKS AND THE ROMANS 150 (1931): ". . . identification of the individual with the State was the very essence of Greek social life." FUSTEL DE COULANGES, *supra* at 295: "Education was far from being free among the Greeks. On the contrary, there was nothing over which the state had greater control. . . . The state wished alone to control education and Plato gives the motive for this: 'Parents ought not to be free to send or not send their children to the masters whom the city has chosen; for the children belong less to their parents than to the city.'" *

her manipulation. Since the Greek state was conceived in the form of a natural organism,¹⁹ the ethos in such a viewpoint considered the part as always medial and never ultimate; hence the defect of any true personal and private right in Greek society.

As a part to the whole was the citizen to the State, and he was in duty bound to conform his behavior with patterns prescribed by the State, not because the State spoke with the absolute imperative of supernatural authority, but because it was the supreme embodiment of right reason among men. This can be explained by the development of Greek philosophy which began with an inquiry into nature and not into man; then, after it thought of the external cosmos as governed by fixed laws, it searches for the inner laws that govern men's destiny, and so seeks an objective view of the internal cosmos. This is to be realized in a cosmopolis. They saw in natural phenomenon a standard for the morals of men. In the harmony and rhythm of nature they discovered the rule of order, of "due" order in a mean.²⁰ The idea of the mean and the limits, an idea of fundamental importance in Greek ethics, was the problem of how to gain a new rule of life by the force of inner understanding. In effect, this extraordinary insight, this judgment by which order should reign amongst men, coupled as it had to be, in order to impose it upon the recalcitrant, with the will to put it into action, resolves itself in the popular sense of the daily courts and assemblies of Athens. At best, these efforts represent a curious experiment in history to administer "justice" according to the standards of the "average man" as to equity and legality. The popular sentiment as to what was right might be mistaken, but it was subject to no test. The people were, for practical purposes, the seat of knowledge of good and evil. The people, therefore, were the seat of power. This was the Greek contribution to democracy, namely, government by direct participation and almost all citizens participated in the multitudinous popular juries and assemblies. But basically it was a rule of men rather than of law. For those beaten in the vote there was no redress. There was no legal check upon the

19. 2 VINOGRODOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* (1922). In the chapter on The Jurisprudence of the Greek City he stated: "The Greeks recognized a close analogy between the organization of the State and the organism of the individual human being. They thought that the two elements of body and mind, the former guided and governed by the latter, had a parallel in two constitutive elements of the State, the rulers and the ruled." *Id.* at 12.

20. The famous doctrine that virtue is a mean state between two vices, of excess and defect, is derived from the medical analogy of health, as a balanced or proportional mixture of contrary physical qualities, which may be upset by extremes of heat and cold, etc. This was itself an application of the Pythagorean view of goodness as due to the imposition of Limit on an Unlimited.

triumphs of the majority and no hope for the outnumbered minority. True, the Greeks had democratic institutions, but the possession of unlimited power undid what ideas of justice institutions are supposed to embody and preserve. There was no law superior to that of the State; the lawgiver is above the law. The discernment of the "due order" through the prevailing insight of numbers could not protect itself against the absolute sway of numbers nor uphold the permanent reign of law against arbitrary revolutions of opinion. It followed that the sovereign people had a right to do whatever was within its power, and was bound by no rule of right or wrong but by its own judgment of expediency. They did not bother too much with the soundness of a law; the event would prove it useful or not. In this way relativism is tempered by pragmatism. In their vigilant effort to preserve order by the judgment of the "mean" whereby no individual was allowed to grow very rich nor too influential nor powerful enough to seize the governance of the state, the Greeks failed to realize that while a single tyrant could ultimately and in time be limited or overthrown by the resistance of the populace—there was no practical force of limitation upon the latent power of the sovereign masses.

The Greeks had the form of democracy—that is to say, the people undertook the work of government. Their assembly constituted the sovereign body, from which there was no further reference; their *Dikasteria* were also courts of final reference, from which there was likewise no appeal whatever. But they did not have the substance of sound democracy. There was no protection for the minority, much less for the individual. The inalienable rights of an individual as defining and limiting the functions of the State were entirely unknown to them. There was no power or law for making the assemblies accountable for their decisions, nor was there any process of review. Justice is "writ large" in the State and small in the individual. Its essence is the distribution of rights and duties on the principle of not meddling with the concerns of others.²¹ To every man his own; but the meaning of the term "his own" was that the State which was the author of rights and duties could assure the citizen of certain determined barriers against the arbitrary dealings of his neighbor, but he had no rights against the State; which in its own action and in its definition of rights remained unchecked by any consideration of natural rights. The "due share" is that which each citizen can claim for himself and against another.²² But the objective content of that "due share" was a difficulty from which the Greek mind failed to extricate itself. The "conscientious" judgment of the

21. Greek Law in 2 THE COLLECTED PAPERS OF PAUL VENOGRAFF 40 (1928).

22. JAEGER, *op. cit. supra* note 17, at 100.

"average man" as to equity and justice may have given Greek polity an ethical basis but it could not give the basis for that ethics. For the Greek conscience blurred the natural and positive laws²³ in his philosophical idea of the right order in the *Πόλις* as referable to the right order of the *κόσμος*.

The need was for a correct norm to measure legal rights, and that norm was implicit for the Greek in the idea of *δίκη*, a philosophical-juridical normative element which must be assumed to be behind the law of the *Πόλις*. In the domain of jurisprudence the great problem was to determine how far the fundamental laws could be considered as ingrained in the nature of man, and how far they were merely subjective and factitious. The root of the difficulty was the vague concept of the eternal law and an enduring scepticism about the supremacy of temporal law as the concrete expression of the universal and immutable *δικαιοσύνη*. In their persistent search into the first principles of Ideal Justice as the major premise of daily government, the Greeks were led to an extreme in which abstract Right proved fatal to any concrete law as supreme over all. Juridically, this weakness appeared in the Greek disregard for precedent. *Stare decisis* would have been utterly unintelligible to the Greeks. In general, however, existing decisions had at least a symptomatic value, as showing the prevailing views and tendencies of popular courts. In actual litigation, the Greeks frequently appealed to an "unwritten law" but their transcendent law of nature was not erected into a positive juridical doctrine.

We have drawn certain general conclusions from the legal practices of the Greeks. What was really wanting in their concepts of the individual and the meaning of his existence in the *Πόλις* is the doctrine of the specific equality of men in terms of their transcending end and the correlative doctrine of the importance of the consent of equals with reservations in the light of that common destiny. Further, their exaggerated rationalism blinded them to that objective social truth that is discerned in the complex needs of society according to the prescriptions of the positive law and in the light of the eternal law. The result was not the rule of law but the rule of men according to the majority vote. Law was then *not supreme but absolute*, that is to say, any law could be enunciated for the preservation of the state against the individual. He was always in the presence of a law which asserted a plenary dominium over him and never abandoned him. Righteousness consisted in obedience to the

23. VINOGRADOFF, *op. cit. supra* note 19, at 39: "Their object was to embody the eternal law (*δικαιοσύνη*); and it is characteristic of the Greek conception that there is no term in the language equivalent to the Latin *ius*, the expression *τὸ δίκαιον* meaning not only 'the lawful' but 'the just.'"

laws of the state, in the same manner as Christian virtue consisted in obedience to the commands of God. The dreadful consequence was, as we know from history, the repeated efforts to seize power and the many revolutions that debilitated and finally brought about the fall of the Athenian people. Peace, order, justice and law cannot long endure if the ideas on which they are based and the practices in which they are embodied are fundamentally unsound. The vitality and vigor of a state is commensurate with the measure of freedom with which its citizens, individually, as well as collectively, can contribute to her strength. To submerge the individual in numbers is ultimately to resolve politics into the imposition of the greater force upon the defenseless minority. With the absolutism of the greater number there is also the absolutism of law as emanating from an unchecked and irresponsible assembly or courts.²⁴

We will now turn from the practices of the Athenians and the ideas prevalent amongst them and attend to the ideal polities of two of Greece's greatest thinkers, Plato and Aristotle.

