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## Natural Law Institute Proceedings Vol. 2

Notre Dame Law School

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**Authors**

Notre Dame Law School, Maurice Le Bel, Ernst Levy, Gordon Hall Gerould, Heinrich A. Rommen, and Robert N. Wilkin

UNIVERSITY OF NOTRE DAME  
NATURAL LAW INSTITUTE  
PROCEEDINGS

*Volume II*

Edited by  
*Alfred L. Scanlan*  
Professor of Law

With an Introduction by  
*Rev. John J. Cavanaugh, C.S.C.*  
President of the University  
of Notre Dame



COLLEGE OF LAW  
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**NATURAL LAW INSTITUTE PROCEEDINGS**  
**VOLUME II**

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**Mr. Alvin A. Gould, of Cincinnati, Ohio**





## FOREWORD

This volume contains the impressive record of the proceedings of the Second Annual Natural Law Institute held at the University of Notre Dame on December 10th and 11th, 1948. This year's two-day Institute was sponsored by Mr. Alvin A. Gould, of Cincinnati, Ohio. It was attended by more than six hundred jurists, judges, lawyers, legislators, philosophers, and others interested in searching appraisal and reaffirmance of the proposition that all American constitutional guaranties of liberty and freedom must rest ultimately in the immutable principles of a universal, unchanging moral philosophy.

This second Institute emphasizes the historical roots of natural law theory in five distinct eras of world history. Five accomplished and scholarly lectures graced the proceedings. Professor Maurice Lebel, of Laval University, Quebec, gave the introductory lecture on Natural Law in the Greek Period. Professor Ernst Levy, distinguished teacher of legal history at the University of Washington Law School, presented a profound and scholarly dissertation on Natural Law in the Roman Period. Dr. Gordon H. Gerould of Princeton University followed with a sketch of natural law theory at the height of its early glory in the mediaeval period, and the famous legal and philosophical writer Heinrich Rommen concluded the journey into the past with his presentation of Natural Law in the Renaissance Period. The Institute was climaxed by a stirring address by Federal District Judge Robert N.

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Wilkin, of Cleveland, Ohio, on the present status of natural law in American jurisprudence. Dean Clarence E. Manion of the College of Law, University of Notre Dame, served as active chairman of the proceedings, which also included a short talk by Mr. Ben Palmer, of the Minneapolis bar, noted author and a lecturer at the first Natural Law Institute, held in 1947.

The consensus of those who attended the second Institute was that, unless one agrees with Hegel that we "learn nothing from history save, the fact that we learn nothing from history," the proceedings were most stimulating and successful. The similarities and dissimilarities in the theories of natural law among many civilizations served to provoke fresh reflection among those who are apprehensively aware of the stage in civilization which we have reached. Attaining the scientific "know-how" by means of which he can destroy himself, Man seems to lack the moral force and law to prevent his own suicide. Notre Dame believes that these annual Institutes may help to correct, in some measure, that very grave deficiency.

ALFRED LONG SCANLAN,  
*Editor*

## INVOCATION

There are less than a half dozen references to lawyers in the New Testament and on the occasions that are mentioned the Doctors of the Law are usually pictured in the unenviable role of hecklers, trying to tempt or ensnare Our Divine Savior in His speech. Let us examine one of these references which I believe will furnish us with a thought suitable to the occasion that has brought us together this morning.

We read in the Holy Gospel according to St. Matthew, XXII 35-40 "And one of them, a doctor of the law, asked Him tempting Him; Master which is the great commandment in the law? Jesus said to him: Thou shalt love the Lord Thy God with thy whole heart and with thy whole soul and with thy whole mind. This is the greatest and the first commandment, and the second is like unto this: Thou shalt love thy neighbor as thyself. On these two commandments dependeth the whole law and the Prophets." A lawyer had asked Our Divine Savior which was the first, the greatest law of all. It was a question which the scribes had frequently pondered, because it was not easy to choose one from among the six hundred and fourteen precepts with which they were familiar, and even though they had compiled a list of the principal laws and prohibitions, they had not succeeded in coming to any agreement concerning the order of importance in which they should be listed; in fact, they

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had come to believe that this impossibility of agreeing upon the primacy of any one law was a sign that God willed that all the precepts of the law should be observed in the same order. Jesus settled the matter once for all by the simple declaration that the first and greatest law was to love God above all else, and the second was to love our neighbor as ourselves.

These were not new laws. They were written in the Old Testament though not in these precise words. When Our Lord picked them out and placed them at the head of the list it was easy to see their preeminence. And for anyone who admits the existence of God, it is easy to see the basis for the first and greatest law. If God is our Creator upon whom alone we depend for our existence and continuance in life, it is but logical that we belong to Him and owe Him everything that we are and have including a love that is above that for all else. The basis for the law that our Divine Savior places second is not so evident, especially since in the word neighbor He includes all men even our enemies, as He made so clear in the parable of the Good Samaritan.

What is there in this "man" that God commands that he be loved even as we love ourselves. As we rub shoulders with him in our daily life he does not seem to be so lovable. As Father Scott puts it: "Of all creatures man alone is an enigma. At times he seems to be an angel, again a devil. Proud of himself today, tomorrow he will despise himself. His thoughts sometimes are as high as heaven, at others as low as hell. A part of him delights in what is good, another part drags him down to what he

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despises. A battle is continually waging within him. He approves of the sublime but too often follows the debased.

“It is possible by observing the ways of other creatures to forecast to a certain extent what they will do. Of man ordinarily you can foretell nothing. Often a man cannot himself foretell what he will do. He may plan and purpose, only to be thwarted by himself. At times capable of the heroic, he as frequently acts the craven. He often wonders at his own courage and as often despises himself for his cowardice.

“He disappoints himself and his friends by his conduct under certain circumstances, while under others he wins admiration. He is a puzzle to himself. While men are praising him, he may be harboring thoughts and purposes that reek of infamy. While they are condemning him he may be wrapped in spirit to the highest realms. He wonders at his own vileness and at his own virtues. He is a living contradiction. That is man.” That is him whom you must love even as you love yourself, no matter where you find him and no matter what the color of skin that clothes him; so says the second great law of God.

Man just doesn't seem worthy of love. In fact, he seems to be the one great discordant note in nature. Man is the only living thing that experiences rebellion within. His passions are continually at war with his ideals, constantly a trap for his downfall. Not so with other living things. With them passion directs them to their welfare. In indulging their instincts they follow the law of their preservation. The contrary with man. Witness the drunkard. The passions of other living things do not lead

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astray. Man's do. Look at the victims of vice. Animals left to themselves do not go to excess. Man does. His passions uncontrolled run away with him. The world is strewn with wrecks of unbridled passion. Why is man the one tragic contradiction in nature? We must go to the first chapter of Genesis for the story. Man rebelled against his Creator. He sinned and brought upon himself this tragic conflict within his own nature. There is no other explanation. But we are not concerned with the fall of man here, the fact remains that man with all his tragic contradictions is still the Creator's Masterpiece. "Thou hast made him a little lower than the angels." He is still beloved by God. And not because of his sins and imperfections, but, in spite of them, because he bears the image and likeness of his Creator in his soul God commands that he be loved by us even as we love ourselves.

The relations which form the basis for these two great commandments also form the subject of a study that is of special interest to students of law. In the first instance the fact that God is the Creator and ruler of all things including man not only places Him as the object of our highest love but also as the supreme lawgiver. In truth, all authority rests in God and no other lawgiver has one iota of authority unless in one way or another it comes to him from God.

Today we are not only concerned with the supreme lawgiver but with the subject of law as well. We can, therefore, pause a moment with profit to consider the basis of God's second great commandment of love as the basis of man's accountability to law. We have been com-

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manded by God to love our fellowman as ourselves, as we have seen, not necessarily because of the good we outwardly see in him but because he is the favored creature of God, made to the image and likeness of his Creator and endowed with an immortal soul with intelligence and free will. For exactly the same reason man becomes a subject of law, he has a soul with the faculty to reason and a will to choose. We do not here speak of the law in nature about us, we speak of moral law, the natural law, the positive law of God or of those who have a right to direct us. All the world about us, the trees, the flowers, the birds and the beasts is subject to the inexorable laws of nature which determine and direct their way through time. They have not, however, been given laws for the keeping of which they will be held accountable by their Creator. It is true that man also, like the trees, the flowers, the birds and the beasts is subject to the immutable laws of nature in many things, but at the same time precisely because God has made him higher than all nature about him and has given him an immortal soul endowed with faculties to reason and to choose He has made him accountable and a subject of laws some placed by the Creator directly and others by those to whom it has been given to share in authority.

If I understand correctly the purpose of this Institute, we are assembled here today to show from history that there has always been recognized by man not only positive laws but a law written by Almighty God upon man's immortal soul which, in fact, has proved the basis for all moral laws. Since this certainly is of inestimable worth in

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these troubled times when so many people are turning their back upon God, we beg our Creator and supreme lawgiver to enlighten us and to guide us during these two days that our endeavors may be fruitful and conducive not only to our own spiritual and moral growth but to the honor and glory of that same all-wise and eternal law-giver.

✠ MOST REV. PAUL C. SCHULTE, D.D.,  
*Archbishop of Indianapolis,*  
*Honorary Chairman,*  
*Second Natural Law Institute Proceedings*



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## INTRODUCTION

It has been most gratifying to see the second Natural Law Institute conducted by the College of Law of the University of Notre Dame accorded the same enthusiastic reception which greeted the first Institute in December of 1947.

The members of this year's Institute were privileged to review, under the expert tutelage of the eminent jurists and scholars whose papers are reprinted in these pages, the development of the doctrine on Natural Law from the Greco-Roman period to the present.

The full flowering of the philosophy of Natural Law had to wait upon the rise of the Scholastics of the twelfth and thirteenth centuries. Yet, even in the era preceding the advent of Christianity, incontrovertible evidence of the recognition of its existence and innumerable references to the Natural Law, are to be found. The Greek poets and philosophers spoke reverently of it as of something higher than the law of the land. They regarded it as a gift of the gods, implanted in the reason of man who alone among creatures was possessed of a sense of right and wrong. The poets, and especially the philosophers, emphasized the fact that the Natural Law was unique among laws: it was unchanging and unchangeable, universal; furthermore, it was a law that was eminently practical, and not merely a topic of philosophical speculation. Cicero and the Roman jurists echoed these teachings of the Greeks.

Only with great difficulty can the value of these testimonials to the Natural Law by writers, and thinkers, of a pre-Christian era be overestimated. Too many jurists today tend to view insistence upon Natural Law as a Christian — and more particularly, a Catholic — preconception and prejudice. And for them, as for so many persons in all walks of life today, the only prejudices that may legitimately be allowed to influence one's judgment or one's teaching, are the prejudices that bear the stamp of the materialistic, the agnostic, the positivistic philosophy.

The Honorable Robert N. Wilkin in his excellent paper notes that "within the last eight or ten years there are unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism, and very definite indications of a revival of Natural Law philosophy."

This is very heartening news. If the University of Notre Dame and its College of Law can, through these Natural Law Institutes and the publication of their proceedings, help to hasten progress in this direction, we shall have fulfilled a patriotic as well as a religious duty. For thus we shall have helped foster a return, not only to the truths taught by the great philosophers and theologians of the Church, but to the truths deeply loved and steadfastly defended by the Founders of our Country and by them written into the laws of our blessed land.

REV. JOHN J. CAVANAUGH, C.S.C.,  
*President of the University of Notre Dame*

## NATURAL LAW IN THE GREEK PERIOD

*Maurice Le Bel*

**T**HE problem of natural law, which this Institute has worthily undertaken to reexamine, is certainly one of the most ancient in human thought as well as one of the most subtle in its aspects and one of the most far reaching in its conclusions. Lawyers and philosophers have long been waging an enormous battle of books and ideas over it, so that I owe the perilous honor of delivering this address to the fact that I am neither a lawyer nor a philosopher. And it is very much to be regretted, for, to treat natural law in Ancient Greece, as it should be treated, to see it and present it as a whole, one should be altogether a lawyer and a philosopher, an historian and a humanist. This is not said to overexaggerate the difficulties of the question, but to emphasize, right at the beginning, both its academic and practical importance.

It is customary to praise our age as being unique for its practical science. But its achievements in other fields are equally remarkable, although they may not always be obvious to the public. There has been lately, for instance, an outstanding revival of interest in the study of Antiquity; our contemporaries are burning with the desire of finding the primitive sources of truth and of the past institutions. Moreover, we are eager to rebuild the social unity of the world, which has been broken up in its religious origin ever since the Reformation, to mention only one cause of division; we are trying to organize the

State on the basis of a common law, better appropriate to the nature of man; our world, however chaotic and troubled it may appear to the observer, is earnestly searching for unity. *One World* seems to be the motto of our century.

Natural law may be one of the bases of unity for our world. China, the mother of civilization, with a population of over 400,000,000 people, managed to live on natural law for over three thousand years, from 2600 B.C. to 600 A.D.<sup>1</sup> After the First World War, the new Republic of Austria, strange as it may seem, officially recognized natural law in the seventh article of her National Code. A good deal of contemporary jurisprudence, for instance, in America and in Great Britain, is still based on natural law, although many writers on legal science never use the expression, partly because they find it too ambiguous, partly because they do not recognize natural law. With the ever-growing importance of the international law and with the deep changes in the life of nations brought about by war and conquest, it is not surprising that a revival of interest in natural law should take place nowadays; the science of natural law has got to be reviewed afresh and to be restated in the light of progress, almost in the same way as the love and the taste for the Classics have got to be fostered every generation by popular and scholarly editions and translations.

Besides being commanded by the extraordinary development of international relations, the study of natural law

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<sup>1</sup> In Indonesia, *Adath* is the word for Natural law; with a present population of about 40,000,000 people. Indonesia still administers justice for the natives according to natural law.

may be regarded as a vigorous element in the new Humanism which is taking place under our eyes. Dr. Carrell's book, *Man The Unknown*, which will perhaps remain the greatest book of the first half of the century, was certainly written to be a beacon to man, who, in his desire to conquer matter, is rather inclined to forget himself and his nature. A great many men have forgotten, if they have ever known it, where they come from and where they are going to; all of us may know more or less about our specialized field. But what do we know about Man? "I look into myself," first said Heraclitus.<sup>2</sup> "Know Thyself" was written on the fronton of the temple of Delphes.<sup>3</sup> "Man is the measure of all things," said Protagoras.<sup>4</sup> The study of natural law may teach us something about the true nature of man.

To avoid a good deal of confusion prevalent on the subject, I shall first endeavor to define and describe the terms of the question, without indulging in too many abstract definitions and thus losing ground with reality and synthesis. After trying to clear the ground of any misunderstanding, I shall pass on to the main point: Natural Law in the Greek Period, which I shall present in two parts; in the first, it will be natural law as seen by the non-philosophers; the second will deal with natural law

<sup>2</sup> Heraclitus, fr. 116 (106): ἀνθρώποισι πᾶσι μετέστι γιγνώσκειν ἑαυτοὺς καὶ σωφρονεῖν.

Heraclitus, fr. 115 (O): ψυχῆς ἐστὶ λόγος ἑαυτὸν αὖξων. Diels, *Die Fragmente der Vorsokratiker*)

<sup>3</sup> Plato, *Theaet.* 183 B: Πάντ' ἄνδρα πάντων χρημάτων μέτρον εἶναι.

<sup>4</sup> Γνώθι σεαυτὸν. Plato, *Phaedrus* 229 e: οὐ δύναμαι ποῦ κατὰ τὸ Δελφικὸν γράμμα γινώσκειν ἑμαυτὸν.

as seen by the philosophers. In the conclusion, I shall summarize my paper and draw the main conclusions.

To begin with, by Ancient Greece I mean primarily Athens, "the school of Hellas," as Pericles and Euripides used to call the Athens of their day. Since the history of Greece is generally centered upon that of Athens because her past happens to be better known than that of the other city-states, I shall leave aside the colonies and the islands, as well as the city-states of the homeland; our knowledge of their legal institutions and literature is too fragmentary to be relied upon for this paper. On the other hand, the principles of Athenian law are well known; it is in Athens that the study of Greek law was most flourishing and produced fundamental works, which are still analyzed in Colleges of Law.

Law is a Greek invention, the word itself and the conception. It is grossly inexact and unfair to repeat the commonplace that Greece gave the world arts and philosophy, whereas it was left to Rome to give mankind government and jurisprudence, as though reality could produce such cleavage. Too many Greek laws, it is true, have perished. Nevertheless, Greek law is original; limited by time and space, it was not, like that of Rome, adopted and applied for centuries in a huge empire made up of divers races. Yet, Plato's Academy, which was, in some measure, the first College of Law, used to teach jurisprudence and draw up codes for colonies, which were the very basis of the Roman law; Plato's *Laws* are the legislator's masterpiece, and he would certainly not have written the four last books of his *Laws*, which deal mostly with civil and criminal law, had there not been any



systematic and technical study of Greek jurisprudence in his Academy. Isaeus was the first jurist of Greece in the fourth century; Aristotle and Theophrastus were the greatest jurists of Greece, since they were the first to write an *Esprit des Lois* and to compare divers legislations and constitutions. Although it is difficult to talk about the spirit of Greek Law, since Greek jurisprudence and court practice underwent only a slight development from Solon to Aristotle, yet the conception of law is originally Greek and is the result of a long process of thought.