GREEK POLITICAL PHILOSOPHY

With Plato and Aristotle, a rational theory of the State came to light in Greek philosophy. Heretofore the task had been one of statecraft; how, by a balance of forces in society, the State could be saved from corruption by sinister social interests. We have seen how Greek practical politics believed it had found its solution in the "middle way" with full reliance on the prevailing judgment of majorities. Their votes forged a law of equity which aimed at keeping everyone in place, and as such held together the centrifugal energies of the discordant elements of society. Accordingly, political thought was occupied with the problem of producing a *concordia ordinum*. This Plato sought to attain in the *Republic* by instituting a human sovereign to whom alone he concedes

24. FUSTEL DE COULANGES, *THE ANCIENT CITY* 296-8 (Small's transl. 1889): "The ancients, therefore, knew neither liberty in private life, liberty in education, nor religious liberty. The human person counted for very little against that holy and almost divine authority which was called country or the state. The state had not only, as we have in modern societies, a right to administer justice to the citizens; it could strike when one was not guilty, and simply for its own interest. . . . Law, justice, morals, everything should give way before the interests of the country. . . . The government was called by turns monarchy, aristocracy, democracy; but none of these revolutions gave man true liberty, individual liberty. To have political rights, to vote, to name magistrates, to have the privilege of being archon—this was called liberty; but man was not the less enslaved to the state. The ancients, especially the Greeks, always exaggerated the importance, and above all, the rights of society." Faith in democracy should always be accompanied by efforts to limit the actions of democracy according to the dictates of the higher law as well as the law of men.

that "insight" into the objective social truth which the Athenians had ascribed to the populace. Aristotle turned to the conception of the "Constitution" as the true sovereign of the State. Unlike the popular democrats and Plato's wise ruler, Aristotle relied on the judgment of the middle class whose interests in the lower and upper strata of society fitted them best to realize the *concordia ordinum*.

The objective of Plato was to train the philosophic ruler, who should govern by trained intelligence and not by the letter of law.²⁵ Through the mouths of Thrasymachus (336 A—354 C) and Glaucon (357—367 E) Plato accepts the Sophists cynical critique of contemporary politics as a tension of wills and interests. The *imperium* of the State merely lays down as the law whatever is to its own interest, and simply makes into justice, in virtue of its superior power, the right which it claims for the strongest or for the greatest number. This would identify *jus* with *potentia*. Plato countered this crass politics with the conception of justice as the inner excellence of the soul, in virtue of which men accommodate themselves to the discharge of a single function for the general benefit. Justice meant that a man should do his work in the station of life to which he was assigned by his capacities. Plato reacted against the crass egalitarianism of the Athens of his day when *any* man might speak in the Assemblies, and *any* man, at his turn, might serve as the adjudicating juror, *any* man, whatever his capacity, might be appointed to executive offices by the chance of lot. The principle of order was for Plato not a surgical band of "means" but that geometrical equality of the right proportion between the elements that constitute a geometrical body. This was the principle of order in the universal cosmos that answered the problem of the one and the many, and since the political cosmos was but a symbol of the order of nature, this geometrical equality was the principle of integration for that "due" order which is just and lawful in the universe, in the individual soul, and in the State. What Plato is asking for is not the Aristotelian "best State" but for the "ideal" State. This fundamental difference is the basis for Plato's radical distinction between the empirical truths of a people swayed by passions and interests, and the ideal, absolute truths which the philosopher contemplates and by title of which he ought to rule. The philosophic nature

25. BARKER, PLATO AND HIS PREDECESSORS 40 (1917): "If the rulers of the State are to educate the citizens into conformity with the moral basis of society, Plato felt that they must themselves be educated to grasp that basis. And, further, when once they had grasped it, so that it dwells in their minds and lives in their intelligence, then *their living intelligence is the true sovereign*, and in accordance with its truth they must educate their fellow-citizens." Plato's ruler is not really above the law. Rather, the law is verified in him so truly that he is best competent to rule others. The philosopher-king is the living oracle of the law according to his vision of the eternal type.

is reserved for a few rare souls: "A whole people cannot be a people of philosophers" (494 A). The ultimate test of the true ruler is therefore the intellectual insight of his philosophic power.²⁶ He must know the "idea" or essence of justice in order that he may fashion into its likeness the characters of those whom he rules. As such the State is the product of superior intelligence and rational organization. Plato would deny that this would result in ruthless imposition. Individuals are directed and perhaps even compelled to contribute to the order of social justice that which the philosopher discerns is in them to give as their "due" share. Plato compensated the intellectual inferiority of the people with the belief that each individual is a specimen embodying a "type" which fits him within the tripartite categories of the State. This postulate is a pious fraud which is required by social expediency and is justified by *raison d'état*. In the half-humorous, half-cynical spirit of Voltaire's *si Dieu n'existait pas il faudrait l'inventer*, Plato, in a famous passage of the *Republic*, has propounded "a noble lie" which is to reconcile the citizens of his utopia to the different stations in life to which it may please the Government to call them after having tested and brought out their innate abilities by a strenuously competitive course of education.

"What we now need," I said, "is some *dodge in the nature of an opportune lie: a single noble lie which will do the trick of convincing*—if possible the Government themselves and in any case the rest of the community."

"What do you mean?" he said.

"Nothing out of the way," I said; "just a *welsh* which has been worked on ever so many occasions before now, as the poets credibly inform us, though it has not been worked in our time and now could only be worked, if at all (of which I am not sure), at the cost of a great deal of tact and patience."

"How shy you seem to be of your idea," he said.

"You will feel," I said, "that I have every reason to be shy when I tell you what it is."

26. Socrates had insisted upon knowledge as the necessary basis of action; and the Socratic conception of government, as an art which involved special knowledge, had especially influenced Plato. He accepted the Socratic thesis that "happiness" is the highest aim of every human soul and insisted with him that the "pursuit of happiness" is not the pursuit of pleasure. The Greek term for happiness is *eudaimonia* and means to possess a "good demon." The Socratic ideal was transferred by Plato to a new sphere, that of political life. But only the philosopher, unmoved and uninfluenced by the things of change and opinion, can contemplate the supreme idea of Good and communicate a pattern of the *right* order as the guiding inner principle for the integration of political society. Plato's original intellectualism which appeared in one of his earlier works, the *Protogoras*, that virtue is knowledge and can be taught, is gradually modified first in *The Menon*, that knowledge is based on preexistential intuition of ideas, and again in the later work, *The Republic*, by the admission of affective influences on ethical conduct.

"Speak out," he said, "and don't be afraid."

"Here goes, then—though I don't know how I shall have the face to say it or whether I shall find words to say it in well, I shall try to convince first the Government and the Army and then the rest of the community that the upbringing and education which we gave them was all a dream and that all the time they were really being moulded and brought up underground in the bosom of the Earth, they and their arms and the rest of their equipment, which was likewise being manufactured there. Then, I shall tell them, when they had been completely finished off, their mother the Earth produced them—thus placing them under an obligation to defend their country, if she is attacked, with all their mind and all their strength, as their mother and their nurse, and also to look after their fellow-citizens as their brothers born of the same Mother Earth.

"Really," he said, "*how can you have the effrontery to go on and on with a lie like that?*"

"You have every reason to be shocked," I said, "but, all the same, do hear my fairy-story out. It goes on like this: 'All of you members of the community are brothers; but when God moulded you, he put a streak of metal into each at the moment of birth—gold into those of you who were fit to govern, because they were the most precious; silver into the soldiers; and iron and bronze into the peasants and workmen. As you are all akin, you will generally *breed true to type*; but it will happen occasionally that the golden stock will have silver offspring and the silver stock golden offspring and so on *mutatis mutandis*. Now the first and chiefest commandment that God lays upon members of the Government is this: the paramount call upon their honour and efficiency as guardians of society is to be on the watch for any of these flaws in the psychic composition of the members of the rising generation and to take the proper action in each case. If it is a case of their own children showing traces of bronze or iron, they must have no mercy on them but must degrade them to the ranks of the workmen or the peasants to which they *intrinsically* belong. Conversely, if the children of peasants or workmen show traces of gold or silver; they must rate them at their intrinsic value and must promote them to be members of the Government or of the Army, as the case may be.' We shall find scriptural authority for the prophecy that the community will come to grief on the day when a member of the iron race or the bronze race enters the Government. *Well, can you think of any dodge for getting this fairy-story believed?*"

"Certainly not for getting it believed by grown-up people now alive; but we might manage it with their children and their descendants and the whole of posterity."²⁷

In this passage, Plato betrays the truth that the racial explanation of differences in human ability and achievement cannot be put forward by any rational mind except as a deliberate and cold-blooded piece of deception, in which the differentiating effects of "upbringing and education" are

27. PLATO, *REPUBLICA* 414 B-425 D: the translation of the passage is taken from 1 TOYNBEE, *A STUDY OF HISTORY* 247-8 (1935) (*Italics mine*).

mendaciously ascribed to existing differences of a racial order—and this with the calculated object of producing certain effects in the practical field of social and political action. The specious motives of a utopia, of a pattern in the heavens, fail to relieve the idealist Plato of the ordinary sound human reactions of shame and shock.

We have so far reviewed two Greek polities that underlie their historical practice and their highest *ideal* expression in the *Platonopolis*. On the one hand, there is the Athenian egalitarian effort for “right-mindedness” and equilibrium in the ultimate of the majority vote, and, on the other, its resolution into the sheer force of greater numbers. Plato found the principle of integration in a hierarchical organization of society according to the visionary pattern of the philosopher ruler, which was as impossible to realize as it was to impose the “nobility” of its essential deception—the lie of intrinsic inequality, upon human beings. Aristotle, reflecting the common sense desire for a *via media* seeks the principle of order in society²⁸ by fixing the concept of justice by a Constitution and its administration by the calculated judgment of the middle class.²⁹ Aristotle, like his master Plato, held that what was really wrong with society was the lack of a sound principle of organization by which power can be made to serve the Πόλις and not any individual. Aristotle rejected with Plato the Sophists’ channeling of power into a science of social engineering. But he also rebelled against the Platonic idealism that found the secret of power in “order”; for order, if it is to be well founded, must be “just,” *i.e.*, it must bear a definite and intelligible relation to a cosmic principle which lies deeper than all mere conventions of behavior, whether of individual or communal life. Aristotle saw the weakness inherent in Plato’s *Republic*. The government therein depicted represents the despotism of an idea; it is an ideocracy. Plato’s refutation of the Sophists’ “greater force measure” was bound by the inadequacy of his metaphysics to come to the same conclusions. The Sophists’ superior man had been the strong man; and justice meant for them anything which was to their material advantage. But the conception could be moralized; the strong man could be made wise instead of strong; and justice might still consist in the rule of a single man, not because the strongest thereby gained the advantage but because the wisest was therein discharging his function. Un-

28. POLITICS Bk. I, 1253 a 37; *cf.* NICHOMACHEAN ETHICS Bk. V, 1129 b 25.

29. They have a faculty of collective judgment in matters of politics: “. . . some appreciate one part, some another and all together appreciate all.” POLITICS Bk. III, c. xi. The doctrine of the *mean* as applied by Aristotle to society must not be confused with mediocrity or “middle-class morality.” Rather, Aristotle’s thinking of the social equilibrium in terms of aesthetic proportions.

checked by law, and unfettered by rules, he will look upon the idea of good, and form the State to its image as nearly as he may.³⁰

Aristotle starts by envisaging the principle of order as immanent, *i.e.*, as essential and inherent in the individual. In so doing he was undoubtedly actuated by a desire to escape from the pitfalls of Platonic transcendentalism.³¹ The ideal is in the actually living individual as the cause of life and progress. Development in nature is restricted to the formation of types confined within the limits imposed by the four operative causes. In this scheme the excellence of the individual is appraised in terms of its *entelechia*, and process acquires meaning and value only so far as it tends towards a self-realization of the appropriate form. He agrees with Plato in supposing that the individual possesses significance as the "carrier" of a type, and that for the realization of this intrinsic finality he requires the life of the Πόλις. But in marked disagreement with Plato, Aristotle embodies the perfection of the Πόλις in the *Constitution*³² which is the norm not only of legal justice but of the moral and intellectual virtues of its citizens.³³ Plato and Aristotle may differ; but for both there is one end—the end of a moral perfection which can be attained only in the Πόλις—and that end is the measure of all things. However, neither Plato nor Aristotle seemed to realize that moral action that is done by instance of state-command destroys moral autonomy.³⁴ Both insisted that, in the exercise of power, justice should be substituted for force. But in their efforts to define

30. BARKER, *THE POLITICS OF ARISTOTLE* 39 *et seq.* (1946), for Aristotle's critique of Plato. See also GOSSELIN, *ARISTOTE* 132 *et seq.* (1928) and RODIER, *ÉTUDE DE PHILOSOPHIE GRECQUE* 202 *et seq.* (1926).

31. Though Aristotle accepts the radical distinction between form and matter inherent in Platonic idealism, for him development in nature is constituted by the process of realizing its *telos* through its own functions and organic structure.

32. This identification of the State with the Constitution is one which naturally follows upon Aristotle's views of the meaning of citizenship. If the State consists of citizens only, and if every citizen is an office-holder, then the Constitution, which determines the holding of office, must determine the State. The nature of the Constitution must therefore be the vital thing to men whose leisure has set them free for a life devoted entirely to politics, and whose position in that life is determined by the Constitution.

33. The Greek theory of the nature of the state, as an entity of which every individual was an integral part, demanded an active political life by each citizen, and, consequently, led logically to pure democracy, since only such men could become virtuous with the ethos of the state by exercising at different times in varying functions political authority. This constitutes the essential difference in the struggle for power between the *parties* of those days and ours. Then, a conflict between parties was a conflict of classes according to real not imaginary platforms. It determined the way of livelihood for each citizen.

34. As the State was all in all to individual morality, so was its moral mission the whole duty of the State. The *Politeia* is therefore the science of the ultimate Good as defined and achieved within the life of the State and under its omniscience.

justice they always left the individual wholly subordinate to the State, nor were they able to supply any satisfactory grounds for the authority of government as exercised by men commanding fellow-men. The great inadequacy of their metaphysics is, of course, the failure to attain to a correct notion of the personality of the individual and the specific equality of human beings.³⁵ Correlative to the truth of the specific

35. The failure of the Greeks to attain to the adequate conception of the specific equality of men (as the Schoolmen say in Latin, *constitutive, exegetive, and consecutive*) was due to historical, sociological, and metaphysical reasons. The popular (and Aristotelian) concept of manual labor and menial services as an impediment to the freedom and leisure necessarily requisite for the development of virtue, the experience of factual inequality, the pride of the cultured Greek freeman, who considered the barbarian as inferior by nature—only added to the inadequate metaphysics of the Greeks which did not attain to the knowledge of an Eternal Divine Personality in whose image man was created. The Christian revelation of the universal salvific will of God and of the equality of men in the adopted sonship of God and the example and teaching of Christ on labor were morally necessary to remove the deeply rooted prejudices of society and to enlighten the thought of the philosopher. Inequality in nature is implied in Plato's concept of virtue. The *arete* of a thing is its proper function or that quality "in virtue of which" it does its particular work well, and each individual has a specific function that constitutes his distinct perfection. Though it is to Aristotle's credit to have conceived of human nature in a normative way, his immanent teleology unwittingly devolves into a crude externalism. A large class of non-citizens are subsidiary to the citizens and as a means to an end external to themselves. The end or function of the state is moral life but only those who have leisure and economic freedom are capable of it. Labor and suffering as means of sanctification or virtue was inconceivable to Aristotle. While Plato's inequality of man was intellectual, Aristotle's was moral. Aristotle's teleology introduces a hierarchy of values which discriminates between the moral capacity of the individuals. Though his teleology preserved the household (against Plato), it justified at the same time a fixed class of slaves. What misled Aristotle was an excessively close comparison of the state with the organism of the human body. The contributory parts of the body (v.g., blood, bones, sinews) are really the same as the integral (v.g., hands and feet) of which they are the conditions. The contributory parts of the state (v.g., traders, artisans, laborers) are not the same as the integral (v.g., for Aristotle, the citizens and governmental agencies). The sound organic theory of the state is based on an analogy which properly harmonizes the paramountcy of the common good with the transcendental significance of each and every individual, whether he be a citizen or not. The attempt to erect a valid ethical system on the basis of pure functionalism must logically conduce to a differentiation of a scale of values according to the various functions of the members of society, and end by making one set of functions instrumental to another. A moral act inferior in virtue as compared to another does not entitle the agent of the higher moral act a superior right over the agent of the lesser virtue.