The Greeks used several words for law: ὀρθός, λόγος, νόμος, τὸ δίκαιον. Ὀρθός is a metaphor belonging to geometry; it means that which is right, the right line, rectum, regula, as in orthopaedics; there is no equivalent in Greek to the Latin *jus*, that which unites or binds men, *jungere*, *jugum*, *conjugium*. The word λόγος means law made by reason and based upon reason, in opposition to fatality or Destiny; it means also relation, principle or formula. The word νόμος, which does not exist in Homer and is first found only in the seventh century poet Hesiod, means till the second part of the fifth century the old and traditional custom; it means also the habit resulting from the necessity of conforming to existing conditions, that is to say the political and social environment as well as the psychological dispositions that go with the existing conditions; the word νόμος suggests the idea of sharing, of division, separation, equal parts; it is used for law, justice, statute. The word τὸ δίκαιον (δικη) is the abstract and absolute right or justice; δίκαιον is a part of it in the same way as *lex* is a part of *jus*;

δίκη is that which directs, shows the way towards an aim, as can be seen in the Latin words: *dicere, digitur, indicare, judicare*. And natural law is rightly called by Aristotle: Τὸ φυσικὸν δίκαιον, φύσει δίκαιον, natural justice, that is to say, justice recognized and admitted without any formal or conventional declaration, resulting from the nature of men and based upon the nature of our being.

The Greeks had a peculiar conception of law. To us, the word suggests a court and a judge, a set of technical rules or regulations which are accumulated, revised and understood by specialists especially. The Greeks did not regard the law exactly in the same way, since their genius was rather metaphysical. They were inclined to consider the law as something absolute, permanent, which it was not a good thing to change, because they thought that law, like poetry, was of divine origin; although Greek laws were changed and revised at times, yet the Greeks were inclined to regard the law as sovereign. Socrates is not speaking metaphorically when he declares himself the slave of the law, in the *Crito*, where he converses with the Laws and admits the absolute sovereignty of the law. To the Greeks law stood over the society; it was the binding force of the city, it was born with the city itself, it was the force that brought and held the city together. The Greek city was an ethical society, originally formed to secure justice to all; it is essentially an educational institution, the city itself being the organ of education for the citizens. The keyword is education; Plato's *Republic* contains the ideal curriculum of secondary education, the *Laws* present the ideal curriculum of university edu-

cation, in the same way as Aristotle's *Politics* deals with the best form of government and the best form of education. There is no distinction in Greek between the science of politics and the science of jurisprudence; to look for the best form of government to live in so as to fully develop one's self as a citizen, is to look for the ideal law and the best theory of law; the subtitle of Plato's *Republic* is "Concerning Justice."

The expression "natural law" is ambiguous, confusing and misleading, not to the Greeks who believed in city education and in generation, but to us who have a two thousand year old heritage of Christianity, for the expression "natural law" has today a definite Christian connotation; it has none, of course, in pagan Greece, where natural law is considered as a thing of human reason alone. Moreover, the word law suggests nowadays something fixed, laid, proclaimed, written; the word natural connected with law suggests something peculiar to human nature. On the other hand, natural law is unwritten, and, as such, cannot always be defined and grasped easily; it is universal, all men have a natural, infallible and practical knowledge of it; man must do good and avoid evil; he who sins should be punished; man must preserve his own being. These precepts are immanent in human nature, they are part of our nature, they are the very expression of the universal notion of justice; they are implanted in us, we would not be what we are without them.

Having described the terms of the question, I shall now turn to the first part of this paper. How did the Greek writers, the non-philosophers, express the idea of univer-

sal justice? Is it possible to see in their expression a development of the concept of natural law? That is the point now under discussion, and I shall follow the chronological order.

Partly because poetry is several centuries older than prose in Greece, partly because poets are usually endowed with deeper feeling and insight than most people, I shall begin with Homer, the father, the source of all poetry. In the *Iliad*, where we can trace the beginning of the international law with Achilles and Agamemnon being made friends, Homer does not use the word law, but he clearly sets forth, in the first book of his epic poem, the problem of justice and injustice, of right and wrong. For him, justice is of divine origin; in the very first lines of the poem he describes the Achaeans carrying a staff in their hands, as "the judges who under Zeus preserve the ordinances."<sup>5</sup> In the eighteenth book of the *Iliad*, there is, on the shield of Achilles, a lively description of justice in a city, and that is new and important.

"The folk gathered in the meeting-place. Here a dispute had arisen, and two men were disputing over the price of a man slain; the one claimed to have paid all, putting his case to the people, while the other denied having got any payment and both were eager to get a settlement by a referee. The folk were shouting for both, helpers on either side, and heralds were keeping them back. And the elders were sitting on seats of stone in a stately circle, and they held in their hands the staves of the loud-voiced heralds; with these they got up and gave their judg-

<sup>5</sup> Homer, *The Iliad* I, 237-239: νῦν αὐτέ μιν υἱες Ἀχαιῶν ἐν παλάμαις φορέουσι δικασπόλοι, οἳ τε Θέμιστας πρὸς Διὸς εἰρῶνται.

ments, each in his turn. In their midst were set two talents of gold, to give him among them who should pronounce the decision most rightly.”<sup>6</sup>

Strange as it may seem, justice is still administered almost in the same way in China today. In Homer, law was customary.

Hesiod is the first poet to have coined the word “law.” His most famous poem, *Works and Days*, he wrote to protest against the injustice of which he had been the victim; he dedicated his work to his brother Perses, to whom he gives the following advice:

“Perses, take this to heart and so lend an ear to justice and put violence from your mind utterly, for this is the law that the son of Cronus ordains for mankind: Though fishes and beasts and winged birds devour one another, since justice is not in them, yet to men he has given justice, and best it is by far. For if one has a mind to know and to speak what is just, to him far seeing Zeus gives a good life; but whosoever wilfully bears false witness and forswears himself, and therein offending justice suffers hurt incurable, his offspring in time to come are left the more in darkness; but the man whose oath is true, his off-

<sup>6</sup> Homer, *The Iliad* XVIII, 497-508

Λαοὶ δ' εἰν ἀγορῇ ἔσαν ἀθροοὶ· ἔνθα δὲ νεῖκος  
ὀρώρει, δύο δ' ἄνδρες ἐνεικέον εἵνεκα ποινῆς  
ἄνδρὸς ἀποφθιμένου· ὁ μὲν εἵχετο παντ' ἀποδοῦναι  
δήμῳ πιφασκῶν, ὁ δ' ἀνάινετο μηδὲν ἐλέσθαι.  
ἄμφω δ' ἰέσθην ἐπὶ ἱστορίῳ πείραρ ἐλέσθαι.  
λαοὶ δ' ἀμφοτέρωσιον ἐπήτυον, ἀμφὶς ἀρωγοί.  
κῆρυκες δ' ἄρα λαὸν ἐρήτυον· οἱ δὲ γέροντες  
σκῆπτρα δὲ κηρύκων ἐν χερσ' ἔχον ἡεροφάνων·  
εἶατ' ἐπὶ ξεστοῖσι λίθοις ἱερῶ ἐνὶ κύκλῳ.  
τοῖσιν ἔπειτ' ἦμισον, ἀμοιβῆδις δὲ δίκασον.  
κεῖτο δ' ἄρ' ἐν μέσσοισι δύο χρυσοῖο τάλαντα  
τῷ δόμεν ὅς μετὰ τοῖσι δίκην ἰθύντατα εἴποι.

spring are the better in time to come.”<sup>7</sup>

This conception of law and justice is much clearer than that of Homer. Theognis, who was robbed of his property by tyrants in the sixth century, asks himself this burning question, which is still very modern in tone:

“Yet how can it be rightful, Father Zeus, King of the Immortals, that a man that hath no part in unrighteous deeds, committing no transgression nor any perjury, but is a righteous man, should not fare aright? What other man living, or in what spirit, seeing this man, would thereafter stand in awe of the Immortals, when one unrighteous and wicked that avoideth not the wrath of God or man, indulgeth wanton outrage in the fulness of his wealth, whereas the righteous be worn and wasted with grievous Penury?”<sup>8</sup>

<sup>7</sup> Hesiod, *Works and Days*, 274-285:

Ἦ Πέρση; σὺ δὲ ταῦτα μετὰ φρεσὶ βάλλεο σῆσι,  
καὶ νῦ δίκης ἐπάκουε, βίης δ' ἐπιλήθεο πάμπαν.  
Τόνδε γὰρ ἀνθρώποισι νόμον διέταξε Κρονίων,  
ἰχθύσι μὲν καὶ θηροῖ καὶ οἰωνοῖς πετεηνοῖς  
ἐσθέμεν ἀλλήλους, ἐπεὶ οὐ δίκη ἐστὶ μετ' αὐτοῖς·  
ἀνθρώποισι δ' ἔδωκε δίκην, ἣ πολλὸν ἀρίστη  
γίγνεται· εἰ γὰρ τίς κ' ἐθέλη τὰ δίκαι' ἀγορεύσει Ζεὺς·  
γιγνώσκων, τῷ μὲν τ' ὄλβον διδοῖ εὐρύοπα  
ὅς δὲ κε μαρτυρήσῃ ἐκὼν ἐπίορκον ὁμόσσω  
ψεύσεται, ἐν δὲ δίκην βλάψας νῆκεστον ἄσθῃ  
τοῦ δὲ τ' ἀμαυροτέρῃ γενεῇ μετόπισθε λείλειπται·  
ἀνδρὸς δ' εὐόρκου γενεῇ μετόπισθεν ἀμείνων.

<sup>8</sup> Theognis, 743-752:

Καὶ τοῦτ', ἀθανάτων βασιλεῦ, πῶς ἐστὶ δίκαιον,  
ἔργων ὅστις ἀνὴρ ἐκτὸς ἐὼν ἀδίκων,  
μὴ τιν' ὑπερβασίην κατέχων μῆδ' ὄρκον ἀλιτρόν,  
ἀλλὰ δίκαιος ἐὼν, μὴ τὰ δίκαια πάθῃ;  
Τίς δὴ κεν βροτὸς ἄλλος, ὄρκῶν πρὸς τοῦτον, ἔπειτα  
ἄζοιτ' ἀθανάτους, καὶ τίνα θυμὸν ἔχων,  
ὅππότε ἀνὴρ ἄδικος καὶ ἀτάσθαλος, οὔτε τευ ἀνδρὸς  
οὔτε τευ ἀθανάτων μῆνιν ἀλευόμενος,  
ἰθροῖζῃ πλούτῳ κεκορημένος, οἱ δὲ δίκαιοι  
τρύχονται χαλεπῇ τειρόμενοι πενίῃ;

This passage shows that the objective notion of justice and injustice, independently of the legislator's will, is the real foundation of natural law; this feeling of what is just and of what is unjust in this world is implanted in human nature, it is universal. Moreover, the idea of justice being satisfied in another world is implied.

It was left to Sophocles to be the champion of natural law in the Athens of the fifth century; no other poet, I should say, not even any philosopher, has more exactly and poetically described the concept of natural law than Sophocles. He makes us conscious of it, in the same way as Paul Claudel makes us conscious of the presence of God and of the working of Grace in man's soul. *Oedipus Tyrannus* contains several passages on natural law, among which I have chosen this short prayer.

Listen to this magnificent prayer for purity in word as in deed. The theme of this prayer is the following: May I ever be pure in word and in deed, loyal to the unwritten and eternal law.

“May destiny still find me winning the praise of reverent purity in all words and deeds sanctioned by those laws of range sublime, called into life throughout the high clear heaven, whose father is Olympus alone; their parent was no race of mortal men, nor shall oblivion ever lay them to sleep; the god is mighty in them, and he grows not old.”<sup>9</sup>

<sup>9</sup> Sophocles, *Oedipus Tyrannus*, 863-872:

ΧΟ εἰ μοι ξυνεῖη φέροντι  
μοῖρα τὰν εὐσεπτον ἀγνεῖαν λόγων  
ἔργων τε πάντων, ὧν νόμοι πρόκεινται  
ὑψίποδες, οὐρανίαν  
δι' αἰθέρα τεκνωθέντες, ὧν Ὀλυμπος  
πατὴρ μόνος, οὐδέ νιν  
θνατὰ φύσις ἀνέρων  
ἔτικτεν, οὐδέ μὴ ποτε λάθρα κατακοιμάσῃ  
μέγας ἐν τούτοις θεός, οὐδέ γηράσκει.

The play of *Antigone* contains a passage even more explicit: it reaches the sublime. The whole tragedy itself is based on the distinction between the written law and the unwritten law; Creon sticks to the word of the law, his son and his wife pay for it with their lives; Antigone sticks to the spirit of the law, but she dies gladly for it, she even rushes to death, which is unique in Greek literature; her sacrifice has made the world brighter.

Cr. Now, tell me thou — not in many words, but briefly — knewest thou that an edict had forbidden this?

An. I knew it; could I help it? It was public.

Cr. And thou didst in deed dare to transgress that law?

An. Yes, for it was not Zeus that had published me that edict; not such are the laws set among men by the Justice who dwells with the gods below; nor deemed I that decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but from all time, and no man knows when they were first put forth. Not through dread of any human pride could I answer to the gods for breaking these. Die I must — I knew that well (how should I not?) — even without thy edicts. But if I am to die before my time, I count that a gain: for when any one lives, as I do, compassed about with evils, can such an one find ought but gain in death? So for me to meet this doom is trifling grief; but if I had suffered my mother's son to lie in death an unburied corpse that would have grieved me; for this, I am not grieved. And if my present deeds are foolish in thy sight, it may be that a foolish judge arraigns my folly."<sup>10</sup>

<sup>10</sup> Sophocles, *Antigone*, 446-470:

KR σὺ δ' εἶπέ μοι μὴ μῆκος, ἀλλὰ συντόμως,



The grave Thucydides, the most scientific historian of Antiquity, admits the existence of the unwritten law. He makes Pericles say in his famous funeral speech:

“Our form of government does not enter into rivalry with the institutions of others. We do not copy our neighbors, but are an example to them. It is true that we are called a democracy, for the administration is in the hands of the many and not of the few. But while the law secures equal justice to all alike in their private disputes, the claim of excellence is also recognized. . . . We are prevented from doing wrong by respect for the authorities and for the laws, having an especial regard to those which are ordained for the protection of the injured as well as to those unwritten laws which bring upon the transgressor of

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- AN ἦδησθα κηρυχθέντα μὴ πράσσειν τάδε;  
 ἦθη· τί δ' οὐκ ἔμελλον; ἐμφανῆ γὰρ ἦν.
- KR καὶ δῆτ' ἐτόλμας τοῦσδ' ὑπερβαίνειν νόμους;
- AN οὐ γὰρ τί μοι Ζεὺς ἦν ὁ κηρύξας τάδε,  
 οὐδ' ἡ Ξύνοικος τῶν κάτω θεῶν Δίκη  
 τοιούσδ' ἐν ἀνθρώποισιν ὥρισεν νόμους·  
 οὐδὲ σθένειν τοσοῦτον φόμπην τὰ σά  
 κηρύγμαθ', ὥστ' ἀγραπτα κάσφαλή θεῶν  
 νόμιμα δύνασθαι θνητὸν ὄνθ' ὑπερδραμεῖν·  
 οὐ γὰρ τι νῦν γε κάχθές, ἀλλ' αἰεὶ ποτε  
 ζῆ ταῦτα, κοῦδεις οἶδεν ἐξ ὅτου ᾿φάνη.  
 τοῦτων ἐγὼ οὐκ ἔμελλον, ἀνδρὸς οὐδενός  
 φρόνημα δέισασ', ἐν θεοῖσι τὴν δίκην  
 δώσειν· θανουμένη γὰρ ἐξήδη, τί δ' σὺ;  
 κελ μὴ σὺ προῦκήρυξας· εἰ δὲ τοῦ χρόνου  
 πρόσθεν θανοῦμαι, κέρδος αὐτ' ἐγὼ λέγω.  
 ὅστις γὰρ ἐν πολλοῖσιν, ὡς ἐγώ, κακοῖς  
 ζῆ, πῶς ὁδ' οὐχὶ κατθανῶν κέρδος φέρει;  
 οὕτως ἔμοιγε τοῦδε τοῦ μέρου τυχεῖν  
 παρ' οὐδὲν ἄλγος· ἀλλ' ἂν, εἰ τὸν ἐξ ἐμῆς  
 μητρὸς θανόντ' ἄθραπτον ἠνσχόμεν νέκυν,  
 κείνοις ἂν ἤλγουν· τοῖσδε δ' οὐκ ἀλγύνομαι.  
 σοὶ δ' εἰ δοκῶ νῦν μῶρα δρώσα τυγχάνειν,  
 σχεδὸν τι μῶρφ μωρίαν ὀφλισκάνω.

them the reprobation of the general sentiment.”<sup>11</sup>

Xenophon, who was in his youth the disciple of Socrates, has imagined the following dialogue between Hippias and Socrates in his *Memorabilia*:

Socrates Do you know, Hippias, said Socrates, what is meant by the unwritten laws?