Nor does the more significant Aristotelian citizen fare better than the non-citizen in his organic theory of the state. The individual citizen is dependent upon the state not only for his *fulness* of life but, further, for his *very* life. Because the individual citizen cannot realize his moral perfection apart from the Constitution of the state which defines the moral life of state and citizen as one, he too is dependent upon the state as absolutely

equality of men is the inherent duty of each person to pursue an end that transcends the State and even defines its rights and powers. The Platonic conception of the impress of an eternally perfect Idea upon receptive matter and Aristotle's doctrine about the growth of potential capacity into actual "form" or "end" translated into terms of practice resolve into all the evils of creative politics. They both embrace a comprehensive scheme of social planning, in which, with the *telos* of man constantly in view, "function" shall be adjusted to capacity within the "constitutional" or "heavenly" pattern. In neither framework is the individual truly free in the pursuit of a destiny that transcends the State and by title of which he can oppose the State.

"The radical error of Classicism is to suppose that the history of mankind can properly be apprehended in terms applicable to the study of 'objects' in 'nature,' *i.e.*, in the light of the conventional concepts of form and matter. In considering the difficulties which arise from any attempt to apply this scheme we may begin by observing that it reduces the individual human being to the dimensions of a 'specimen' embodying a 'type.' . . . Furthermore to envisage him in this light involves the assumption that he becomes fully 'intelligible' in terms of structure and function or, as Aristotle put it, of 'what he was to be.' It raises the question of growth or development as this was conceived by idealism. To this question the answer must already be fairly evident. The type, *qua* type, does not and cannot possibly change; it merely renews itself incessantly in and through the individual; while the individual, on his part, achieves fulfillment (*i.e.*, his end or *telos*) by virtue of this incessant renewal of himself in type. In this highly formalized and schematized picture of life we may discern certain important implications for the idealist theory of human relationships. For it appears to suggest that the sole essential and intrinsic relation of the individual is with the 'type' to which he naturally belongs. . . . But, in that case, what becomes of the relationships of individuals with one another? Are those (as the Sophists had contended) to be relegated to the category of mere convention (*νόμος*) and thereby admitted to be 'unnatural'? Again, are they to be reduced to terms of mere animal gregariousness or explained as a community (*κοινωνία*) of interest in physical satisfactions like those which arise from the association of 'male and female' or of 'master and slave'? To avoid this conclusion idealism casts about for a distinctive principle of integration and this it discovers in the ideal of justice, which as Aristotle rightly suggests, is the common property of all rational beings. But since the ideal, as it stands, is wholly 'formal,' it undertakes to give it content by identifying it with the 'justice' of the *πόλις*.

"It is precisely at this point that the idealist commits the crime of Prometheus in seeking to appropriate what belongs to Zeus or, like Adam in the Garden, eats of the forbidden fruit in order to become 'like God.' In other words, what he does is to treat knowledge not as a means to 'wisdom' but as a source of 'power.' The power to which he thus aspires proves, however, to be quite illusory. For what he has in fact accomplished is to substitute his notion of

as a hand or foot is dependent upon the body, equally and in the same degree. The equality and identity of dependencies is simply assumed.

order for the order which exists in the universe; the fictitious for the actual; the dead concept for the living reality. His problem is thus to give currency to this counterfeit of cosmic order by persuading or compelling men to accept it as genuine. The effort to do so constitutes the history of 'politics' in classical antiquity."³⁶

Aristotle's conception of law, like that of justice, is different from that of Plato. The Platonic eternal ideas matter more than the laws, and those who have apprehended these ideas must be free to impose them at their discretion upon the ignorant and emotionally swayed masses. Plato, like all the Socratics, was so centered with the pure intelligibility of reality and its eternal immutability, that he withdrew it so far from the contingency and flux of temporal existence that he did not do justice to the true value of temporal law. Aristotle, on the other hand, together with the practitioners of his day, was a consistent advocate of the sovereignty of the Constitution. His law is the custom, written and unwritten, which has developed with the development of the State. For this reason, he is the first Greek to attempt a theory of progress in terms of human perfectibility through existence in society.³⁷ His "Constitution" expresses the prevalent Greek concept of a political philosophy that reaches into the whole life of the individual.³⁸ His definition of "justice in general" treats with moral precepts brought under the cognizance of the State by its laws, while justice in particular, is subdivided first, into the distributive justice, which in the plenitude of state power-

36. COCHRANE, CHRISTIANITY AND CLASSICAL CULTURE 97-8 (1944).

37. POLITICS Bk. I, c. 3: "For man, as in his condition of complete development, *i.e.*, in the State, he is the noblest of all animals, so apart from law and justice he is the vilest of all. For injustice is always most formidable when it is armed; and Nature has endowed Man with arms which are intended to subserve the purposes of prudence and virtue but are capable of being wholly turned to contrary ends. Hence if Man be devoid of virtue, no animal is so unscrupulous or savage, none so sensual, none so gluttonous. Just action on the other hand is bound up with the existence of a State; for the administration of justice is an ordinance of the political association and the administration of justice is nothing else than the decision of what is just."

Bk. IV, c. 13: "But as our object is to discover the best polity, or in other words the polity under which the State would be best organized, and as the best organized State is the one which offers the greatest possibility of happiness, it is evidently our duty to apprehend the nature of happiness."

38. 1 NEWMAN, THE POLITICS OF ARISTOTLE 209-10 (1887): "It was thus that in the view of the Greeks every constitution had an accompanying ethos, which made itself felt in all the relations of life. Each constitutional form exercised a moulding influence on virtue; the good citizen was a different being in an oligarchy, a democracy, and an aristocracy. Each constitution embodied a scheme of life, and tended consciously or not, to bring the lives of those living under it into harmony with its particular scheme. If the law provides that the highest offices in the State shall be purchasable or confines them to wealthy men, it inspires *ipso facto* a respect for wealth in the citizens."

dispensed rights to individuals in a geometrical proportion, according to what the individual did and could contribute to the common stock by military service, taxation, and liturgies;³⁹ and secondly, legal redress. But what in fact in any Greek system of thought or practice made any advocacy of an objective law or a "due" order was at most a vague normative measure designated as "law of nature." To them the law of nature is no more than a basis of comparison. Law is nothing more than the uniformity of nature, and human law is likewise nothing but a common apprehension of a part of this uniformity by man. It is an intellectual standard by which one form of polity may be compared on its merits with another, and even one enactment made within the State with another.⁴⁰ Particular laws are said to be good when they embody the true law; and when a given polity or law is bad, it does not follow that it is not binding nor is its legitimacy challenged. If the Greeks thought of a law of nature as applying to a particular state at all, they meant by this natural law no more than that portion of a state's actual laws which in fact happens to be identical in all other states. In this universality, they resolved for themselves the differences of local conventions and attained to the underlying cosmic laws that regulate the universe. They had in mind no fundamental principles which must invalidate a positive law inconsistent with them; in short, they thought of law in terms of the state, not of the state in terms of the law.

In drawing together the practical and speculative experiences of the Greeks in politics, we conclude with these observations. To their everlasting credit is the common and persistent search for first principles underlying thought and being. They looked upon the world and all within it as a harmonious whole from which every part derived its meaning and position. Though this perspective may have first arisen from native aesthetic instinct, their concept of the universe was ethical in character. Among the ancients no people strove to assert the sovereign primacy of spirit over matter, of reason over elements of force as did the Greeks. Consequently, man is the center of their thought and their political experiments labor to realize each individual's type of "form" in society. They endeavored to define the "idea" in him or for him within the universal pattern. This idealism sought to discover "objective" standards in the order to which man must contribute his "due" share. This norm is the *δίκη*, the *right* way. This inner rule of law in social life which constitutes the idea of the *Πόλις* is attained either by

39. See Aristotle on Legal Redress and Greek Law in 2 THE COLLECTED PAPERS OF PAUL VINOGRADOFF cc. 1, 4 (1928).

40. McILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN 37 (1940).

the popular assessment of the *δέμος* or by the superior insight of the philosopher-king.⁴¹

The Greek ethico-political systems are expressions of one and the same fundamental *intellectualism* of Greek thought.⁴² It is by rational thought that we are to find the inherent meaning and essential norm of human conduct, and it is reason *alone*, that can give it authority. These systems, however, rest precariously upon undefined postulates⁴³ and some of them contain a *petitio principii*.⁴⁴ Even its "natural law" was but the common residue of conventional and traditional practices. It was called the law of nature because it was thought to express itself inevitably through physical necessity in spite of the anarchic elements of time and change. It is characteristic of the development of Greek juridical ideas that the "law of nature," though appealed to as a philosophical explanation of existing facts, does not serve as a means for concrete juridical deductions. It was at a later stage—with the advent of Stoicism, especially in its Roman form—that the law of nature began to be considered as a source of law in the practical sense of the term.⁴⁵ A conscious juristic theory of the law of nature was rendered unnecessary by the conception of the *ἐπιείκεια*. Although the oath of the heliasts urged them to frame their decisions according to their consciousness of justice only when there was no definite law to go by, in practice the tribunals took great liberties in the application of existing laws. Neither in their concept of fundamental law (which meant no more than the "composure" or the constitution of the State)⁴⁶ nor in their understanding of the rule of law did they think of its supremacy as a review upon the actions of those who acted by that law.

The rigidity of the political "form," the *πολιτεία*, had two serious failings with the same inherent absolutism of law. First, there could not

41. Aristotle made the natural law tantamount to the established order of existing society while only Plato among the ancients may have conceived it as an ideal criterion for correcting existing law.

42. It was the entelechy of Greek Politeia to discern what human nature is in each individual (functionally) and how the community (rather than the state, we should say) should be instrumental to bring each type to perfect existence as a part within the mosaic of the social order under the omniscient artistry either of the philosopher-king or of the community.

43. REPUBLIC 506. Socrates admits his inability to know the real meaning of the Good, the Supreme Idea. See ST. AUGUSTINE, CITY OF GOD VIII, 3. Augustine refers to this basic failure of the ancients.

44. Plato builds a state to illustrate man; but he presupposes a knowledge of man in building it.

45. VINOGRADOFF, *op. cit. supra* note 19, at 42. ". . . the theory of a transcendent law of nature was not erected into a positive juristic doctrine."

46. The Greeks' word for it is *politeia* and means simply the state as it actually is.

be in a strict legal sense any question of an unconstitutional act by the δέμος; and secondly, there was no remedy for an impossible situation short of actual revolution. Since the πολιτεία included the whole life of the State, these revolutions, as Aristotle points out,⁴⁷ destroyed the states themselves. Thus the Greek achievement for order and justice, identified with the constitutional pattern, could only endure to the extent that the state by means of an educational process could succeed in molding the character and virtues of its citizens in complete subordination to the end of the state.⁴⁸ Though the Greeks distinguished between the natural and conventional elements of law, they were never adequate in their account of what natural law is nor did they attain to the sound concept of temporal law as simultaneously just and mutable. Had their "reason" been governed by clear and definite first principles of the eternal law of a *Personal* God in light of which positive laws could be constructed for the needs of social life, it would have escaped all the errors of the complete self-sufficiency of rationalism and found in the limits of a superior law a sound basis for morality and politics.⁴⁹ The authentic link between happiness and morality cannot be found in a mere world concept. The highest good for man transcends earthly life and that the Greek did not see. The good man is the good citizen—and more.

THE ROMAN IMPERIUM

Parallel with the rise and fall of the Athenian Πόλις, Rome was employed in working out the same problems, with greater practical sense,

47. POLITICS Bk. V.

48. *Id.* Bk. VIII, c. 1. We must remember as always that the constitution, in Aristotle's view is a "way of life." "Training for an end that is common should also itself be common. We must not regard the citizen as belonging just to himself: we must rather regard every citizen as belonging to the state. Each is a part of the state; and provision made for each part will naturally be adjusted to the provision made for the Whole." *Ibid.* This illustrates how the "logical necessity" of Aristotle could easily substitute itself for the necessities of reality.

The threat to the equilibrium of the state is designated by the Greeks, *stasis*, the assumption of an independent position within the state and menacing to challenge it. Aristotle was so repelled by it that, besides prescribing the principle of the *mean* and the process of state education, as remedies, he also laid down the most absolute vigilance of the private and public conduct of its citizens. POLITICS Bk. V.

49. Nonetheless the Greek *politeia* was vastly superior to the ancient oriental rule. The individual was completely sacrificed to the divine oriental despot for whose sole sake he lived and labored. The Greeks were the first to conceive of the City-State as an association of citizens bound together by common values and interests integrated by law (the Constitution) for the prosecution of a general welfare which they conceived as essentially ordained to the happiness of its members. The failure of the *politeia* was consequent to the flaws inherent in Greek intellectualism which conduced to all the restraints of a self-enclosed naturalism.

and greater temporary success, but ending at last in the collapse of the colossus. The vast superstructure fell because its "inner laws" of society, so much a Greek inheritance, could not sustain it any longer. Speculative politics had no attraction for the grim and practical genius of the Romans. It was the legal sense of the Roman citizens—with their conceptions of *imperium*, *lex regia*, *aequitas*—which gave to the Empire the framework and structure of its institutions. But the ideas on which it rested had been imported from the East. The Roman Imperium was the result of the fusion of Roman political development and Roman institutional structure with Hellenistic conceptions. Rome built a world-state in a world permeated by the preparatory thought of Greece, and Augustus did envisage the task of the Empire in terms of Greek idealism. The Greek philosophy was a more potent force in its decline than it was in the days of Plato and Aristotle; and Stoicism exerted a greater influence on the lives of men and the development of States than the Academy or the Lyceum. Under the influence of Zeno and his heir, Posidonius, the narrow confines of the Πόλις with its periclean glory and Aristotelian ἀντάρκεια was to expand gradually into a *cosmopolis*. The Roman genius received the Greek conceptions, in themselves unsubstantial and unbodied, and converted them into an organized system of life.

The Roman world is the world of the *will* (as the Greek's was that of the mind), and therefore, of law and politics. This *will*, in such a world, on the one hand, is continuously seen in the controlling and inflexible order of the state, and, on the other, begins to develop in a form of individual rights. With the development of the principle of the will with its subjective nature, private rights cannot fail to arise, and the state cannot long preserve the rough semblance of a secure unity. The irresolution of these tensions of wills, only temporarily "solved" by the stoicism of the Roman jurists, by the facade of the Republic and the veiled absolutism of Augustus, may help to explain the loss of vitality which doomed the eternal city.

ROMAN POLITICAL PRACTICE AND IDEAS

We will review in a summary way the essential characteristics of the Roman *imperium*, particularly in its administration of justice. This function of the state, more than any other, discloses its political *scientia*. All the institutions of men are merely so many expressions of their thoughts; their institutions are their ideas, and law, in particular, is the embodiment of a people's political philosophy. Then we will attend to the philosophy professed and observe what spirit and ideas it instilled into the political forms which embodied that justice.

Two essential characteristics of Roman Law are its *extrinsicism* and

subjectivity. The whole force of its legality rested on authority, and its objective content was not clearly fixed nor universally known, till about 429 A.D. at the time of the East Roman Empire under Theodosius II when the first codification made an appearance. This can be partly accounted for in the religious origins of civil law. The early priest-magistrates never felt compelled to give a rational exposition of their answers which carried with it the full imposition of a religious compliance. Their declaration of law could never be argued nor challenged.⁵⁰ The religious character of the law accentuated its tyranny over the citizen believer and bound him inextricably in a web of duties which left him no freedom of thought nor of conscience. Yet even when law and politics were distinguished from religion by the philosophers, Roman jurisprudence in the days of the Republic and the Principate continued to be authoritarian. Though a matter of reasoning as its product shows, it based its decisions not on a reason, but on the authority of eminent jurists. "Stat pro ratione voluntas" (Juvenal). Great as was the importance attached to *mos maiorum*, it was only "well established" custom not lightly to be abandoned, but never binding as a statute. Previous decisions had no binding force and the principle of *stare decisis*, which protects the rule of law as against the insecurity of momentary judicial sense, was practically unknown and inadmissible in their concept of the function of law. The existence and content of legal rules was to a large extent uncertain.⁵¹ This absence of a definite body of law was not looked upon as an evil in republican and classical times but found its full recompense in a body of sages. The belief persisted that a man of standing and versed in political and legal affairs possessed, if he had devoted his mind seriously and conscientiously to the subject, an *intuitive perception of the law*.⁵² This feature is especially observable in the *responsa*;⁵³ a *responsum* remained the authoritative finding of a

50. FUSTEL DE COULANGES, *op. cit. supra* note 18, at 252: "The Veritable legislator among the ancients was not a man, but the religious belief which men entertained. The laws long remained sacred. Even at a time when it was admitted that the will of men or the votes of a people might make a law, it was still necessary that religion should be consulted, and at least that its consent should be obtained. At Rome it was not believed that a unanimous vote was sufficient to make a law binding; the decisions of the people required to be ratified by the pontiffs, and the augurs were required to attest that the gods were favorable to the proposed law."