Hippias These laws, replied Hippias, are those which are observed everywhere in any country.

Socrates Could you say that they have been established by men?

Hippias How could I say that, Socrates, knowing that men cannot get together and that they do not speak the same language?

Socrates Who do you think is the author of those laws?

Hippias I believe that these laws are from the gods, for, among all men, the first law is to respect the gods.

Socrates And to respect parents is it not also a universal law?

Hippias It is so, Socrates.

The dialogue, which deals with justice, is rather long. It ends this way.

Socrates Then, Hippias, do you believe that the gods command what is just or what is contrary to justice?

Hippias No, by Jove, they do not command what is contrary to justice; for, if a god did not make just laws, it would be very difficult for another legislator to make some.

<sup>11</sup> Thucydides, L. II, 37: 'Ανεπαχθως δὲ τὰ ἴδια προσομιλοῦντες τὰ δημόσια διὰ θεός μάλιστα οὐ παρανομοῦμεν, τῶν τε ἀεὶ ἐν ἀρχῇ ὄντων ἀκροάσει καὶ τῶν νόμων, καὶ μάλιστα αὐτῶν ὅσοι τε ἐπ' ὠφελίᾳ τῶν ἀδικουμένων κείνται καὶ ὅσοι ἀγραφοὶ ὄντες ἀσχύνην ὁμολογουμένην φέρουσιν.

Socrates In consequence, Hippias, the gods recognize the identity of what is just and of what conforms to law."<sup>12</sup>

As we see from those quotations, and I could still multiply them, we are now a long way from Homer; there has been in Greece a gradual development of the concept of natural law and also a gradual improvement in the description of it in poets and historians especially; it is of divine origin, natural, universal, known to all. I intentionally started with the non-philosophers in order to show that natural law is not a philosopher's conception alone; it was talked about in conversation, it was brought on the stage, it was admitted in the writing of history. And as we move towards the fourth century, the concept is clearer and more easily understood and defined.

## II

There is also a certain evolution in the philosopher's conception and expression of natural law. I shall now turn to the second part of this paper. To begin with, I shall try to show the origin and the development of the

<sup>12</sup> Xenophon, *Memorabilia*, L. IV, ch. IV: 'Αγράφους δέ τινας οἴσθα, ἔφη, ὦ Ἰππία, νόμους; Τούς γ' ἐν πάσῃ, ἔφη, χώρα κατὰ ταῦτά νομιζομένους. "Ἐχοις ἄν οὖν εἰπεῖν, ἔφη, ὅτι οἱ ἄνθρωποι αὐτοὺς ἔθεντο; Καὶ πῶς ἄν, ἔφη, οἱ γε οὔτε συνελθεῖν ἅπαντες ἄν δυνηθεῖεν οὔτε ὁμόφωνοι εἶσι; Τίνας οὖν, ἔφη, νομίζεις τεθεικέναι τοὺς νόμους τούτους; Ἐγὼ μὲν, ἔφη, θεοὺς οἶμαι τοὺς νόμους τούτους τοῖς ἀνθρώποις θεῖναι. Καὶ γὰρ παρὰ πᾶσιν ἀνθρώποις πρῶτον νομιζέται θεοὺς σέβειν. Οὐκοῦν καὶ γονεᾶς τιμᾶν πανταχοῦ νομιζέται; Καὶ τοῦτο, ἔφη.....

Πότερον οὖν, ὦ Ἰππία, τοὺς θεοὺς ἡγή τὰ δίκαια νομοθετεῖν ἢ ἄλλα τῶν δικαίων; Οὐκ ἄλλα μὰ Δί', ἔφη. Σχολῆ γὰρ ἄν ἄλλος γέ τις τὰ δίκαια νομοθετήσῃεν εἰ μὴ θεός. Καὶ τοῖς θεοῖς ἄρα, ὦ Ἰππία, τὸ αὐτὸ δίκαιόν τε καὶ νόμιμον εἶναι ἀρέσκει.

concept of natural law from Pythagoras to the Stoics. Then I shall endeavor to show that the evolution of the concept of natural law is bound up in Greece with the evolution of the concept of the individual. And lastly I shall study natural law in relation with slavery and usury.

The first difficulty concerns the definition of natural law. Its existence is admitted by experience and reason; its subject is man or human nature; its object is made up of a few general principles such as: good must be done and evil, avoided; damages must be repaired; its basis is the sense of justice; its qualities are based on human nature: it is universal and it is immutable. But it is only after a long process of thought that this definition has been arrived at; the main phases of this development may be seen in Pythagoras, Heraclitus, Plato, Aristotle and the Stoics.

It is to Pythagoras that we owe the first study of the principles of justice. For him and for his disciples, justice was a square number, that is to say, a number multiplied into itself; the word number had then a wider meaning than today: it meant both quantitative relation and qualitative essence. Anyhow, a square number, being composed of equal parts, is perfectly harmonious; each part has an equal numerical value and the whole is perfect. It follows from that conception of justice as a square number that the State is made up of equal parts, is the sum of equal members. The state will live and justice will be preserved as long as its parts are kept equal; it is only a matter of adjustment and equilibrium. Equality is conceived as the principle of law. But how is

equality going to be kept? By measuring out to everybody what is measured to him: justice is requital. Hence the theory of punishment, the law of retaliation; everybody must suffer as he has acted.

Pythagoras' theory of justice perfectly conforms to the deep rooted feeling of the Greeks for equality. When a colony was founded, and even on the homeland, the heads of the families used to think of themselves as equals; they thought of forming a sort of community of equals. That feeling is thus expressed by Aristophanes, in *The Clouds*: "What is the use of geometry? says Strepsiades. Why, for measuring lands into equal portions. — Do you mean the colonists' land? No, I mean all the land."<sup>13</sup> Plato adopted the Pythagorean conception of justice in the *Republic*, but he greatly enlarged upon it by giving it a deeper meaning and a more spiritual content. Aristotle objected to the conception of justice as mere requital, in his *Ethics*, but he admitted that proportionate requital was the very bond of the state.<sup>14</sup> Moreover, Aristotle's theory of "particular" justice, as distinguished from "universal" justice, owes something to Pythagoras.

If Pythagoras may be credited with being the first to have thought of equality as the principle of justice, which

<sup>13</sup> Aristophanes, *The Clouds*, 202-204:

ΛΛΑ. Γεωμετρία.

ΣΤ.

Τοῦτ' οὖν τί ἐστι χρήσιμον;

ΜΑ. Γῆν ἀναμετρήσαι.

ΣΤ.

Πότερα τὴν κληρουχικήν;

ΜΑ. Οὐκ, ἀλλὰ τὴν σύμπασαν.

<sup>14</sup> Aristotle, *Nicomachean Ethics* 1132b: Δοκεῖ δέ τισι καὶ τὸ ἀντιπεπονθὸς εἶναι ἀπλῶς δίκαιον, ὥσπερ οἱ Πυθαγόρειοι ἔφασαν ὠρίζοντο γὰρ ἀπλῶς τὸ δίκαιον τὸ ἀντιπεπονθὸς ἄλλῳ. τὸ δ' ἀντιπεπονθὸς οὐκ ἐφαρμόττει οὐτ' ἐπὶ τὸ διανεμητικὸν δίκαιον οὐτ' ἐπὶ τὸ διορθωτικόν . . . . .

is so important in the concept of natural law, Heraclitus is the first philosopher to have shown the relation between the divine law and the human laws.

Heraclitus, one of the greatest political thinkers of Greece in the fifth century, is remembered mostly for this hatred of democracy, his prophecy about global war and his pre-Christian utterances on the vanity of all human affairs. But he does not seem to have been, so far, fairly appreciated by scholars. To begin with, long before Plato and Socrates, he had a lofty conception of the law and he was the first to transform the concept of law into something real. For him law is reason; it must rule and govern, because it is neither transitory nor capricious; it is constant, serene, eternal; it deals with the general and the universal. The city where man lives must be based on law, because law is reason and reason is universal; the science of politics is derived from the knowledge of the universal law. Although his theory is not systematically expressed, yet his fragments are numerous enough to reveal his conception of the law. "The people must fight for the law just as for a city wall." (fr. 44 /100/) "With god all is beautiful, good, and just, but men hold that this or that is unjust or is just" (fr. 102 /61/). "All human laws are sustained by the one divine law, which is infinitely strong, and suffices, and more than suffices, for them all" (fr. 114 /91b/).<sup>15</sup>

<sup>15</sup> Heraclitus, fr. 44 (100) μαχεσθαι χρῆ τὸν δῆμον ὑπὲρ τοῦ νόμου δκωσπερ τείχεος.

Heraclitus, fr. 102 (61): τῷ μὲν θεῷ καλὰ πάντα καὶ ἀγαθὰ καὶ δίκαια, ἄνθρωποι δὲ ἅ μὲν ἄδικα ὑπειλήφασιν ἅ δὲ δίκαια.

Heraclitus, fr. 114 (91b) τρέφονται γὰρ πάντες οἱ ἀνθρώπειοι νόμοι ὑπὸ ἑνὸς τοῦ θεοῦ κρατεῖ γὰρ τοσοῦτον ὀκόσον ἐθέλει καὶ ἐξαρκεῖ πᾶσι καὶ περιγίνεται: (Diels, Die Fragmente Der Vorsokratiker).

Heraclitus was the first to see man or the human soul as the center of the world. He was the first to ask himself the ever burning question. What is man doing in the cosmos? What is his place in the universal struggle between Being and Becoming? "I look into myself," he used to say. In fact, by looking into himself, he became conscious of his place and of his effect in the world, for knowledge has a relation to life. And the soul has a deep insight; reason is universal. Man sees the laws of the universe; his duty is to learn and obey them. He must follow the truth of nature which is infallible, because it is the divine law of nature. Man is a whole in the scheme of the universe; he is not only a physical being that has to obey the laws of the universe; he is also an intellectual being who has to obey the laws of the city in which he lives. In short, Heraclitus was the first to see and to express the relation between the divine law and the human laws. He humanized the law, and that is new.

Plato, who owes so much to Heraclitus, does not seem to have ever forgotten the oath which he took, like the other Athenian boys, when he was entered on the role of his deme: "I will hearken to the magistrates, and obey the existing laws, and those hereafter established by the people."<sup>16</sup> As a matter of fact, Plato seems to have been obsessed all his life with the idea of justice; it forms, with the true, the good and the beautiful, the basis of his conception of the moral order. But justice is never a legal matter for him; throughout the *Republic*, he never sees society as a legal society, being busy with the maintenance

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<sup>16</sup> Poll. VIII, 105; Stol., Floril., XVIII, 48.

and the correction of rights; for him society is ethical, citizens have got special duties and functions to perform; justice is in the soul, it is a spirit, an attitude, a habit of life that animates the citizen in the accomplishment of his duties and functions.

In *Minos*, which is a short dialogue dealing with natural law, Plato — the question is still debated as to whether he is the author of this dialogue — tries to discover an absolute and immutable law behind the diversity and the contradictions of the laws established by different societies. In *Crito* and the *Apology*, he analyzes the rights and duties of the individual in his relation to the state and to the law. Socrates, like Antigone, dies for something higher than the law of the state. Should Socrates obey the law or stick to the inner sense of justice with which the law is conflicted? That is the eternal question of all martyrs. “Acquit me or condemn me, I shall never alter my ways,” says Socrates, preferring death when something spiritual, a spiritual question is at issue. In the *Laws* Plato admits the sovereignty of law; that legislator’s masterpiece contains an interesting passage on natural law, on matters about which written law is silent:

“In the private life of the family many trivial things are apt to be done which escape general notice, — things which are the result of individual feelings of pain, pleasure, or desire, and which contravene the instructions of the lawgiver; and these will produce in the citizens a multiplicity of contradictory tendencies. This is bad for a State. For while, on the one hand, it is improper and undignified to impose penalties on these practices by law, because of their



triviality and the frequency of their occurrence, on the other hand, it detracts from the authority of the law which stands written when men grow used to breaking the law in trivial matters repeatedly. Hence, it is impossible to pass over these practices in silence, it is difficult to legislate concerning them.”<sup>17</sup>

There is also in *Protagoras* a beautiful passage on the sanctity of law and the equality of members of the state.

“So Zeus, fearing that our race was in danger of utter destruction, sent Hermes to bring respect and right among men, to the end that there should be regulation of cities and friendly ties to draw them together. Then Hermes asked Zeus in what manner then was he to give men right and respect: “Am I to deal them out as the arts have been dealt? That dealing was done in such wise that one man possessing medical art is able to treat many ordinary men, and so with the other craftsmen. Am I to place among men right and respect in this way also, or deal them out to all?”—“To all,” replied Zeus; “let all have their share; for cities cannot be formed if only a few have a share of these as of other arts. And make thereto a law of my ordaining, that he who

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<sup>17</sup> Plato, *Laws*, 788 a-b: Ἰδία γὰρ καὶ κατ' οἰκίας πολλὰ καὶ μικρὰ καὶ οὐκ ἔκφανη πᾶσι γιγνόμενα, ῥαδίως ὑπὸ τῆς ἐκάστων λύπης τε καὶ ἡδονῆς καὶ ἐπιθυμίας ἕτερα παρὰ τὰς τοῦ νομοθέτου συμβουλᾶς παραγενόμενα, παντοδαπὰ καὶ οὐχ ὅμοια ἀλλήλοις ἀπεργάζονται ἂν τὰ τῶν πολιτῶν ἦθη τοῦτο δὲ κακὸν ταῖς πόλεσιν· καὶ γὰρ διὰ σμυδρότητα αὐτῶν καὶ πυκνότητα, ἐπιζήμια τιθέντα ποιεῖν νόμους ἀπρεπῆς ὅμα καὶ ἀσχημον· διαφθείρει δὲ καὶ τοὺς γραφῆι τεθέντας νόμους, ἐν τοῖς μικροῖς καὶ πυκνοῖς ἐθισθέντων τῶν ἀνθρώπων παρανομεῖν. ὥστε ἀπορία μὲν περὶ αὐτὰ νομοθετεῖν σιγᾶν δὲ ἀδύνατον. ἃ δὲ λέγω, δηλωῶσαι πειρατέον ὅλον δείγματα ἐξενεγκόντα εἰς φῶς· νῦν γὰρ λεγομένοις ἔοικε κατὰ τι σκότος.

cannot partake of respect and right shall die the death as a public pest.”<sup>18</sup>

Plato seems to have been conscious of the rigidity of the law in the mind of his countrymen, who were not very keen on changing the law. In order to better the laws and to accommodate them to particular situations, Plato becomes the champion of equity, as may be seen in *Gorgias*. Equity, in Greek, has a non-technical meaning. Aristotle defines it: “that natural justice which exists independently of human laws.”<sup>19</sup> It was very often resorted to in Athens by the orators, following Aristotle’s advice: “If the written law tells against our case, clearly we must appeal to the universal law and insist on its greater equity and justice.”<sup>20</sup> The Athenian judges used

<sup>18</sup> Plato, *Protagoras*, 322c-324A: Ζεὺς οὖν δείσας περὶ τῷ γένει ἡμῶν μὴ ἀπόλοιτο πᾶν, Ἐρμῆν πέμπει ἄγοντα εἰς ἀνθρώπους αἰδῶ τε καὶ δίκην, ἵν’ εἰεν πόλεων κόσμοι τε καὶ δεσμοὶ φιλίας συναγωγοί. Ἐρωτᾷ οὖν Ἐρμῆς Δία, τίνα οὖν τρόπον δοίη δίκην καὶ αἰδῶ ἀνθρώποις· Πότερον ὡς αἱ τέχναι νε νέμηνται, οὕτω καὶ ταύτας νείμω; Νε νέμηνται δὲ ὄδε· εἰς ἔχων ἰατρικὴν πολλοῖς ἰκανὸς ἰδιώταις, καὶ οἱ ἄλλοι δημιουργοί· Καὶ δίκην δὴ καὶ αἰδῶ οὕτω θῶ ἐν τοῖς ἀνθρώποις, ἢ ἐπὶ πάντας νείμω; Ἐπὶ πάντας, ἔφη ὁ Ζεὺς, καὶ πάντες μετεχόντων. οὐ γὰρ ἂν γένοιτο πόλεις, εἰ ὀλίγοι αὐτῶν μετέχοιεν ὥσπερ ἄλλων τεχνῶν καὶ νόμον γε θὲς παρ’ ἐμοῦ τὸν μὴ δυνάμενον αἰδοῦς καὶ δίκης μετέχειν κτείνειν ὡς νόσον πόλεως.