51. CICERO, *DE LEGIBUS* 3, 20, 46: ". . . legem custodiam nullam habemus itaque eae leges sunt, quas adparitores nostri volunt; a librariis [*i.e.*, from the *scribae*] petimus, publicis litteris consignatam memoriam nullam habemus."

52. SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 61 (1946).

53. The *responsa* were brief and disdained to give reasons, forming thus a complete contrast to the lengthy argumentation of a medieval *consilium* or a modern counsel's opinion. In a juristic dispute *auctoritas* counted heavily, and it was from this point of

man who knew; it therefore contained neither citations of previous authorities nor confutations of other opinions. The crafty Augustus succeeded in subordinating these jurists to his imperial system by granting them the startling *jus respondendi*, i.e., the right of officially giving, in the name of the prince, opinions which were legally binding upon the judge. In this wise, what would have developed an independent body of jurists in cooperation with the bench, was converted into a facile instrument of the Princeps' imperium. The Roman process of adjudication was more nearly a private method of legislation limited in general by the prevalent policy of the State. This was disclosed by the *Edicta* promulgated annually and changed every year, for the reason that the law had its source only in the will of the man who was for the time invested with the *imperium*.

If the distinctive contribution of the Romans was their "law," may we not use as a norm of evaluation the position of the individual in relation to the State as defined by its law?

"Although the Roman State thus accorded its citizens—and in a lesser degree also the peregrine members of the State—a wide space for their unfettered individual activities, the legal guarantee of this freedom from and towards the State is but faintly indicated. There is no such thing in Rome as the special constitutional safeguards of freedom such as are contained in modern constitutions; in principle there was no legal guarantee at all. 'The Roman government refrained in greater degree than most others from interfering arbitrarily with the legal sphere of the individual, but it nevertheless maintained the conviction . . . that the State has power to dispose of its citizens at its discretions.' In the relation of the individual to the State the principle of liberty vies with the principle of authority. The Roman authoritative State claims the principle of freedom for itself also and grants liberty to the citizen, while itself *free to give or to withhold*."⁵⁴

"Liberalism aims at a *magna charta* for criminal law, a protection of the individual against the arbitrary decision in penal matters of the State and its officials, and therefore at as exact a statutory delimitation as possible of the punishment, or at least of the kind and scope of punishment; at the greatest possible reduction of the discretion of the judge, in short at strict adherence to the rule of '*nullum crimen sine lege, nulla poena sine lege*.' Roman criminal law knows nothing of this point of view, it seeks—apart from the right to

view that precedents and *mos maiorum* were appealed to, particular weight being attached to the decisions of established repute. For contemporary satires on this, see *id.* at 61-2.

54. SCHULZ, PRINCIPLES OF ROMAN LAW 163 (1936); cf. BIONDI BIONDI, PROSPETTIVE ROMANISTICHE, pubblicazione della Università Cattolica del Sacro Cuore, Scienze Giuridiche, Vol. XXXVII, (1933) Romanita' e Fascismo 38: "I Romani non ebbero l'istituto giuridico (espropriazione per pubblica utilità) ma il fatto; *non si trattava cioè dell'applicazione di una legge, in verità mai esistita, ma piuttosto della esplicazione di quell'imperium dei magistrati, a cui tutto, anche i più fondamentali diritti dei singoli, erano sempre subordinati.*" (Italics mine).

provocatio—not the protection of liberty but only just and effective punishment, whereby the special circumstances of each case are taken into consideration. For this wide and unfettered discretionary powers are necessary; these must be accorded to an authoritative judge, but to him alone."⁵⁵

"The legal relations of the individual to the State in matters pertaining to property were also regulated according to authoritative principles. Private law and procedure were not applicable here; the authority of the State caught up these legal relationships into the realm of the *ius publicum*. . . . The *auctoritas of the Roman State could not tolerate a procedure in which the State was subjected to the law of an independent court*, whether this was an ordinary court administering private law or an administrative court."⁵⁶

"The conception of a claim to legal protection is, apart from anything else, entirely non-Roman; a claim on the part of an individual against a magistrate to undertake an official act was unthinkable to the Romans."⁵⁷

"Finally, it is in conformity with the authoritative principle that the rule of the separation of State powers was not observed. The legislature and (criminal) judiciary were both in the hands of the *Comitia* and in those of the imperial Senate. The *princeps* combined civil and criminal judicial functions with the creation of law. Executive and judiciary were not separated, as all the jurisdictional magistrates as well as the imperial Senate also took part in the administration. Executive and legislative were united in the hands of the *comitia*, the imperial Senate, and the *princeps*."⁵⁸

Both in civil and criminal matters, therefore, the individual was encompassed on all sides by the full discretionary power of the State. However, in the city of Rome, the situation was arrested in a balance of forces. The close vicinity of the popular assembly, of the Senate and the magistrates with power of intercession, naturally acted as a deterrent. But outside the city and particularly in the provinces the magistrates enjoyed exceedingly wide powers. This plenitude of power in the provinces was signified in the *imperium* and given a greater arbitrary exercise. When the governor pronounced his decisions, fixed the amount of taxes, and exercised the military powers, he acted according to his own will; no law controlled him; neither the provincial law, as

55. SCHULZ, PRINCIPLES OF ROMAN LAW 176 (1936). The double rule "*nullum crimen sine lege, nulla poena sine lege*" is the citizen's fortress against the all-powerful State. Note: Under the Emperors, lay juries disappeared; and most trials, both civil and criminal took place under a single judge, the praetor, who united in himself all the powers that we distribute between civil and criminal tribunals, common law and equity courts. In the provinces, the praetor, subject only to the emperor's rescripts, dispensed justice according to his sense of Roman law as promulgated by the malleable *lex annua*. A succeeding praetor could annul the judgment of a former praetor which had not yet been executed at the time of his departure.

56. *Id.* at 176-7 (Italics mine).

57. *Id.* at 178 (Italics mine).

58. SCHULZ, PRINCIPLES OF ROMAN LAW 179 (1936).

he was a Roman, nor the Roman laws, as he passed judgment upon provincials.

Fundamental to the authoritarian nature and structure of society is a faith that compels a strong sense of obedience. There dawned an epoch of doubt and transition during which the Romans passed from the tyranny of the gods to the ill-disguised despotism of the Republic and Empire. The authority of the old institutions waned with the impaired authority of the national gods, and a new principle of integration, new "inner laws" of society were needed to put an end to the revolutions that threatened anarchy. Lucretius, in a naturalized version of Epicurus (*De Rerum Natura*), promised emancipation from the religious misconceptions of ultimate reality by propounding a view of nature that made life independent of the inhibitions consequent to belief in super-human powers.⁵⁹ Its vogue was very limited since it offended the deep religious sense of the Romans and could not adequately explain the civic duty demanded by the State.⁶⁰ But it served its purpose by being the first systematic attempt to study the individual and society in terms of nature and reason—*naturae species ratioque*.

STOICISM AND THE IMPERIUM

Stoicism appeared to satisfy the triple moral requirements of the age; for the Deity, for Reason, and for Civic Duty. It was the last significant philosophic attempt of antiquity to meet the legitimate demand of thinking men for a just and reasonable world. It sought as well to satisfy the urgent demands of religious duties and civic disciplines on the basis of a cosmology erected upon the concept of fate. It endeavored to evade the difficulties of Platonic transcendence and of Aristotelian seeming dualism by immersing the *logos* or principle of cosmic order in matter. Such an ordered Universe must unquestionably be the intricate and complex manifestation of an all-pervading Reason expressed as Law which, transcending in its universal scope all human capacity, must itself be the Deity. From this Stoic dogma of divine immanence and monism certain inferences were drawn which the Roman jurists were quick to appropriate as foundations to bolster the tottering Imperium. First, this all-pervading Deity (*Deus pertinens per naturam cuiusque rei*) reveals itself with distinct clearness in the intelligence of man, who thereby is constituted in communion with the Deity and equal to fellow-men, by participation in the same divine Spirit. Man alone is strictly self-consciously reasonable that he can discern the inevitable

59. BEVAN, *STOICS AND SCEPTICS* 148 (1913); also Cicero's critique of the Stoic philosophy, *DE DEORUM NATURA*.

60. 1 LECKY, *HISTORY OF EUROPEAN MORALS* 184-5 (1869).

workings of this Deity through him. *Virtus eadem in homine ac Deo, neque ullo alio ingenio praeterea*. Since every creature seeks to realize itself by a complete manifestation in itself of this innate law of nature, man achieves his perfection by willingly admitting his identity with the workings of this divine principle of which he is a part. Consequently to "follow nature" (*sequere naturam*) is to follow reason and an apparently valid religious sanction is provided for duties and disciplines. It matters little to the non-metaphysical mind of the Romans that compliance to authority was substantiated at the cost of liberty in a cosmology of necessitarian monism. Cleanthes has commemorated this evasive incongruity: *ducunt volentem fata nolentem trahunt*. Secondly: The political correlative of these premises is a world-wide society or state of which the Roman Imperium is the destined historic expression. Thirdly, from the equality of men in the communion of a common intelligence and nature a more complacent theory of popular sovereignty could be derived ultimately from Nature, expressed immediately in the equality of men, and transferred by consent to the governance of the charismatic leader. In spite of the slight variants of the doctrine according to Posidonius, Seneca, Epictetus, Cicero, and Marcus Aurelius, the latter's epitome of it is substantially representative.

"If our intellectual part is common, the reason also, in respect of which we are rational beings, is common: if this is so, common also is the reason which commands us what to do, and what not to do; if this is so, there is a common law also; if this is so, we are fellow-citizens; if this is so, we are members of some political community; if this is so, the world is in a manner a state. For of what other common political community will any one say that the whole human race are members? And from thence, from this common political community comes also our very intellectual faculty and our capacity for law; or whence do they come?"⁶¹

In the second century B. C. the Roman was fast becoming religiously destitute. The tradition of ceremonial observances was growing dim and their anthropomorphic gods left the Romans without any binding reason for right conduct toward them.⁶² Scepticism and Epicurianism had detached his interior life from the State and society but the Roman

61. THE THOUGHTS OF THE EMPEROR MARCUS AURELIUS ANTONINUS Bk. IV, c. 4. (Long's transl. 1923). See Bk. VII, c. 9.

62. The fact that the Greek and Roman religions remained to the end strongly political or aesthetic in character probably prevented them from reaching the idea of a connection between the national religion and private morals, and left the recognition of this truth to the poets and the philosophers. St. Augustine (especially in CITY OF GOD Bk. II, c. 6, perceived this difference between Christianity and the Roman religion, and he challenged the pagans to produce instances of moral teaching in their religion. He appraised their virtues as natural not religious.

was developing in the wrong way. The importance of self was becoming self-seeking with disastrous consequences to Roman society. Destitute as the Roman was both in regard to the Deity⁶³ and to duty, he found in Stoicism an explanation of man's place in the universe—an explanation relating him directly to the Power manifesting itself therein and deriving from that relation a binding principle of duty to that Power and to the State.

The bond then which unites man with god and his fellow man is the Supreme Reason and in each case it is expressed by *Law*, the supposition being that right reason and law are identified. This means that the universe may be looked on as one great State (*civitas*) of which god and man are citizens, or in another way as a State of which the Constitution is itself the Reason, or god's law, which all reasonable beings must obey. Such obedience is itself the effort by which man realizes his own reason.⁶⁴ It is not hard to see how Stoicism basing civic duty on a sublimated version of the deity as supreme reason (which embraced all the traditional gods and *numina*) supplied a satisfying idea of a supreme intelligent rule—a divine imperium as giving content and force to the political authority of the State. From his own constitution and laws the Roman could easily lift his mind to the constitution and law of the *communis deorum et hominum civitas*. He can feel himself the citizen of a State whose maker and ruler is god, and whose law is the inevitable force of reason; he can realize his relationship to god as a part of the same State, gifted with the same power of discerning its legal basis, even helping to administer its law by rational obedience.⁶⁵ The Roman jurists invigorated the colossus with this new faith. Justice is a principle of nature, a principle which lies behind all the order of the world, the expression of a universal principle or law of nature—the ultimate principle behind all law.⁶⁶ Inasmuch as this principle is immanent in each individual, the Roman jurists were able to formulate in terms of Stoicism a popular source of despotism. The *coetus multitudinis* possessed a plenitude of power which it could delegate. The praetor in

63. Hitherto there had been nothing in the religion of Rome, or of any other city-state, to make it reasonable, inevitable, that men should worship the Deity, except the elementary instincts of awe, fear, tradition, and self-interest involved in the tradition of the family and the city.

64. 1 LECKY, *op. cit. supra* note 60, at 186-336, for an exposition of Stoicism.

65. 1 JANET, HISTOIRE DE LA SCIENCE POLITIQUE 257 (1872), says of the Stoics: ". . . de rompre les liens artificiels qui dans l'antiquité enchaînaient l'homme à l'Etat." Further, ". . . cette école fut évidemment une protestation des classes populaires et méprisées contre la philosophie aristocratique de Platon et des autres socratiques."

66. 1 CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 5 *et seq.* (1903); for the influence of Stoicism on the Roman jurists, *id.* at 35 *et seq.*

declaring the law legislated out of the plenitude of his own will in the exercise of the legislative power of the people. As with the praetor so with the emperor, for it is in this sense that the *lex regia* is to be understood whereby power was conferred on each successive emperor, in that the people transferred to him their whole power and authority.⁶⁷ The Stoic dogma of the sovereignty of Reason led the Romans to absorb the basic individualism of her citizens into the universalism of a world-state, which in the unanimity of a despotic rule is the effective oracle of universal Reason.⁶⁸

By substituting a philosophic notion of law, proceeding out of nature as the common patrimony of humanity, in place of civil law, the Roman State could justify its assumption of all individual, family, and proprietary rights into the public domain. The tragic consequence of this dictatorial socialism was the gradual enervation of a citizenry utterly stripped of attachment to the existing order. Even amongst the romanized subjects, who had made a complete surrender of their faiths, laws, and institutions by the *deditio*,⁶⁹ there was no native force left to withstand the barbarian invasions. A people that had divinized itself by a pantheistic doctrine of Universal Reason could not logically object to the disrupting influences of strangers. With the emperor absolute⁷⁰ and

67. See the chapter *Le Droit Civil Des Romains*, in COQUILLE, *LES LEGISTES, LEUR INFLUENCE* 33 (1836).

68. *Ibid.* In the chapter *Le Stoïcisme et Le Droit Romain*, he stated: "La souveraineté de la raison, ce dogme des stoïciens, nous mène au césarisme comme elle y a mené les anciens. Qui est juge de la raison? *C'est toujours un homme qui la promulgue, et la raison dans cet homme est égale à la force qu'il emploie pour la faire prévaloir. Une fois lancé dans la doctrine de la raison, c'est un instinct pour l'homme de chercher un organe à la raison universelle, dont les raisons particulières ne sont que des fragments, et de lui attribuer une force universelle, afin que la raison domine sans obstacle dans le monde.* Là est l'explication de tous les bouleversements locaux qui, tant dans l'antiquité que dans les temps modernes, conduisent les peuples de la démocratie au despotisme." *Id.* at 82 (Italics mine).

69. FUSTEL DE COULANGES, *op. cit. supra* note 18, at 501-2.

70. SCHULZ, *PRINCIPLES OF ROMAN LAW* 182 (1936): "The authority of the princeps is of a peculiar kind. The term 'charismatic authority'—in the sense used by Max Weber must be applied here. Weber means by this the 'quality of a person which, adjudged to be something above everyday experience, causes such persons to be looked upon as endowed with supernatural or superhuman or at least specifically non-commonplace powers or qualities, not attainable by ordinary persons, or as divinely inspired as a model human being and therefore as a leader.' This kind of authority—which may of course assume many forms—was enjoyed by Augustus. To his followers he appeared as the man of destiny, as the godlike ('divine' according to the poets) saviour and leader. . . . He enjoyed specific official powers, as often happens in the case of the charismatic political authority, but Augustus himself expressly declares that his rule was not based on these official powers. He refers to his *peculiar auctoritas as transcending all others.*"

solely responsible in his sovereign will and the individual clinging to his own individual will⁷¹ in unconcerned submission to what was deemed inevitable, we must look to the material prosperity and advantages of the Roman State to account for its duration rather than a properly coordinated relation of authority with the principle of personal freedom.