<sup>19</sup> Aristotle, *Rhetoric I*, 1374a: Τὸ γὰρ ἐπεικὲς δοκεῖ δίκαιον εἶναι, ἔστιν ἐπεικὲς τὸ παρὰ τὸν γεγραμμένον νόμον δίκαιον.

<sup>20</sup> Aristotle, *Rhetoric I*, 1375a: Φανερόν γὰρ ὅτι, εἰ μὲν ἐναντίος ἦ ὁ γεγραμμένος τῷ πράγματι, τῷ κοινῷ χρηστέον καὶ τοῖς ἐπεικιστέροις καὶ δικαιότεροις.

Demosthenes, *Contr. Lept*, 118: Χρὴ τοίνυν, ὦ ἄνδρες Ἀθηναῖοι, κάκειν’ ἐνθυμίσθαι καὶ ὁρᾶν, ὅτι νῦν ὁμοιοκότες κατὰ τοὺς νόμους δικάσειν ἤκατε, οὐκί τοὺς Λακεδαιμονίων οὐδὲ Θηβαίων, οὐδ’ οἷς ποτ’ ἐχρήσανθ’ οἱ πρῶτοι τῶν προγόνων, ἀλλὰ καθ’ οὓς ἔλαβον τὰς ἀτελείας, οὓς ἀφαιρεῖται νῦν οὗτος τῷ νόμῳ, καὶ περὶ ὧν ἂν νόμοι μὴ ὦσι. γνώμη τῇ δικαιοτάτῃ κρινεῖν.

cf. *Contr. Timocr.* 149-151; *Contr. Aristocr.* 96.

to swear that they would judge according to equity all the cases which the law had not foreseen. Equity was conceived as being halfway between natural law and positive law, between natural justice based on the nature of man and positive justice which is established by laws or statutes. The notion of equity, as expressed by Plato and Aristotle, is in accordance with human nature and the unwritten common law; it is like a link between the absolute perfection of natural law and the relative imperfection of human laws.

It is in Aristotle, the greatest exponent of moral philosophy, that we are bound to find the most complete definition of natural law; Aristotle is more systematic than Plato, whose statements are often contradictory. Besides analyzing and summarizing the conclusions arrived at by his predecessors, Aristotle marks the concept of natural law with the stamp of his own genius.

He thus defines nature in his *Politics*: "What each thing is when fully developed we call its nature, whether we are speaking of a man, a horse or a family." That conception of nature is typically Greek, and is that of a biologist; the child does not count much in Greek art, as in classical ages on the whole. "It is characteristic of a man, says Aristotle, that he alone has any sense of good or evil, or just or unjust; and the association of living beings who have this sense makes a family and a state."<sup>21</sup> Moreover,

<sup>21</sup> Aristotle, *Politics*, I, a: 'Η δ' ἐκ πλειόνων κοινῶν κοινωνία τέλειος πόλις, ἣ δὴ πάσης ἔχουσα πέρας τῆς αὐταρκείας ὡς ἔπος εἰπεῖν, γινομένη μὲν οὖν τοῦ ζῆν ἔνεκεν, οὐσα δὲ τοῦ εὖ ζῆν. Διὸ πᾶσα πόλις φύσει ἐστίν, εἴπερ καὶ αἱ πρῶται κοινωναίαι. Τέλος γὰρ αὕτη ἐκείναι, ἣ δὲ φύσις τέλος ἐστίν· ὅλον γὰρ ἕκαστόν ἐστι τῆς γενέσεως τελεσθείσης, ταύτην φαμέν τὴν φύσιν εἶναι ἐκάστου, ὥσπερ ἀνθρώπου ἵππου οἰκίας... ἐκ τούτων οὖν

he establishes the following distinction between natural and conventional justice:

“Of political justice part is *natural*, that which everywhere has the same force and does not exist by people thinking this or that; *legal*, that which is originally indifferent, but when it has been laid down is not indifferent. The things which we are just by virtue of convention and expediency are like measures; for wise and equal measures are not everywhere equal. Similarly the things which are just not by nature but by human enactment are not everywhere the same . . . though there is but one which is everywhere by nature the best.”<sup>22</sup>

In his *Rhetoric* Aristotle draws a distinction between particular and common law, and then describes natural law:

“Law is in part particular and in part common; the particular is that which different peoples establish among themselves, and is in part unwritten and in part written; the common law is the law of nature. It is what all men, by a natural intuition, feel to be common right and wrong, even if they have no common association and no covenant with one another.

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φανερὸν ὅτι τῶν φύσει ἢ πόλις ἐστὶ, καὶ ὅτι ἄνθρωπος πολιτικὸν ζῶον . . . τοῦτο γὰρ πρὸς τὰ ἄλλα ζῶα τοῖς ἀνθρώποις ἴδιον, τὸ μόνον ἀγαθοῦ καὶ κακοῦ καὶ δικαίου καὶ ἀδίκου καὶ τῶν ἄλλων αἰσθησὶν ἔχειν.

Plato, *Phaedrus*, 230 d: τὰ μὲν οὖν χωρία καὶ τὰ δένδρα οὐδὲν μ' ἐθέλει διδάσκειν, οἱ δ' ἐν τῷ ἄστει ἄνθρωποι.

For Socrates, both the country and the trees are not willing to teach him anything; it is the men living in the city that are willing to do so.

<sup>22</sup> Aristotle, *Nicomachean Ethics*, V, 1134b-1135a: Τοῦ δὲ πολιτικοῦ δικαίου τὸ μὲν φυσικόν ἐστι τὸ δὲ νομικόν, φυσικὸν μὲν τὸ πανταχοῦ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τῷ δοκεῖν ἢ μὴ, νομικὸν δὲ ὃ ἐξ ἀρχῆς δὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλας, ὅταν δὲ θῶνται, διαφέρει, ὡς τὸ μνάς λυτροῦσθαι, ἢ τὸ αἶγα θύειν ἀλλὰ μὴ δύο πρόβατα . . .

Thus Sophocles' Antigone is represented as saying that it is right to bury Polynices despite the interdict, because she feels that this is a natural right; for nowise today nor yesterday, but through all time, this law has its life, and none knows whence it came. And, as Empedocles says of the prohibition against taking life, this is not in some cases right and in others wrong, "but this universal law reaches on and on through the broad domain of heaven and over the immensity of earth."

"Whereas rights and wrongs were of two kinds, the written and the unwritten, those for which the law makes provision have been discoursed, and the unwritten are of two kinds. They are partly matters connected with exceptional goodness or badness, the occasions of denunciations or eulogies, disgraces or preferments, or gifts or honor — as, for example, being grateful to a benefactor and repaying kindness with kindness and helping one's friends and all such things — and they are partly matters not covered in particular written codes. For it is admitted that what is reasonable is right, and it is a kind of right which goes beyond the written law. This is brought about partly by the intention of the legislators, partly without their intention — without their intention when a point is overlooked, by their intention when they cannot define precisely, but have to use language of universal application, and cannot but make a rule that will apply in a majority of cases.

"It is also reasonable to make allowance for human limitations; also to consider not the law but the legislator, and not the legislator's language, but his intent, nor the action but the motive, not the part but the whole, and not what a man's character is at the moment but what it has been always or predominantly in the past."

And he concludes this part by saying that one could go “into arbitration rather than a court of law, in order that equity might prevail.”<sup>23</sup>

Aristotle’s concept of natural law is somewhat limited to the philosopher’s concept of the city and of men; it excludes the slaves, the greatest number of people. For Aristotle man was a political animal that could not live and develop himself but in a city. The Stoics were the first to draw a sharp distinction between the city and the

<sup>23</sup> Aristotle, *Rhetoric*, I, 1373b-1374b: Λέγω δὲ νόμον τὸν μὲν ἴδιον, τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἐκάστοις ὠρισμένον πρὸς αὐτούς, καὶ τοῦτον τὸν μὲν ἄγραφον, τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν. Ἔστι γὰρ ὁ μαντεύονται τὸν πάντες, φύσει κοινὸν δίκαιον καὶ ἀδίκιον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ἢ μηδὲ συνθήκη, ὅλον καὶ ἡ Σοφοκλέους Ἐπιγόνη φαίνεται λέγουσα, ὅτι δίκαιον ἀπειρημένον θάψαι τὸν Πολυεΐκη, ὡς φύσει ὄν τοῦτο δίκαιον.

οὐ γὰρ τι νῦν γε κἄχθές, ἀλλ’ αἰεί ποτε

ζῆ τοῦτο, κούδεις οἶδεν ἐξ ὄτου φάνη.

Καὶ ὡς Ἐμπεδοκλῆς λέγει περὶ τοῦ μὴ κτείνειν τὸ ξυψυχον τοῦτο γὰρ οὐ τοῖς μὲν δίκαιον τοῖς δ’ οὐ δίκαιον,

ἀλλὰ τὸ μὲν πάντων νόμιμον δία τ’ εὐρυμέδοντος

αἰθέρος ἠνεκέως τέταται διά τ’ ἀπλέτου αὐ γῆς.

Aristotle, *Rhetoric*, I, 1374a: Ἐπει δὲ τῶν δικαίων καὶ τῶν ἀδίκων ἦν δύο εἶδη (τὰ μὲν γὰρ γεγραμμένα τὰ δ’ ἄγραφα), περὶ ὧν μὲν οἱ νόμοι ἀγορεύουσιν εἰρηται, τῶν δ’ ἀγράφων δύο ἐστὶν εἶδη ταῦτα δ’ ἐστὶν τὰ μὲν καθ’ ὑπερβολὴν ἀρετῆς καὶ κακίας, ἐφ’ οἷς ὀνειδή καὶ ἔπαινοι καὶ ἀτιμίαι καὶ τιμαὶ καὶ δωρεαί, ὅλον τὸ χάριν ἔχειν τῷ ποιήσαντι εὖ καὶ ἀντυποιεῖν τὸν εὖ ποιήσαντα καὶ βοηθητικὸν εἶναι τοῖς φίλοις καὶ ὅσα ἄλλα τοιαῦτα, τὰ δὲ τοῦ ἰδίου νόμου καὶ γεγραμμένου ἔλλειμμα.

(1374b): Καὶ τὸ τοῖς ἀνθρώποις συγγινώσκειν ἐπεικέες. Καὶ τὸ μὴ πρὸς τὸν νόμον ἀλλὰ πρὸς τὸν νομοθέτην, καὶ μὴ πρὸς τὸν λόγον ἀλλὰ πρὸς τὴν διάνοιαν τοῦ νομοθέτου σκοπεῖν, καὶ μὴ πρὸς τὴν πράξιν ἀλλὰ πρὸς τὴν προαίρεσιν, καὶ μὴ πρὸς τὸ μέρος ἀλλὰ πρὸς τὸ ὅλον, μηδὲ ποιός τις νῦν, ἀλλὰ ποιός τις ἦν αἰεὶ ἢ ὡς ἐπὶ τὸ πολὺ. Καὶ τὸ μνημονεύειν μᾶλλον ὧν ἔπαθεν ἀγαθῶν ἢ κακῶν, καὶ ἀγαθῶν ὧν ἔπαθε μᾶλλον ἢ ἐποίησεν. Καὶ τὸ ἀνέγχεσθαι ἀδικούμενον. Καὶ τὸ μᾶλλον λόγῳ ἐθέλειν κρίνεσθαι ἢ ἔργῳ. Καὶ τὸ εἰς διαίταν μᾶλλον ἢ εἰς δίκην βούλεσθαι ἵεναι. ὁ γὰρ διατητῆς τὸ ἐπεικέες ὀρεῖ, ὁ δὲ δικαστῆς τὸν νόμον καὶ τούτου ἔνεκα διατητῆς εὐρέθη, ὅπως τὸ ἐπεικέες ἰσχύη. It is also in his *Nicomachean Ethics* (V, 10, 1137 a 31 sqq.) that Aristotle studies equity (ἐπεικεία, ἐπεικέες) and distinguishes it from justice (δικαιοσύνη, δίκαιον).

world, or the relations between all human beings, independently of any origin and of any political philosophers. And their cosmopolitan outlook was based on a new conception of law and justice; it came about when the Greek city states were falling into partial bankruptcy; instead of clinging, like Aristotle, to the conception of the city, they wanted "to embrace under a unique law all the families of reasonable beings."<sup>24</sup> For Aristotle, law and justice do not go beyond the city; the Stoics, like the sophists, call themselves citizens of the world. With them, justice governs the relations of men, no matter where they are. This natural law of theirs is based upon the identity of the nature of men and gods as reasonable beings. Plato's conception of society is based upon a distinction of classes and the inequality of individuals; Aristotle does not consider slaves as citizens, although he is convinced that slavery is natural and also that the city itself is natural. Completing and correcting Pindar, who had already said: "custom is the king of all things."<sup>25</sup> Chrysippus says: "Law is the king of all things divine and human."<sup>26</sup> The Stoics build their society on equality; the individual becomes the moral unity, the law becomes universal. Following Heraclitus, they made the individual the center of the world and in consequence abolished the different classes established by Plato and Aristotle. For them the principle of justice is in common nature; it is from that principle we must start if we want to talk of good and bad. All men are equal; the prin-

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<sup>24</sup> Dio Chrysost., *Orat.*, 36, 29.

<sup>25</sup> Herodotus, 3, 38: νόμος πάντων Βασιλεὺς

<sup>26</sup> Chrysippus, *On Law*: "Law is the king of all things divine and human." (Marcianus, *Instit.*, *Arm.*, III no 314).

ciples of unity, of equality and community that exist in the physical universe, are also the principles of life among men. For the first time the idea of a moral person appears, that person having nothing to sacrifice in order to become a member of society.

This rapid review of the most important philosophers that have dealt with the concept of natural law, covers about four centuries of thought and reveals both the continuity and the tenacity of Greek thinkers about natural law. From Pythagoras to the Stoics there is a definite growth and development in the expression of the concept of natural law. Aristotle accepted, with certain modifications, the principles of equality and reason set forth by Pythagoras and Heraclitus respectively, may be seen in his conception of justice. Justice, for him, is a virtue, and virtue consists in keeping the just middle between two extremes. Moreover, Aristotle is the last of the great thinkers to have considered natural law as something divine and universal, one and above man; with the Stoics the concept of natural law becomes human, universal in name, intrinsic and as manifold as the individuals.

Such evolution of the concept of natural law is closely connected with the evolution of the concept of the individual, for the individual is the subject of natural law. And the clear, distinct concept of the individual is a conquest of human thought. Moreover, in Greece, man was not the only legal subject, for the Greeks considered also the gods, the animals and the inanimate objects as legal subjects. But I do not want to enter into the details of this question. What I want to stress rapidly before concluding this paper, is that the clear notion of the indi-



vidual took several centuries to be expressed properly and that it has some bearing upon natural law, even upon practical life, since slavery was found natural and usury unnatural in Ancient Greece.

There may be seen two phases in the evolution of the concept of the individual, as may be gathered in a study of the Greek institutions relating to murder; I take murder to illustrate my point, because the Greeks, from Homer to Pobylius, used to be fond of murder stories or of murder tragedies; that is why they always preferred the murder to the trial, the *Iliad* to the *Odysseus*, *Agamemnon* to the *Eumenides*.

At the beginning, there was the clan in which the honor of the murdered person is absorbed in a divine or mythical force which symbolizes the group; the honor of the murdered person is satisfied by the clan or the family, gathered together in religious ceremonies; these ceremonies, accompanied with magical expressions, are carried out to satisfy the gods or to reveal the god's sanction. The outrage is objective and religious. With time, under different economic factors, the clan transforms itself into the city, and the city marks the beginning of individualism; the concept of offense becomes secular, the offense tends to be regarded as an attempt at the individual. From the primitive and religious concept of offense, was born the concept of the individual as an object of respect; the outrage done becomes the offended individual; and as it is the city now that reproves and corrects the insolence, the concept of the individual becomes closely associated with that of the city. There is a gradual sec-

ularization of the idea of offense, and with it appears the concept of the individual.

This development can be seen in Greek literature, from Homer to Pindar; it reaches its climax in the 5th Century with Aeschylus and Sophocles. Aeschylus was fond of treating the problem of sin and individual responsibility on the stage, particularly in his famous trilogy, where he abolishes hereditary responsibility and replaces the blood for blood vengeance by a religious sacrifice; Sophocles treated the problem of suffering, particularly in *Oedipus Tyrannus*, where the distinction between voluntary and involuntary responsibility is clearly presented.