What is particularly characteristic of the Roman Stoic Reason is that it is basically a will-force (just as the Greeks, conversely, were so rational as not to account properly for the will, as a faculty of free choice). This appears strikingly in their "law." There is no such supremacy of the rule of law to define the action of its executors or the judgments of the jurists.⁷² The practical norm of the needs of society⁷³—born of nature and manifesting the right course of nature—defines its law and identifies it with Right Reason. The effectiveness of the State to realize these needs is the full content of her legal power.

Our summary analysis of the essential characteristics of Greek and Roman *πολιτεία* has sought out whether there were any reasons within it, apart from the multiple historical circumstances attendant upon the fall of Rome, that would belie the claim to a lasting *civitas*. In all the breadth and splendor of the Acropolis and the Roman Forum, we find popular governments, deliberative assemblies, enlightened philosopher-kings and Caesars, but no conceivable scheme for bringing arbitrary government under control. Popular governments existed either by participation or delegation but there had been no limited government, no state the circumference of whose authority had been defined by a force external to

71. See the chapter on Liberty in SCHULZ, PRINCIPLES OF ROMAN LAW c. VII, 140-63 (1936).

72. COQUILLE, *op. cit. supra* note 67, at 54-5: "Les choses romaines étaient réglées non par un droit fixe, mais par le *volonté de personnes déterminées*. Ni lois, ni coutumes assurées: L'explication du droit est arbitraire; elle varie, change au gré des circonstances. Les lois ne manquaient pas: elles n'étaient jamais exécutées. Aussi le droit romain n'est pas un ensemble de lois; le Digeste, auquel Justinien a prétendu donner force de loi, est une compilation de décisions rendues par des jurisconsultes et des magistrats sur des cas particuliers: c'est un recueil de jurisprudence. . . . *L'absence de droit caractérise le droit romain; nous le voyons tout transformer en question de volonté, ce qui est tout francher par la force.*" (Italics mine).

73. Le Stoïcisme et Le Droit Romain in COQUILLE, *op. cit. supra* note 67, at 87: "*Salus populi suprema lex*. On dit: l'utilité commune, le bien public, et tout droit est obligé de céder. L'expropriation pour la cause d'utilité publique est tout à fait dans le goût antique. Quel rapport y a-t-il entre le droit et l'utilité? Les stoïciens ne séparaient pas ces deux mots, qui se rejoignent aujourd'hui pour signifier que l'utilité engendre le droit. Si le besoin que l'État a d'une chose lui donne le droit de me la prendre, je suis autorisé à conclure que l'utile est la mesure du droit; et comme dans la question de l'utile nous sommes juges en notre propre cause, il s'ensuit qu'il n'y a d'autre droit que la force. Et l'État a tous les droits en qualité du plus fort."

its own.⁷⁴ The appeal to Caesar was never a review of law but the recognition of the ultimate and plenary source of all justice on earth.

The pagans sensed the need for an ethical-religious basis for civic duty—either the gods or Nature. The philosophers would proclaim an eternal law as the metaphysical barrier before the governments; but they knew its qualities of eternal immutable verity rather than its content. The statesman trusted to their heavenly “insight” or to the charismatic office.⁷⁵ Whether it was the *right* way of the Greeks, *δικη*, or the inevitable way of the Romans,⁷⁶ it was fundamentally a rationalistic justification of the need of force in the imposition of an order which defined its own justice and law. It was the rule of “arms and law.” The reality it seeks to contain is the associating and organizing idea of law as a wilful coercion of anarchic human forces into a replica of the cosmic order. The difficulty is that the total reality is wider than the approach of creative politics; for there are other ideas equally important with this idea—and ultimate; the inviolable dignity of the human person whose destiny to the Beatific Vision defines the authority of the state as a service and itself a temporal institution. To maintain the necessary immunity of the human person in the midst of civic duties, to reduce all political authority within defined limits it was necessary to wait for the divine revelation of the *Summum Bonum* as a Personal God. The philosophical or theological conception of a single terrestrial city of God, evolving through a political order, could not but rest precariously upon isolated individualism and the absolute sovereignty of the *πόλις* and the imperium. The City of God, penetrated by a subtle Reason, made it

74. LORD ACTON, *THE HISTORY OF FREEDOM* 16 (1922): “The ancients understood the regulation of power better than the regulation of liberty. They concentrated so many prerogatives in the State as to leave no footing from which a man could deny its jurisdiction or assign bounds to its activity. . . .”

75. SCHULZ, *PRINCIPLES OF ROMAN LAW* 183 (1936): “Augustus’ successor Tiberius, clearly recognizing that he was not endowed with his predecessor’s charisma, attempted to strip the Principate of its charismatic attributes, and rejected with characteristic violence both the charismatic title ‘Augustus’ and the divine or semi-divine reverence thereto attached. In truth genuine charisma cannot be passed on; it is unique. The place, however, of true charisma is often taken in the case of the successors of the genuinely charismatic ruler by a substitute. This is a *kind of institutional*, particularly an official charisma . . . in this sense the authority of the *princeps* retained its charismatic character.”

76. FOWLER, *THE RELIGIOUS EXPERIENCE OF THE ROMAN PEOPLE* 372 (1911): “Suffice it to say that their idea on the universe as Reason and God naturally led the Stoics into a kind of Fatalism, a destined order in the world which nothing could effectively oppose; and they are naturally in some difficulty in reconciling this with the freedom of Man’s will. That freedom they constantly and consistently asserted; but it comes after all to this, that Man is free to bring his will into conformity, *through knowledge*, with the Power and the universal Reason; or as Dr. Caird puts it, Man has the choice whether he will be willing or an unwilling servant; unwilling, if he makes it his aim to satisfy his particular self, an aim which he can only attain so far as the general system of things allows him; willing if he identifies himself with the divine reason which is manifested in that system.”

less likely than ever to arrive at a concept of inalienable human rights inherent in the social individual. Virgil's "City of Men" blurred into Marcus Aurelius' "City of God."

"The poet saith, dear City of Cecrops; but thou—
wilt thou not say, dear City of god?"

By resorting to a number of arbitrary identifications—religion, morals, politics—the immanent cosmic reason equated subjectively to "mind," the pagan philosophers and statesmen built up a factitious and transitory order by the destruction of the vital elements on which the prosperity of states rest. Their order was doomed to extinction by reason of its inherent deficiencies. The sack of Rome was the greatest dramatic violation of the self-sufficiency of the Graeco-Roman *πολιτεία*.

Not till the advent of Christianity could man break through the all-enclosed system of naturalism born of Greek intellectualism and Roman voluntarism which bound the ultimate Good within the *πολιτεία*. How could pagan society thrive on the vitality of its citizens when the individual was caught up within a World-State or absorbed into a World-Soul? Without any certainty about the meaning of *personal* existence, constant demands on individual and collective allegiance cannot but exhaust the positive energies of human nature, and consequently, individuals and societies inevitably surrender apathetically to sheer activism. For in the recognition that there is in each man a final essence—that is to say, an immortal soul—which only God can judge, a limit was set upon the dominion of men over men. The prerogatives of supremacy were radically undermined. The inviolability of the human person was declared, endowed with authentic and transcendent purposes and inalienable rights. The acknowledgment of a higher law, *of which the State is not the oracle*, is in effect an immaterial power which an actual ruler or government can be compelled to respect by the conscience of those in whom it reveals itself. In the hierarchy of orders, political science and jurisprudence shrank to its narrower limits and subordinate and subsidiary levels. Law was to be born of the idea of justice not of religion. For while Christianity provided a higher moral ingredient and purpose for law and government, it disclaimed to be either its source or premise. The Christian faith did not absorb nor eliminate but rather preserved the exigencies and dictates of the order of nature within the supernatural order of grace. Man was liberated from the nightmare involved in the concept of nature as a closed system, determined by its own exclusive laws, and of the perplexing antithesis between the spiritual aspiration for liberty and the pagan cosmological necessitarianism. Christianity released the positive energies of human nature for the development of a Christian polity,—of the City of Men which is *not* the City of God but ever looks towards it for light and guidance in the realization of a just order among men.