The concept of the individual was evolved in a Greek world, where the problem of the city-state and of the mutual relations of city-states occupies the mind of most thinkers. Herodotus divides the individuals into Greeks and Barbarians. He is the first to have described the Greeks in a manner which must be most agreeable to our contemporary nationalists and racists. He makes the Athenians say before the battle of Plataea:

“There was nowhere in the world so much gold, or land so excellent in beauty or worth, as would induce them to be willing to join the side of Persia and to enslave Greece, for that would be treachery to the Greek nation, which had one blood, one speech, one religion and one culture.”<sup>27</sup> Isocrates regarded himself as a citizen of

<sup>27</sup> Herodotus, VIII, 144: 'Ατὰρ αἰσχροῦς γε οἴκατε ἐξεπιστάμενοι τὸ Ἀθηναίων φρόνημα ἀρρωδῆσαι· ὅτι οὔτε χρυσός ἐστι γῆς οὐδαμῶθι τοσοῦτος οὔτε χώρα κάλλει καὶ ἀρετῇ μέγα ὑπερφέρουσα, τὰ ἡμεῖς δεξάμενοι ἐθέλομεν ἂν μηδίσαντες καταδουλώσαι τὴν Ἑλλάδα..... τὸ Ἑλληνικόν, ἔδν ἑμαιμόν τε καὶ ὁμόγλωσσον, καὶ θεῶν ἰδρύματα τε κοινὰ καὶ θυσίαι ἦθεά τε ὁμότροπα.

Greece and the champion of the pan-hellenic world order, an idea which Aristotle disliked immensely. Not only did Isocrates want Athens to place herself at the head of all the Greek peoples against Asia, but he considered Greek culture as something far superior to Greek race. "Thanks to Athens, says he, the name of Hellenes seems to mean less a race than a way of thinking, and one deserves much more to be called a Greek, if he has received the Athenian culture, than if he is only a Greek by birth."<sup>28</sup> Plato held the same view as Isocrates and limited his brotherhood to the Greek world; but he strongly emphasized the idea of a common law which regulates the relations of the Greek states. On the other hand, Plato's bitterest enemies, the sophists, Protagoras and Hippias — to whom Plato was so unjust — regarded themselves as citizens of the world, for, together with the Cynics and the Stoics, they held that all men were by nature fellow-citizens. Aristotle was far too much of a Macedonian to agree with Plato, Isocrates and the sophists; he limited his outlook to the city, to the citizens only, the slaves being considered by him merely as tools.

For Aristotle, slavery is natural, like maternity and paternity. He justifies it by saying that it is based on human nature. Although a slave is a property with a soul, yet it is a natural institution. The slave is an instrument for use in the family; it is even indispensable to it,

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<sup>28</sup> Isocrates, *Panegyric*, 50: Τοσοῦτον δ, ἀποτέλειπεν ἡ πόλις ἡμῶν περὶ τὸ φρονεῖν καὶ λέγειν τοὺς ἄλλους ἀνθρώπους, ὧσθ' οἱ ταύτης μαθηταὶ τῶν ἄλλων διδάσκαλοι γεγόνασιν, καὶ τὸ τῶν Ἑλλήνων ὄνομα πεποιήκεν μηκέτι τοῦ γένους, ἀλλὰ τῆς διανοίας δοκεῖν εἶναι, καὶ μᾶλλον Ἑλλήνας καλεῖσθαι τοὺς τῆς παιδείσεως τῆς ἡμετέρας ἢ τοὺς τῆς κοινῆς φύσεως μετέχοντας.

it is a natural wealth. But he does not recognize slavery as the result of war, because that form of slavery comes from war, which is against the common good of the city, whereas the natural slaves are essential to the wellbeing of the city. He writes in his *Politics*:

“The first coupling together of persons then to which necessity gives rise is that between those who are unable to exist without one another, namely the union of male and female for the continuance of species; and the union of natural ruler and natural subject for the sake of security. Thus the female and the slave are by nature distinct. Yet among barbarians the female and the slave have the same rank; and the cause of this is that barbarians have no class of natural rulers, but with them the conjugal partnership is a partnership of female slave and male slave. Hence the saying of the poets:

‘’Tis meet that Greeks should rule barbarians, implying that barbarian and slave are the same by nature.’ “He is by nature a slave who is capable of belonging to another (and that is why he does so belong), and who participates in reason so far as to apprehend it but not to possess it; for the animals other than man are subservient not to reason, by apprehending it, but to feeling. And also the usefulness of slaves diverges little from that of animals; bodily service for the necessities of life is forthcoming from both, from slaves and from domestic animals alike. The intention of nature therefore is to make the bodies also of freemen and of slaves different — the latter strong for necessity service, the former erect and unserviceable for such occupations.”<sup>29</sup>

<sup>29</sup> Aristotle, *Politics*, I, 1252a: Ἀνάγκη δὲ πρῶτον συνδυάζεσθαι τοὺς ἄνευ ἀλλήλων μὴ δυναμένους εἶναι, ὅλον θῆλυ μὲν καὶ ἄρρεν τῆς γενέσεως ἔνεκεν. . . ἄρχον δὲ φύσει καὶ ἀρχόμενον διὰ τὴν σωτηρίαν. τὸ μὲν γὰρ δυνάμενον τῇ διανοίᾳ προορᾶν ἄρχον φύσει καὶ δεσπῶζον φύσει,

The Sophists, the Cynics and the Stoics did not reason in the same way as Aristotle; for them slavery was unnatural; they preached the equality of human beings, whether they were citizens or slaves, whether they were living in Greece or elsewhere, whether they belonged to a democracy or to a kingdom. Hippias writes in *Protagoras*: "I hold you all kinsmen, relatives and fellow citizens by nature, though not by law; for like is kin to like, but law, the tyrant of mankind, often constrains by violence in contravention of nature." Philemon, a comic writer of the fourth century, holds the following views on the stage: "Although one is a slave, master, he is none the less a man as a man is." "Even if one is a slave, he has the same skin. For nobody has ever been born a slave by nature. On the contrary it is destiny that has

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τὸ δὲ δυνάμενον ταῦτα τῷ σώματι ποιεῖν ἀρχόμενον καὶ φύσει δοῦλον διὸ δεσπότη καὶ δούλῳ ταῦτὸ συμφέρει· φύσει μὲν οὖν διώρισταὶ τὸ θῆλυ καὶ τὸ δοῦλον. . . ἐν δὲ τοῖς βαρβάροις τὸ θῆλυ καὶ τὸ δοῦλον τὴν αὐτὴν ἔχει τάξιν.

Aristotle, *Politics*, I, 1252a: αἴτιον δ' ὅτι τὸ φύσει ἄρχον οὐκ ἔχουσιν, ἀλλὰ γίνεται ἡ κοινωνία αὐτῶν δούλης καὶ δούλου. διὸ φασιν οἱ ποιηταὶ "βαρβάρων δ' Ἑλλήνας ἄρχειν εἰκός", ὡς ταῦτὸ βάρβαρον καὶ δοῦλον ὄν. . .

Aristotle, *Politics*, I, 1253b-1254a: οὕτω καὶ τὸ κτῆμα ὄργανον πρὸς ζωὴν ἐστὶ, καὶ ἡ κτήσις πλῆθος ὀργάνων ἐστὶ, καὶ ὁ δούλος κτῆμά τι ἔμψυχον. καὶ ὥσπερ ὄργανον πρὸ ὀργάνων πᾶς ὑπερέτης. . . ὁ γὰρ μὴ αὐτοῦ φύσει ἀλλ' ἄλλου ἀνθρώπου ὢν, οὕτως φύσει δούλος ἐστὶν, ἄλλου δ' ἐστὶν ἀνθρώπου, ὃς ἂν κτῆμα ἢ ἀνθρώπου ὢν, κτῆμα δὲ ὄργανον πρακτικὸν καὶ χωριστόν.

Aristotle, *Politics*, I, 1254b: Ἔστι γὰρ φύσει δούλος ὁ δυνάμενος ἄλλου εἶναι (διὸ καὶ ἄλλου ἐστίν) καὶ ὁ κοινωνῶν λόγου τοσοῦτον ὅσον αἰσθάνεσθαι ἀλλὰ μὴ ἔχειν. τὰ γὰρ ἄλλα ζῶα οὐ λόγῳ αἰσθανόμενα, ἀλλὰ παθήμασιν ὑπηρετεῖ. καὶ ἡ χρεια δὲ παραλλάττει μικρόν· ἡ γὰρ πρὸς τάναγκαῖα τῷ σώματι βοήθεια γίνεται παρ' ἀμφοῖν, παρὰ τε τῶν δούλων καὶ παρὰ τῶν ἡμέρων ζώων. βούλεται μὲν οὖν ἡ φύσις καὶ τὰ σώματα διαφέροντα ποιεῖν τὰ τῶν ἐλευθέρων καὶ τῶν δούλων, τὰ μὲν ἰσχυρὰ πρὸς τὴν ἀναγκαίαν χρῆσιν, τὰ δ' ὀρθὰ καὶ ἀχρηστα πρὸς τὰς τοιαύτας ἐργασίας.

cf. *Nicomachean Ethics*, VIII, 11.

enslaved the body.” The sophists, as well as the Cynics and the Stoics, were cosmopolitan citizens; they recognized the individuality of men; they opposed Nature to positive law; for them, nature is enthroned alone positive law.<sup>30</sup>

There is one point, however, on which all Greek philosophers seem to have agreed, and this is so rare — for a philosopher is a man who by nature picks a bone with another philosopher — that it is worth mentioning: that point is usury, they were all against it. The rate of interest, in the fourth century, ranged between 12 and 48 per cent. Usury, for them, is against nature; they even find interest on borrowed money quite unnatural.<sup>31</sup> Aristotle has thus forcibly summarized the Greek philosophers’ point of view on the matter:

“The branch connected with exchange is justly discredited (for it is not in accordance with nature, but

<sup>30</sup> Plato, *Protagoras*, 337c: Ὁ ἄνδρες, ἔφη, οἱ παρόντες, ἡγοῦμαι ἐγὼ ὑμᾶς συγγενεῖς τε καὶ οἰκείους καὶ πολίτας ἅπαντας εἶναι φύσει, οὐ νόμῳ· τὸ γὰρ ὁμοῖον τῷ ὁμοίῳ φύσει συγγενές ἐστιν, ὃ δὲ νόμος, τύραννος ὢν τῶν ἀνθρώπων, πολλὰ παρὰ τὴν φύσιν βιάζεται.

<sup>31</sup> Philemon, *op. Stob. Floril. LXII, 28*:  
Κἄν δούλος ἢ τις, οὐθεν ἤτιον, δέσποτα  
Ἄνθρωπος οὗτός ἐστιν, ἄν ἄνθρωπος ἦ.

*Id.*, *Fragm. 39 op. Meineke Com. Nov. 1 IV, p. 47*.  
Κἄν δούλος ἢ τις σάρκα τὴν αὐτὴν ἔχει·  
Φύσει γὰρ οὐδεὶς δούλος ἐγεννήθη ποτέ,  
Ἢ δ’ αὖ τύχη τὸ σῶμα κατεδουλώσατο.

Chrysippus goes as far as to consider slavery as an exchange of service between the master and the servant. Moreover, the slave may be a blessing for the master, as much as the master may be a blessing for the slave (Seneca, *De Ben.*, III, 22; Athenaeus, *Deipnos.*, VI, 267b; Arn., III, nos 351-353).

Ulp. 1 *Instit. Dig. I, 4*: “Jure naturali omnes liberi nascuntur. Uno naturali nomine homines appellamur.”

involves men's taking things from one another.) As this is so, usury is most reasonably hated, because its gain comes from money itself and not from that for the sake of which money was invented. For money was brought into existence for the purpose of exchange, but interest increases the amount of money itself (and this is the actual origin of the Greek word: offspring resembles parent, and interest is money born of money); consequently this form of the business of getting wealth is of all forms the most contrary to nature."<sup>32</sup>

Aristotle finds usury unnatural. The money-lender's activity is unnatural because he does not use money which is an artificial medium of exchange, according to its functions; it follows that usury, which is the result of this misuse is against nature. Interest tends also towards the infinite, there is no end to it, and, for Aristotle and all the Greek philosophers, the infinite is irrational and against nature.

From these considerations it follows that natural law is far from being a purely academic speculation, just good enough for people with leisure to brood over; it is fundamental even in practical life. It follows also that the concept of natural law has had a very strange destiny in Greece. If we recall the sayings of Homer and Hesiod, Theogenis and Sophocles, Xenophon and Plato, we shall

<sup>32</sup> Aristotle, *Politics*, I, 1258b: Διπλῆς δ' οὐσης αὐτῆς, ὥσπερ εἶπομεν, καὶ τῆς μὲν κατηλικῆς τῆς δ' οἰκονομικῆς, καὶ ταύτης μὲν ἀναγκαίας καὶ ἐπαινουμένης, τῆς δὲ μεταβλητικῆς ψεγομένης δικαίας (οὐ γὰρ κατὰ φύσιν ἀλλ' ἀπ' ἀλλήλων ἐστίν), εὐλογώτατα μισεῖται ἢ ὀβολοστατικῆ διὰ τὸ ἀπ' αὐτοῦ τοῦ νομίσματος εἶναι τὴν κτῆσιν καὶ οὐκ ἐφ' ὅπερ ἐπορίσθη. μεταβολῆς γὰρ ἐγένετο χάριν, ὃ δὲ τόκος αὐτὸ ποιεῖ πλέον. ὅθεν καὶ τοῦνομα τοῦτ' εἴληφεν· ὅμοια γὰρ τὰ πικτόμενα τοῖς γεννώσιν αὐτὰ ἐστίν, ὃ δὲ τόκος γίνεται νόμισμα ἐκ νομίσματος. ὥστε καὶ μάλιστα παρὰ φύσιν οὗτος τῶν χρηματιστῶν ἐστίν.

remember that, in the minds of these writers, natural law is something divine and universal; it is a gift of the gods, like justice and poetry; it is to be found everywhere in the world, because it is based on reason, which is proper to man, it is immanent in human nature. For Pythagoras and Heraclitus, the principles of justice, upon which natural law is based, are to be found in equality and in insight, in the law of retaliation and in the law of reason; justice is harmony and equilibrium, man is the center of the cosmos. For Plato, justice is a spirit, a habit of life that animates man's action; the inner sense of justice, which is felt by the conscience, is something much higher in spiritual truth and content than the law of the State; natural law is eternal, like the gods who have given it to mankind. With Aristotle, natural law is one, divine, universal;<sup>33</sup> with the Stoics, it is human, universal, as manifold as the individuals themselves.

Strange destiny indeed is that of the natural law, for it was first called divine and then, in the course of centuries, became human. This destiny is quite as strange as that of Fire, which was too, divine in its origin, gave birth to love and kept unity as long as it was in the hands of the gods; placed in the hands of Prometheus, it became the source of the arts and of the inventions, the very principle of division on earth.

There is, however, a much more tragic and strange destiny than that: it is the destiny of men in the world.

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<sup>33</sup> The words "god," "divine" do not imply the same meaning today as they did with the Greeks. They never believed in Creation. It is therefore a grave mistake to translate Θεός by God with a capital G, as is usually done even in the best translation of Plato and Aristotle. Now, ὁ Θεός, God is not to be found in Aristotle.



Looking back on this achievement of the Greeks, who were the first to conceive and express the concept of natural law, of a law which exists for every human being, whether he is a slave or a freeman, looking back on this achievement, with all its consequences on practical life, one cannot help admiring the acuity of their mind as well as their tenacity in research and their burning love of man. With Saint Paul, they could have defined natural law: "*Quod semper aequum ac bonum est*";<sup>34</sup> this formula is far too wide to be contained in any positive law. One then easily understands Sophocle's enthusiasm, I should say, his overwhelming pride in man as a creative being; when he writes this beautiful ode, which is the first definition of humanism, in *Antigone*:

"Wonders are many, and none is more wonderful than man; the power that crosses the white sea, driven by the stormy south-wind, making a path under surges that threaten to engulf him; and the Earth, the eldest of the gods, the immortal, the unwearied, does he wear, turning the soil with the offspring of horses, as the ploughs go to and fro from year to year.

And the light-hearted race of birds, and the tribes of savage beasts, and the sea-brood of the deep, he snares in the meshes of his woven toils, he leads captive, man excellent in wit. And he masters by his arts the beast whose lair is in the wilds, who roams the hills; he takes the horse of shaggy mane, he puts the yoke upon its neck, he tames the tireless mountail ball.

And speech, and wind-swift thought, and all the moods that would a state, hath he taught himself;

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<sup>34</sup> Paul, 14 ad Sal.

and how to flee the arrows of the frost, when 'tis hard lodging under the clear sky, and the arrows of the rushing rain; yes, he hath resource for all; without resource he meets nothing that must come; only against Death shall he call for aid in vain; but from baffling maladies he hath devised escapes.

Cunning beyond fancy's dream is the fertile skill which brings him, now to evil, now to good. When he honors the laws of the land, and that justice which he hath sworn by the gods to uphold, proudly stands his city; no city hath he who, for his rashness, dwells with sin. Never may he share my hearth, never think my thoughts, who do these things!"<sup>35</sup>

<sup>35</sup> Sophocles, *Antigone* 332-375:

ΧΟ. Πολλά τὰ δεινὰ κούδέν ἀνθρώπου δεινότερον πέλει·  
τοῦτο καὶ πολλοῦ πέραν πόντου χειμερίῳ νότῳ  
Χωρεῖ περιδουχίουσιν  
περῶν ὑπ' οἰδμασιν·  
θεῶν τε τὰν ὑπερτάταν, Γᾶν  
ἄφθιτον, ἀκαμάταν ἀποτρύεται,  
ἰλλομένων ἀρότρων ἔτος εἰς ἔτος,  
ἵπτεϊφ γένει πολεῦων.  
κουφονόων τε φύλον ὀρνίθων ἀμφιβαλῶν ἄγει  
καὶ θηρῶν ἀγρίων ἔθνη πόντου τ' εἴναμμαν φυσιν  
σπείρασι δικτυοκλωστοῖς,  
περιφραδῆς ἀνήρ·  
κρατεῖ δὲ μηχαναῖς ἀγραύλου  
θηρὸς ὀρεσσιβάτα, λασιαύχενά θ'  
ἵππον ὀχμάζεται ἀμφὶ λόφον ζυγῶν,  
οὐρειὸν τ' ἀκμήτα ταῦρον.  
καὶ φθέγμα καὶ ἀνεμόεν  
φρόνημα καὶ ἀστυνόμους ὀργὰς ἐδιδάξατο καὶ δυσαύλων  
πάγων ἐναίθρεια καὶ δύσομβρα φεύφειν βέλη,  
παντοπόρος· ἄτορος ἐπ' οὐδὲν ἔρχεται  
τὸ μέλλον· Ἄϊδα μόνον φεῦξιν οἶκ' ἐπάξεται.  
νόσων δ' ἀμηχάνων φυγὰς ζυμπέφρασαι.  
σοφόν τι τὸ μηχανόεν  
τέχνας ὑπὲρ ἑλλάδ' ἔχων τοτὲ μὲν κακόν, ἄλλοι ἐπ' ἐσθλὸν ἔρπει·  
νόμους γεραίρων χθόνος θεῶν τ' ἔνορκον δίκαν,  
ὑψηλοῖς· ἀπολις, ὅτῳ τὸ μὴ καλὸν  
ξύνεστι τόλμας χάριν· μήτ' ἐμοὶ παρέστιος  
γένοιτο μητ' ἴσον φρονῶν, ὅς τὰδ' ἔρδει.

The Greeks centered their interest on man especially. Their concept of natural law was born of their study of man. It is one of their greatest contributions to the world's culture and civilization. It is a new idea, which is still alive today; and the Greeks had the genius of coining words for this new idea. Thanks to natural law, there is something humane and personal in Greek law, there is a soul, a spirit in it. There is even too much poetry in natural law not to be divine. The Greek saw it and expressed it, for they were poets, they looked at the world in awe, like children. That is why everything they have invented still looks so fresh; their literature and their philosophy seem to be less old than yesterday's newspapers; one never tires of studying Greek, as one never tires of looking at the sun on the Aegean sea.

Natural law is, in fact, the expression of the divine law in man. As long as man respects the divine in himself, he lives in peace, for the divine, which is measure and order, is peace. Socrates used to smile, when looking at the Parthenon, for the Parthenon was for him the symbol of order and harmony, of measure and proportion; it may also be regarded as the symbol of natural law for the Greeks of old.



## NATURAL LAW IN THE ROMAN PERIOD<sup>1</sup>

*Ernst Levy*

THE subject assigned to me in this discussion is the law of nature in the period of Roman history. Stretching beyond the developments in Roman Law it includes the currents among philosophers, rhetors and theologians, and within the limits of Roman Law it embraces the evolution down to the age of Justinian and his compilation in the sixth century A.D. However, time does not permit me to cover such a vast field in an adequate way. A selection is imperative, and there can be no doubt as to how to make it. Roman jurisprudence in its classical period suggests itself as the appropriate topic, for a number of reasons. It represents a unique achievement in legal history and the greatest intellectual legacy the Romans have left to us. It is neither dependent on the Greeks as are Roman philosophy and rhetoric, nor does it herald the Scholastics, as do the writings of the Church Fathers. It is, therefore, not likely to be treated by the other speakers. Moreover, the attitude of the classical jurists toward natural law is by no means settled, but is,

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<sup>1</sup> The following abbreviations are used: D. = *Justiniani Digesta*, edd. T. Mommsen and P. Krüger, *Corpus juris civilis*, Vol. I (13th stereo. ed., 1920); Inst. = *Justiniani Institutiones*, ed. Krüger, in the same volume; Gai. I etc. = *Gai Institutiones*, edd. Seckel et Kuebler (7th ed., 1935); Ind. int. = *Index interpolationum*, edd. Levy and Rabel (1929 ff); SZ. = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*. The Loeb Classical Library and S. P. Scott, *The Civil Law* (1932) have principally, though not throughout, been used for the translation of Greek and Roman texts.

on the contrary, still a highly controversial subject. They are both invoked and rejected as witnesses for the recognition of a law of nature, and legal historians as well as philosophers are themselves divided on the issue. Another attempt, therefore, should be made to clarify the problem. Everything else including the tendencies of post-classical writers and Justinian's men can be given but passing attention.

With one exception. Cicero holds an outstanding position in the field.<sup>2</sup> Greatly impressed with the doctrines of Plato,<sup>3</sup> Aristotle<sup>4</sup> and the Stoics<sup>5</sup> and brought up in the milieu of the schools of the rhetors, he became acquainted early with the subject of natural law. With or without reference to the Greek models, he returned to it so often and in such various forms of expression that, at least to us, he has become the chief source of the Roman theory of the law of nature. An outline of his views, however, will not only be an end in itself. It will also bring into better relief the manner in which the lawyers looked at the matter. And this by way of contrast. Cicero, for

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<sup>2</sup> The literature is large. See especially, M. Voight (*infra* n. 51) I 176 ff, R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West* I (1903) 1 ff (the second edition of 1930 was not accessible to me); E. Costa, *Cicerone Giureconsulto* (1927) I 16 ff; C. H. McIlwain, *The Growth of Political Thought in the West* (1932) 114 ff; R. N. Wilkin, *Eternal Lawyer, A Legal Biography of Cicero* (1947) 223 ff; G. Lombardi, *Sul concetto di 'ius gentium'* (1947) 61 ff.

<sup>3</sup> R. Morrow, "Plato and the Law of Nature" in *Essay in Political Theory presented to G. H. Sabine* (1948) 17 ff. Voigt, *loc. cit.* I 81 ff gives a survey on Greek doctrines at large.

<sup>4</sup> F. D. Wormuth, "Aristotle on Law" in the *Essays* cit. in n. 3, 53 ff. See also J. Bryce, *Studies in History and Jurisprudence* II (1901) 567, O. Lenel in *Enzyklopädie der Rechtswissenschaft*, 7th ed., I (1915) 331.

<sup>5</sup> E. Bodenheimer, *Jurisprudence* (1940) 107 ff, H. A. Rommen, *The Natural Law*, transl. by Hanley (1947) 21 ff.

all his great talents, was a statesman and philosopher, an orator and legal practitioner rather than a creative jurist. He was a close friend of some of these jurists, but their world was not his.

To Cicero, law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite.<sup>6</sup> The very root<sup>7</sup> and origin<sup>8</sup> of the law is in nature or, as he also puts it, in God. For the mind of God cannot exist without reason, and divine reason cannot but have this power to establish right and wrong.<sup>9</sup> God, therefore, is the inventor, interpreter and sponsor of natural law.<sup>10</sup> The Gods have given it to the human race.<sup>11</sup> It is the supreme law,<sup>12</sup> the only true law<sup>13</sup> and genuine justice.<sup>14</sup> In fact, justice does not exist at all, if it does not come from nature or right reason.<sup>15</sup>

Consequently, that law is above space and time. It is alike at Rome and at Athens,<sup>16</sup> a *ius gentium*, as he says,<sup>17</sup> it rules the whole universe by its wisdom in command and prohibition. It is eternal and everlasting, hence unchangeable, so that neither senate nor people can relieve us from

6 De legibus 1.6.18; cf. de re publica 3.22.33.

7 De leg. 1.6.20. i. f.

8 De leg. 1.13.35; cf. pro Milone 4.10

9 De leg. 2.4.9, 10; cf. de natura deorum 2.31.78, 79; 2.62.154.

10 De re publ. 3.22.33 i. f.; cf. de officiis 3.5.23.

11 De leg. 2.4.8.

12 De leg. 1.6.19 i. f.

13 De re publ. 3.22.33 init.; de leg. 2.4.10 i. f.

14 De off. 3.17.69 i. f.

15 De leg. 1.15.42

16 De re publ. 3.22.33.

17 De off. 3.5.23: "Neque vero hoc solum natura, id est iure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continenture, eodem modo constitutum est"; de haruspicum responso oratio 14.32: "quamquam hoc si minus civili iure perscriptum est, lege tamen naturae communi iure gentium sanctum est."

its obligations.<sup>18</sup> It is not reduced to writing<sup>19</sup> nor made by man altogether.<sup>20</sup> It has its origin ages before any written law existed or any State was established.<sup>21</sup>

The substance of natural law presents itself in a number of basic principles. It permits selfhelp against vital aggression and defense against injury.<sup>22</sup> It forbids one not only to act insidiously or fraudulently<sup>23</sup> but even to do harm to anyone.<sup>24</sup> Although it is not against nature that a man secures the necessities of life for himself rather than somebody else, nature does forbid him to increase his means, wealth and resources by despoiling others.<sup>25</sup> More than that: it is a matter of injustice not to shield from wrong those upon whom it is being inflicted.<sup>26</sup> For nature ordains that anyone desire to promote the interests of a fellow-man, whoever he may be, just because he is a fellow-man.<sup>27</sup> There are, to sum up, two fundamentals of justice: the negative that no harm be done to anyone and the affirmative that the common welfare be served.<sup>28</sup>

Greatly inferior in all these respects is man-made law, the law originating in man's opinion,<sup>29</sup> whether custom or statute, unwritten or written.<sup>30</sup> It is not one but mul-

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18 De re publ. 3.22.33; de leg. 2.4.8.

19 Pro Milone 4.10; de leg. 1.6.19, 20.

20 De invent. 2.53.161; de leg. 1.10.28; 2.4.8, 10.

21 De leg. 1.6.19 i. f.; 2.4.9.

22 Pro Mil. 4.10; de inv. 2.53.161.

23 De off. 3.17.68.

24 De off. 3.5.26; 3.6.27; de fin. bonor. et malor. 3.21.70, 71.

25 De off. 3.5.21-23.

26 De off. 1.7.23.

27 De off. 3.6.27.

28 De off. 1.10.31

29 De oratore 3.29.114; de leg. 1.16.45; see also *supra* n. 17.

30 Part. orat. 18.62; 37.129; de off. 3.5.23; de leg. 1.15.42.



tifarious, often different among different peoples, limited in time and subject to change. As based on expediency rather than reason, it can be overthrown by that very expediency. Moreover, expediency has little to do with justice. In a passage most pertinent to our modern problems, Cicero illustrates his point by warning that a law cannot be considered just which enables a dictator to put to death with impunity any citizen he wishes, even without a trial.<sup>31</sup> And he continues: "if the principles of law were founded on the enactments of peoples, the edicts of rulers, or the decisions of judges, then the law would sanction robbery and forgery of wills, in case these acts were approved by the votes or resolutions of the populace." In this event, a law could make justice out of injustice.<sup>32</sup> Therefore, a legal doctrine concerned with the origin of law and justice cannot start from the Twelve Tables and the edict of the praetor; it is bound to draw upon the depths of philosophy and to inquire into nature's gifts to men and the natural association among them.<sup>33</sup> Such, however, he adds, is not the point of view of the lawyers. These men spend their time on minor details; they talk and write about eaves and housewalls because they have only the needs of the public and the practice of the courts in mind. This, he concludes, means little for cognition, though for practical purposes it is indispensable.<sup>34</sup> And that, in fact, makes all the difference. Lawyers proceed in one way, philosophers in another. The law the lawyers

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<sup>31</sup> De leg. 1.15.42; see also de inv. 2.53.160.

<sup>32</sup> De leg. 1.16.43, 44; 2.5.11.

<sup>33</sup> De leg. 1.5.16, 17.

<sup>34</sup> De leg. 1.4.14; 1.5.15-17.

deal with is enforceable,<sup>35</sup> while the law of nature has no effect on the wicked. If he fails to comply with its rules, he will suffer the worst penalties in his conscience, but may escape legal punishment.<sup>36</sup> For civil law cannot forbid everything ruled out by the law of nature.<sup>37</sup>

Cicero himself when speaking as an attorney did not always see fit to allude to the natural law. In his oration for Caecina<sup>38</sup> he made the point that even a statute duly enacted could, in principle,<sup>39</sup> not deprive a Roman citizen of his most vital rights, among them his freedom. Hence, he inferred, not everything the people might have approved had legal strength.<sup>40</sup> A higher law might bar it.<sup>41</sup> But he abstained from identifying this higher law as the law of nature, probably because he felt that nature, while the only forum to decide on the justness of a statute, could not tell of its validity.<sup>42</sup> In conformity with this position, he takes the institution of slavery for granted,<sup>43</sup> as Aristotle did.<sup>44</sup> He does not deem it unjust either except for those who are capable of governing

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<sup>35</sup> De off. 3.17.68: "Sed aliter leges, aliter philosophi tollunt astutias: leges, quatenus manu tenere possunt, philosophi, quatenus ratione et intellegentia."

<sup>36</sup> De re publ. 3.22.33: "quae (lex) . . . nec improbos iubendo aut vetando movet; . . . cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit."

<sup>37</sup> De off. 3.17.69.

<sup>38</sup> 33.95.97.

<sup>39</sup> For the detail see E. Levy, *Die römische Kapitalstrafe* (1931) 9 f, W. Kunkel, *Römisches Privatrecht* (1935) 67.

<sup>40</sup> "Non quidquid populus iusserit, ratum esse oportere."

<sup>41</sup> See the discussion by V. Arangio-Ruiz, "La Règle de Droit et la Loi dans l'antiquité Classique" (1938) in *Rariora* (1946) 255 ff.

<sup>42</sup> De leg. 1.15.42—1.16.45.

<sup>43</sup> For reference see Costa (*supra* n. 2) I 74 ff.

<sup>44</sup> See esp. Politics 1253b 15 ff.

themselves.<sup>45</sup> Assuming the fact that slaves were usually treated rather harshly, he only warns his contemporaries to have regard for justice toward them and to give them their due like free employes.<sup>46</sup> Again he omits any mention of the law of nature under which according to the doctrine of the Sophists God left all men free; nature made none a slave.<sup>47</sup> He does refer to the Greeks in tackling the problem of whether animals as living creatures participate in natural law and so are likewise protected from injury. But he rejects these views as he found them in Pythagoras and Empedocles.<sup>48</sup> Instead he sides with Chrysippus by stating that a community in the law was only between men: they might lawfully use animals to their best advantage.<sup>49</sup> The world itself, he says, was created for the sake of gods and men, and anything in it was made to serve them.<sup>50</sup>

So much about the ideology of Cicero. It forms a proper background for a review of the jurisprudence of the classical era, i.e., the approximately three hundred years beginning with the time of his death. As already indicated, the sources,<sup>51</sup> at a glance, do not seem to offer

<sup>45</sup> De re publ. 3.25.37.

<sup>46</sup> De off. 1.13.41.

<sup>47</sup> So Alcidas of Elis according to a scholium on Aristotle, Rhetoric 1373b 18; see also the general reference in Aristotle, Pol. 1253b 20. Cf. M. Salomon, "Der Begriff des Naturrechts bei den Sophisten", SZ .32 (1911) 154.

<sup>48</sup> De re publ. 3.11.19. For similar views held by Greek rhetors see G. Castelli, *Studi in onore de Silvio Perozzi* (1925) 55 ff; cf. SZ. 46 (1926) 414 f.

<sup>49</sup> De finib. 3.20.67.

<sup>50</sup> De natura deorum 2.61.154-62.155 ff; de leg. 1.8.25.

<sup>51</sup> The first broad discussion of them was presented by M. Voigt, *Das Jus Naturale, Aequum et Bonum und Jus Gentium der Römer*, 4 vols. (1856-1875). The most recent comprehensive monograph is C. A. Maschi, *La Concezione Naturalistica del Diritto e degli Istituti Giuridici Romani* (XIX and 395 pp., 1937).

an unequivocal line of thought. This does not mean to say that they are barren. Their wealth rather is disturbing. Hundreds of texts are concerned with *ius naturale*, *naturalis ratio*, *rerum natura* and other phrases referring to *natura* or *naturalis*.<sup>52</sup> It is impossible to find a common denominator. The outlook brightens, however, if different meanings are recognized and explained as such. Cicero, the philosopher, believes in a universal and eternal law. The jurists consider this type of natural law only in a minority of instances which will be examined later. As a rule, they refer to nature and preferably to the nature of things when they deal with factual situations of daily life. There the jurists feel at home. To master such problems they, and they alone, are called upon. They have to do with the law binding here on earth, and, if necessary, to be enforced by the courts. In almost all the passages pointing to nature they discuss questions of mine and thine, i.e., problems of the private law, the very province in which their influence has not been obscured by the passing of centuries. They did not call that positive law. And we, too, should avoid a term which too easily suggests that they were normally engaged in the interpretation of statutes formally laid down. Such statutes were uncommon. The bulk of the private law had gradually grown out of the practice in business and court procedure. And gradually it had been built up by the jurists into a system second to none in the harmony

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<sup>52</sup> A complete list of the passages written by or transmitted under the name of classical jurists is found in *Vocabularium Iurisprudentiae Romanae* IV (1914) 22 ff. The texts referred to in the following pages, unless otherwise indicated, are considered as furnishing evidence of the classical situation even though their formal authenticity in one case or another may be open to doubt.

of its rules. It was this very situation that so frequently caused the jurists to use nature as a yardstick. For "natural" was to them not only what followed from physical qualities of men or things, but also what, within the framework of that system, seemed to square with the normal and reasonable order of human interests and, for this reason need not be in need of any further evidence.

To make this clear it will be advisable to present some illustrations.<sup>53</sup> From the nature of man in its physical sense it was derived that a person under puberty could not act for himself and, therefore, had to be taken care of by someone else, whether his father or guardian.<sup>54</sup> Equally, an insane person could not make or accept a promise.<sup>55</sup> As to relationship and the right of intestate succession springing from it, the Romans distinguished two groups. Under the *ius civile* only agnates were considered, i.e., those stemming from a common male ancestor or, more correctly speaking, those who were subject to the same paternal power or would have been so if the common ancestor were still alive, regardless of whether the connection was created by blood or adoption. They included persons related by blood, whether through males or females, and, therefore, as Gaius puts it, tied together under natural law.<sup>56</sup> "*Naturalis cognatio*" was also the technical term for the relationship of slaves. In

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<sup>53</sup> Other illustrations of which, however, not all would seem to be classical are found in G. Rotondi, *Scritti giuridici* (1922, ex 1912) 11 200 ff.

<sup>54</sup> Gai. I 189.

<sup>55</sup> (Gai.) *rerum cottidianarum* D. 44.7.1.12.

<sup>56</sup> I 156. See also Mod. D 38.10.4.2 (*iure naturali connectuntur*) which in so far gives classical law; cf. H. J. Wolff, "The Background of the Post-Classical Legislation on Illegitimacy" in *Seminar* 3 (1945) 25.

these connections<sup>57</sup> natural children, fathers and sons are often mentioned in the sources. None of these "natural rights" could be affected by emancipation, adoption,<sup>58</sup> or other cases of *capitis diminutio*.<sup>59</sup> The right of self-help against a present attack, as innate in every human being, was likewise traced to natural reason.<sup>60</sup> And Florentinus enlarged on that idea by adding, in the manner of Seneca,<sup>61</sup> that an insidious<sup>62</sup> assault on man by man was particularly outrageous in view of the relationship established between all of us by nature.<sup>63</sup> In the field of contracts an impossible obligation was deemed no obligation,<sup>64</sup> as e.g. the promise to deliver a slave, when at the time of the promise the slave was dead. This rule was based on natural reason.<sup>65</sup> Similarly, a performance was not due while prevented by the very nature of human conditions.<sup>66</sup> So a slave child was not owing before his birth. Nor could the construction of a house promised today be expected to be finished tomorrow.<sup>67</sup>

<sup>57</sup> The extension of the use of *naturalis* to illegitimate relationship between free persons may not have been practiced until after the classical period: H. J. Wolff *loc. cit.* 24 ff; cf. O. Gradenwitz, "Natur und Sklave bei der *naturalis obligatio*" in *Königsberger Festgabe für T. Schirmer* (1900) 25 f.

<sup>58</sup> Paul. D. 38.6.4; cf. also Ulp. D. 37.4.8.7 and Pap. D. 28.2.23 pr.

<sup>59</sup> Gai. I 158, Ulp. ep. 28.9; cf. Pomp. D. 50.17.8.

<sup>60</sup> Gai. D. 9.2.4 pr.; Ulp. D. 43.16.1.27, both, it seems to me, substantially genuine.

<sup>61</sup> Epist. moral. 15.3.33: homo sacra res homini; *ibid.* 52: natura nos cognatos edidit.

<sup>62</sup> Cf. *supra* n. 23.

<sup>63</sup> D. 1.1.3. The reasons advanced by some authors (G. Beseler, *Beiträge zur Kritik der römischen Rechtsquellen* III (1913) 62, S. Perozzi, *Istituzioni di Diritto Romano* 2nd ed. (1928) I 98, Lombardi 154 ff) attacking the text would not appear to be convincing. The *cum* is to be understood as conditional (if) rather than casual (as).

<sup>64</sup> Cels. D. 50.17.185 and 188.1; cf. Paul. D. 49.8.3.1, Paul. Sent. 3.4b.1.

<sup>65</sup> (Gai.) *rerum cottid.* D. 44.7.1.9 on the model of Gai. III 97.

<sup>66</sup> Cels. D. 50.17.186; Paul. D. 7.7.1.

<sup>67</sup> Paul. D. 45.1.73 pr; see also Paul. D. 40.7.20.5.

Invalid, however, was the stipulation not only of a dead slave but also a temple or tomb,<sup>68</sup> i.e., of things the Romans did not deem susceptible of private ownership. With this instance we come to those cases in which nature was used as the rationale of a rule derived from legal rather than physical principles. Nature is here the order inherent in conditions of life as the Romans saw it. A few illustrations must suffice to give an idea of the character of this rather comprehensive group. According to natural reason a man's legal position may, in principle, be improved but not impaired without his consent.<sup>69</sup> According to nature the benefits of a thing go to that party who bears the expenses<sup>70</sup> and vice versa, so that the maintenance of a borrowed slave is on the borrower and not the lender.<sup>71</sup> According to natural reason expenses incurred in the production of fruits may be deducted where the fruits are to be returned to another party.<sup>72</sup> From the structure of the Roman family it follows according to nature that the father cannot any more bring a suit against his son than he may sue himself.<sup>73</sup> It also follows that a child born out of wedlock is related to the mother only.<sup>74</sup> The modes of acquisition of property are generally realized as originating either in civil law or in natural law.<sup>75</sup> Among the latter methods the jurists list,

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68 (Gai.) rer. cott. D. 44.7.1.9; cf. Gai. III 97.

69 Gai. D. 3.5.38.

70 Paul. D. 50.17.10.

71 Gai. D. 13.6.18.2; cf. Gai. D. 7.1.45.

72 Paul. D. 5.3.36.5.

73 Paul. D. 47. 2.16, hardly interpolated, as G. Beseler, *Bullettino del Istituto di Diritto Romano* 45 (1938) 178 suggests.

74 Ulp. D. 1.5.24, substantially genuine except for the nisi-clause. Cf. Lombardi (*supra* n. 2) 217 ff.

75 Gai. II 65; (Gai.) rerum cottid. D. 41.1.1 pr.

e.g., delivery (*traditio*),<sup>76</sup> occupation of something belonging to nobody or captured in war,<sup>77</sup> and the accrual of a building to the owner of the ground regardless of who built it or owned the materials.<sup>78</sup> Where a new thing was made out of materials belonging to another person, as wine made by A from grapes of B, there was even a conflict of opinion on which was favored by natural reason.<sup>79</sup>

This habit of operating with nature in matters of legal reasoning is greatly significant of the way in which the jurists looked at their system. It appeared to them to be rounded out and well-balanced like a living organism the capacities and limits of which are determinable by its nature. Accordingly, the basic concepts they used in their mental processes gradually became so fixed that their "nature" could not even be altered by statute. The laws, says Gaius,<sup>80</sup> might decree that in certain circumstances a man be treated as a murderer, adulterer or thief although he did not commit the act himself, but they could not state that he be a murderer, adulterer or thief, as such notions were established by nature. The whole device of a fiction so successfully employed in Roman Law rests, after all, on its reluctance to tamper with traditional units of legal thought.

The jurists then called a rule natural when it seemed to them in conformity with either the physical condition

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<sup>76</sup> Gai. II 65 and 66. Cf. Inst. 2.1.40.

<sup>77</sup> Gai. II 66, 69; (Gai.) rer. cott. D. 41.1.3 pr; Flor. D. 1.8.3.

<sup>78</sup> Gai. II 73; Gai. D. 43.18.2; Ulp. D. 9.2.50. See also Maschi (*supra* n. 51) 284 ff.

<sup>79</sup> Gai. II 79; cf. (Gai.) rer. cott. D. 41.1.7.7.

<sup>80</sup> Gai. III 194. Gai. D. 7.5.2.1. offers another illustration.



of man or his normal conduct or expectation in social relations. Hence they considered such a rule as self-evident and in no need of further explanation. Hence they considered it also to be universally recognized. From the latter point of view it was an easy step to place *ius naturale* in a close relation with a technical term of long standing: the *ius gentium* i.e. the set of rules in force among all peoples,<sup>81</sup> as opposed to the *ius civile*, the body of rules exclusively reserved to Roman citizens. Only citizens, e.g., might be related through agnation and transfer or receive title in property by means of a *mancipatio*, while cognate relationship and transfer through *traditio* were applied to foreigners (*peregrini*) as well as citizens (*cives*). In fact, more than once a device of *ius gentium* was, in a truly Aristotelian fashion,<sup>82</sup> traced to *naturalis ratio*<sup>83</sup> or, conversely, the *naturalis ratio* derived from the *ius gentium* character of a device.<sup>84</sup> Occasionally, the one term may have been chosen alternately for the other.<sup>85</sup>

However, we should be careful not to press the equation. In classical times, the two notions did not coin-

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81 This is the central point of the fine and provocative book of Lombardi (*supra* n. 2).

82 Eth. Nicom. 1134 b 18; Rhet. 1373 b 2. See also Cicero (*supra* n. 17).

83 Gai. I 1 and 189; see also Gai. II 65 (*iure naturali*). Cf. (Gai.) rer. cott. D 41.1.1 pr.; cod. 9.3.

84 Gai. III 154.

85 The usual comparison in this regard of the Institutes of Gaius with the *Res cottidianae* would offer full proof only if Gaius were also responsible for the detail of the latter work. Such a view, however, is hardly maintained by modern authors, whatever their positive suggestions about the origin: see especially V. Arangio-Ruiz, *Studi Bonfante* I (1930) 495 ff; F. Schulz, *History of Roman Legal Science* (1946) 167 f, S. di Marzo, *Bullettino* (*supra* n. 73) 51-52 (1948) 1 ff.

cide.<sup>86</sup> The one stated the fact of universal usage, the other its motivation. Moreover, while *ius gentium* was a hard and fast category indispensable to the technique of the jurists, *naturalis ratio* never obtained an organic status in their reasoning. They used it or not at convenience. And where they used it, the relation to *ius gentium* was not always the same. So Gaius contrasts a partnership created by informal consent as an institution of *ius gentium* and thus based on *naturalis ratio* with the archaic community of the coheirs (*sui heredes*) after the father's death which he calls a natural, i.e. normal and automatic partnership and yet peculiar to Roman citizens.<sup>87</sup> So he points out on one occasion<sup>88</sup> that natural rights cannot be impaired by the civil law;<sup>89</sup> on another he states that statutes might change regulations of *ius gentium*,<sup>90</sup> and as subject to such a change he cites the rule otherwise presented as *lex naturae*<sup>91</sup> that the child of a free woman be born free. In still other instances it is more or less certain that a Roman jurist alluding to

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<sup>86</sup> *Contra* the predominant opinion, e.g., Lenel, (*supra* n. 4) 331 f, P. Krüger, *Geschichte der Quellen*, 2nd ed. (1912), 134, Perozzi, (*supra* n. 63) I 91, 100, Arangio-Ruiz, *Istituzioni*, 9th ed. (1947) 25 ff, Lombardi *loc. cit.* 126 ff, 143 ff and *passim*. But see also W. W. Buckland, *Textbook of Roman Law* 2nd ed. (1932) 52 ff, F. Pringsheim, *SZ* 46 (1926) 352 ff.

<sup>87</sup> Gai. III 154a according to the parchment edited 1933 by V. Arangio-Ruiz in *Pubblicazioni della Società Italiana* no. 1182. It reads: "Sed ea quidem societas de qua loquimur, id est quae nudo consensu contrahitur, iuris gentium est; itaque inter omnes homines naturali ratione consistit. Est autem aliud genus societatis proprium civium Romanorum. Olim enim motuo patre familias inter suos heredes quaedam erat legitima simul et naturalis societas. . . ." See also Levy, *SZ*. 54 (1934) 261, 279; C. W. Westrup, *Introduction to Early Roman Law II* (1934) 38 ff, 63 ff.

<sup>88</sup> *Supra* n. 59.

<sup>89</sup> I 158: "civilis ratio civilia quidem iura corrumpere potest, naturalia vero non potest." For III 194 see *supra* n. 80.

<sup>90</sup> I 83 ff: "animadvertere tamen debemus, ne iuris gentium regulam vel lex aliqua vel quod legis vicem optinet, aliquo casu commutaverit."

<sup>91</sup> Ulp. D. 1.5.24; *supra* n. 74.

*ius gentium* would have found it inadvisable to substitute *ius naturale* as an equivalent and vice versa. Gaius declares a *verborum obligatio*, produced through the strictly formalized question and answer '*promittis ? promitto*', to be *ius gentium* and thus accessible to non-citizens.<sup>92</sup> But he is silent about natural reason as the root of the rule, and this is hardly due to mere coincidence. For elsewhere, as noted before, he deduces the "natural" character of contractual partnership from the very fact that it flows from informal consent,<sup>93</sup> and, vice-versa, Paul states that a lease is contracted not by formal words but by any consent because it is a natural transaction common to all peoples.<sup>94</sup> Conversely, a house built by anyone on somebody's ground belonged to the latter, and this, we are told, in accordance with natural law.<sup>95</sup> Was the rule at the same time regarded as *ius gentium* and practiced everywhere? If the Romans knew anything about the pertinent customs prevailing in large parts of their empire,<sup>96</sup> they could not very well have answered in the affirmative.<sup>97</sup> These various asymmetries demonstrate that the idea of natural law, such as hitherto discussed, was handled rather loosely and had no firm place in the classical system. The result would square with the general and plausible assumption that the idea came

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<sup>92</sup> III 93.

<sup>93</sup> III 154a; *supra* n. 87.

<sup>94</sup> D 19.2.1: "Locatio et conductio cum naturalis sit et omnium gentium, non verbis sed consensu contrahitur." The reasons advanced to deny the authenticity of this text (see Lombardi 233 ff with references) do not seem convincing. Cf., in general, also Arangio-Ruiz (*supra* n. 86) 26.

<sup>95</sup> *Supra* n. 78.

<sup>96</sup> Lombardi 133 is inclined to deny that.

<sup>97</sup> See Maschi 291 ff, R. Taubenschlag, *The Law of Greco-Roman Egypt* (1944) 180 f.

from foreign, namely Greek, thought. If so, however, it was markedly adapted to the Roman ideology. For in all the cases considered as yet the jurists moved entirely within the limits of the actual and enforceable law.<sup>98</sup>

But there are other passages. They show the natural law holding a position of its own and leading to legal consequences which originated neither in *ius civile* nor in *ius gentium*. The outstanding case in point is the institution of slavery. Under both *ius civile* and *ius gentium* the slave is not a person but a thing, not a subject but an object of rights. He cannot have ownership or personal rights or obligations. By nature, however, he is a person as the freeman, and born free: all men are equal. This contrast is explicitly and pointedly stressed in three passages of the Digest. Ulpian states:

As far as the *ius civile* is concerned, slaves are not regarded as persons. This, however, is not true under natural law, because, so far as natural law is concerned, all men are equal.<sup>99</sup>

Ulpian, also, points out:

Manumission . . . took its origin from *ius gentium*. For under natural law all men were born free and manumission was not known, as slavery itself was not recognized. But after the *ius gentium* introduced slavery, the benefit of manumission also came in.<sup>100</sup>

<sup>98</sup> Cf. also H. F. Jolowicz, *Law Quarterly Review* 48 (1932) 179f.

<sup>99</sup> Ulp. D. 50.17.32: "Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt."

<sup>100</sup> Ulp. D. 1.1.4 pr.: "Manumissio . . . a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis."

Finally, Florentinus sets forth:

Freedom is a man's natural capacity of doing what he pleases unless he is prevented by force or law. Slavery is an institution of *ius gentium* by which one man is made the property of another contrary to nature.<sup>101</sup>

A number of modern legal historians consider the opinion on the law of nature as it presents itself in these passages to be incompatible with the position taken in the great majority of texts from which I have made a selection. They are, therefore, inclined to believe that those passages, as alien to the classical authors, must be due to interpolation.<sup>102</sup> Such a view could not easily be rejected, indeed, if the three statements were entirely isolated. This, however, would not seem to be the case. There is no lack of evidence. It flows from many sources.

The emperor might grant a manumitted slave the rights of a freeborn man and thus release him from his duties toward the *manumissor*. In this way, as a jurist comments, the freed man is restored to those rights which originally were vested in all men.<sup>103</sup> More than that: such a man is technically known as "*natalibus suis restitutus*," as reinstated in his rights of birth. The same idea of the natural freedom of any newborn human underlies

101 Flor. D. 1.5.4 pr. and 1: "Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur. Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur." The *nisi*-clause does not seem to be open to such objections as advanced by V. Scialoja, *Teoria della Proprietà* (1928) I 260 f and F. Schulz, *Principles of Roman Law* (1936) 140 ff n. 2.

102 Perozzi, *Albertario* (see *Ind. int.*), H. Siber, *Obligatio naturalis* (1925) 5f (in part), Lombardi 159 ff, 205 ff, 209 n. 7, 375 f.

103 Marcian. D. 40.11.2: "illis enim utique natalibus resituitur, in quibus initio omnes homines fuerunt."

another reasoning. I have already mentioned that an illegitimate child followed the personal status of his mother. That status was generally determined by the time of conception. When, however, the mother, though slave at that time, was freed before the birth, the child was deemed free, and this, as Gaius argues, "*naturali ratione*."<sup>104</sup> Furthermore, the young of an animal given in usufruct belonged not to the owner but to the usufructuary of the animal as its fruit. On the other hand, it was held after some controversy,<sup>105</sup> that the child of a slave woman should be dealt with differently.<sup>106</sup> It would, as Gaius states,<sup>107</sup> seem absurd for a human being to be thought of as fruit, while nature has made every fruit for the benefit of human beings. Or, as Ulpian terms it,<sup>108</sup> one human being cannot be treated as fruit made for another. This comes very close to the view proffered by Cicero.<sup>109</sup>

The patent fact that slaves were endowed with reason and acted as other humans was bound to leave its mark on legal practice and doctrine. What is revealing, however, is that the jurists in forming a pertinent terminology liked to use phrases borrowed from nature. Let us contemplate this triad: *Naturalis cognatio*, *naturalis possessio* and *naturalis obligatio*. A cohabitation of slaves of a permanent character, the *contubernium*, frequently practiced and frequently favored by their masters, could not constitute a marriage. Such natural cognation there-

<sup>104</sup> I 89; see also Paul. Sent. 2.24.1,2.

<sup>105</sup> De finibus 1.4.12.

<sup>106</sup> Gai. II 50; Paul. Sent. 3.6.19.

<sup>107</sup> D. 22.1.28.1.

<sup>108</sup> D. 7.1.68 pr.

<sup>109</sup> *Supra* n. 50.

fore, as resulted between parent and child or between children born out of this connection, did not qualify for a right of succession after the slaves were set free. But it was not entirely devoid of consequences: it barred them, e.g., from intermarriage<sup>110</sup> and established duties of reverence<sup>111</sup> with both effects being referred to the natural law. Similarly, the actual control of a slave over property, real or personal, was considered a *possessio naturalis*<sup>112</sup> and consequently denominated in the same way as the factual control of free people who held specific things for others, as a tenant, a borrower or a son in the power of his father. Such *possessio* was distinguished from the *possessio civilis* of a man holding the property for himself and, therefore, under certain conditions capable of acquiring ownership, whether through legal transaction or lapse of time. A *possessio naturalis* did not carry these privileges nor could it as such, as a rule,<sup>113</sup> be recovered through legal proceedings. It only presented that physical element without which a *possessio civilis* could not arise. The concepts of *cognatio* and *possessio naturalis* as against *cognatio* and *possessio civilis* had much in common. Both put the emphasis on the natural point of view: the one in stressing the relationship by blood and the other accenting the visible holding of a thing regardless of title. Both were originally used in regard to free

<sup>110</sup> Pomp. D. 23.2.8; Paul. D. eod. 14.2 (classical in substance); cf. Inst. 1.10.10.

<sup>111</sup> Paul. Sent. 1.1b.1 = D. 2.4.6.; Ulp. opin. D. 37.15.1.1 notwithstanding the postclassical composition of these texts. Cf. E. Levy, *Pauli Sententiae* (1945) 64, Wolff (*supra* n. 56) 28.

<sup>112</sup> Ulp. D. 45.1.38.7; see also Javol. D. 41.2.24i f. (probably genuine in so far); cf., W. Kunkel, *Symbolae Friburgenses in Honorem Ottonis Lenel* (1935) 44.

<sup>113</sup> For its qualifications see, e.g. Kunkel, *loc. cit.* 61 ff, Arangio-Ruiz (*supra* n. 86) 273 ff.

men and hence transferred to slaves. Both were already familiar to preclassical jurists, as e.g. Servius,<sup>114</sup> Cicero's friend, and synchronizing with the then fashionable view of the natural law.

Different in all these respects was *naturalis obligatio*. This notion can at the earliest be verified late in the first century A.D.<sup>115</sup> It was an abstract concept and directly created to meet situations peculiar to slaves.<sup>116</sup> Where a slave entered a contract, which happened daily to slaves in charge of estates, factories or shops, his master might be liable within certain limits. He himself could not be sued even after he was set free. But payment made under that contract, whether by him or a third person, could not be recovered; his contract was also a sufficient basis for a suretyship or pledge.<sup>117</sup> Such a payable though not actionable obligation might have been called hybrid or imperfect. The jurists, however, coined it *obligatio naturalis*. "Slaves" says Ulpian, e.g., "are liable on contracts not in a civil way (*civiliter*), but in a natural way (*naturaliter*)."<sup>118</sup> Where did this conception originate? The idea could certainly not have been that it was natural for an obligation not to be actionable; the very contrary was true. The choice of the name cannot be accounted for but by the consideration that as the slave was a person only under natural law so his contracts produced obligations of merely natural law character. Neither his freedom nor his contract was enforceable. But either one

<sup>114</sup> For *naturalis possessio* see Jul. D. 41.5.2.2.

<sup>115</sup> Javol. D. 35.1.40.3; cf. Gradenwitz (*supra* n. 56) 26 f.

<sup>116</sup> For the detail see J. Vázny, *Studi Bonfante* IV (1930) 145 ff; see also SZ. 51 (1931) 555.

<sup>117</sup> Gai. III 119a.

<sup>118</sup> D. 44.7.14; see also Jul. D. 46.1.16.4 and Paul. D. 12.6.13 pr.



had some other, minor legal consequences. The equation is even documented in the statement of Tryphoninus: "as the freedom of the slave is a matter of natural law . . . , so the question of whether or not a debt existed in regard to an action of the master against the slave for recovery of money which was not due has to be considered under the aspect of natural law."<sup>119</sup> This statement, too, has been suspected.<sup>120</sup> But it seems difficult to accept these doubts as long as no other plausible explanation of the assuredly classical term *naturalis obligatio* has been advanced.

There are incidentally more illustrations of the fact that the jurists classed slaves among persons. They are, says Paul, ineligible to serve as jurors, but not by nature as the dumb and deaf, the incurably insane and the person under puberty<sup>121</sup> who are deficient in judgment. . . . Women and slaves, he continues, are rather barred by custom, not because they lack reason, but because it is established that they cannot serve in civic positions.<sup>122</sup> It should not be forgotten either that in certain exceptional cases slaves had procedural standing,<sup>123</sup> that the emperors showed an increasing tendency to insist on their humane treatment,<sup>124</sup> that the religious law (*ius sacrum*) in many respects dealt with them as persons.<sup>125</sup>

119 D. 12.6.64: "ut enim libertas naturali iure continetur . . . ita debiti vel non debiti ratio in conditione naturaliter intellegenda est."

120 See the authors listed by F. Pringsheim, SZ. 52, 139 n. 5 and Lombardi 188 ff. The classical origin of the thought has been maintained by Gradenwitz *loc. cit.* 28, Lenel (*supra* n. 4) 332 n. 1, see also Kunkel (*supra* n. 39) 167 n. 2.

121 He consequently is not liable *iure naturali*: Lic. Rufin. D. 44.7.58.

122 D. 5.1.12.2.

123 P. Bonfante, *Corso di Diritto Romano* I (1925) 154 f.

124 Cf. Kunkel 67 n. 6, also Carlyle (*supra* n. 2) 48 f.

125 A Pernice, *Sitzungsberichte der Preussischen Akademie der Wissenschaften* 1886, 1173 ff, Bonfante I 145 f.

Under these circumstances it would seem difficult to believe that, in the matter of slavery, the jurists should never have referred to the natural law as a basis of legal effects and terms and thus as an order different from both *ius civile* and *ius gentium*. Hence I do not see any conclusive reason to throw overboard in substance those three texts in which Florentinus and Ulpian present these distinctions in general terms.<sup>126</sup> Moreover, we found Florentinus pointing to the natural relationship of all men,<sup>127</sup> and the weight of Ulpian's assertion that under natural law all men are equal is fortified by the inscription of the passage which suggests that it was part of a discussion of the so-called obligations of slaves.<sup>128</sup> Ultimately, there can be no doubt but that the jurists knew about that concept of Greek philosophy as transmitted to them by Cicero, Seneca<sup>129</sup> and others.

But the use of the concept is one thing and its appraisal another. In this respect, the three most technical applications of the term "natural" which we have just discussed seem to offer some guidance. Natural cognation, as we have noted, was of consequence in the praetorian law,<sup>130</sup> to a lesser extent in regard to slaves, and of none in the matter of succession under the *ius civile*. Natural

<sup>126</sup> D. 1.5.4 pr. and 1; 1.1.4 pr.; 50.17.32.

<sup>127</sup> D. 1.1.3.

<sup>128</sup> Ulp. D. 15.1.41. See O. Lenel, *Palingenesia iuris civilis* (1889) Ulp. no. 2899.

<sup>129</sup> Seneca, too, took the institution of slavery for granted. But, from his Stoic point of view, that meant little to him. On the one hand he urges "corpora obnoxia sunt et adscripta dominis, mens quidem sui iuris" (*De benef.* 3.20.1) and "Quid est praecipuum? in primis labris animam hebere. Haec res efficit non e iure Quiritium liberum, sed e iure naturae. Liber autem est, qui servitutem suam effugit" (*Natural. quaest.* 3 praef. 16). On the other hand, he warns: "'Servuse est.' hoc illi nocebit? ostende, quis not sit: alius libidini servit, alius avaritiae, alius ambitioni, omnes timori." (*Epist. moral.* 5.6.17). For more detail see Carlyle 19 ff.

possession, held by free men or slaves, failed, in principle, to be protected at law.<sup>131</sup> A natural obligation was payable but not enforceable, and this very defect may have contributed to the choice of the word. In all these cases then the attribute *naturalis* indicated a reduction, if not denial, of legal effects. To dismiss this fact as a mere coincidence is obviously inadequate. Instead, a definite evaluation seems to emerge. The Roman jurists to whom theory meant little and practical results meant everything cannot have looked upon natural law as an order of equal status. They did not deny its existence and credited it with the absence of slavery in prehistoric times.<sup>132</sup> But within the framework of their actual system they must have thought of natural law as inferior rather than superior to the law in force.

In the light of these statements we have reason to doubt the authenticity of that trichotomy which appears in the opening passage of Justinian's Digest as a quotation from the Institutes of Ulpian:<sup>133</sup>

Private law is tripartite; for it is composed of natural precepts, of those of (all) peoples and of those of Roman citizens.<sup>134</sup>

This triple division of the law has long been suspected as being at variance with the common bipartition between *ius civile* and *ius gentium*. It is now almost generally re-

<sup>130</sup> The duties of maintenance as introduced in the *cognitio extra ordinem* (cf. Bonfante I 279 ff) are of too late an origin to serve as evidence for the reasons behind the coinage of classical concepts.

<sup>131</sup> *Supra* n. 113.

<sup>132</sup> Ulp. D. 1.1.4 pr., Marcian. D. 40.11.2. The more general statement in Inst. 2.1.11 is not verified for the classical law; its much discussed relation with (Gai.) rer. cott. D. 41.1.1 pr. lies beyond the scope of this paper.

<sup>133</sup> D. 1.1.1.2-4; eod. 6 pr.

<sup>134</sup> "Privatum ius tripartitum est: collectum enim est et naturalibus praeceptis aut gentium aut civilibus."

garded as spurious.<sup>135</sup> The suspicion grows when we read the definition of *ius naturale* which follows immediately:

The law of nature is that which nature has taught all animals. This law is not peculiar to the human race, but belongs to all creatures living on the land or in the sea and also to birds. Hence arises the union of male and female which we call marriage, hence the procreation of children, hence their rearing; for we see that all animals, even wild beasts, appear to take part in this knowledge of the law.<sup>136</sup>

This community of law among men and animals is foreign to Cicero<sup>137</sup> and to the Stoics such as Chrysippus,<sup>138</sup> Seneca<sup>139</sup> and Marcus Aurelius the emperor.<sup>140</sup> Advocated though it was by some Greek philosophers and rhetors,<sup>141</sup> it appears inconceivable for a classical jurist. Discernment and reason which made the doings of slaves have repercussions in the actual law were wanting in the animal. Confused are mating and marriage, instinct and sensible action.<sup>142</sup> Ultimately, it is an open question,

<sup>135</sup> The most recent list of pertinent authors is found in Lombardi 196.

<sup>136</sup> "Ius naturale est quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censi."

<sup>137</sup> *Supra* n. 49 and 50.

<sup>138</sup> As quoted by Marcia. D. 1.3.2 (τῶν φύσει πολιτικῶν ζώων).

<sup>139</sup> De benef. 4.5.2; 6.7.3; epist. moral. 12.3.8; 20.7 passim.

<sup>140</sup> Τῶν εἰς ἑαυτὸν 7.9: νόμος εἰς, λόγος κοινὸς πάντων τῶν νοερῶν ζώων.

<sup>141</sup> *Supra* n. 48.

<sup>142</sup> E. g. Ulp. D. 9.1.1.3: "nec enim potest animal iniuria fecisse, quod sensu caret."

whether the Institutes of Ulpian were written by himself.<sup>143</sup>

There remains, however, a famous saying of Ulpian, likewise found in the opening title of the Digest, which, while not mentioning the natural law in so many words, substantially states its principles, as they are recognized to the present day.<sup>144</sup> It reads:

The precepts of the law are these: to live honestly, to harm no one, to render every man his own.<sup>145</sup>

There is no sufficient cause to attack the text as of Byzantine origin.<sup>146</sup> So we should enjoy the fact that such lofty words came from the pen of a classical writer. And yet: two definite qualifications seem unavoidable. In the first place, not one of the three propositions shows any original thinking. Each is familiar to Greek philosophers and from them transmitted to the Romans by Cicero who in part presents them in the very same phrases. Ulpian's borrowing is today an undisputed fact.<sup>147</sup> Second, none

<sup>143</sup> Schulz (*supra* n. 85) 171 f.

<sup>144</sup> See, e. g. H. Coing, *Die obersten Grundsätze des Rechts. Ein Versuch zur Neubegründung des Naturrechts* (1947) 29, H. R. McKinnon, *Notre Dame Lawyer* 23 (1948) 134.

<sup>145</sup> D. 1.1.10.1: "Iuris praecepta sunt hae: honeste vivere, alterum non laedere, suum cuique tribuere."

<sup>146</sup> So E. Albertario, *Studi di Diritto Romano V* (1937 ex 1930) 99.

<sup>147</sup> Compare Cic. de finibus 2.11.34: "Stoicis consentire naturae quod esse volunt e virtute, id est honeste, vivere"; ib. 3.8.29: "beate vivere, honeste, id est cum virtute, vivere."—Cic. ib. 3.21.71: "ius autem, quod ita dici appellarique possit, id esse natura, alienumque esse a sapiente non modo iniuriam cui facere, verum etiam nocere"; de off. 1.10.31: "fundamenta iustitiae: primum ut ne cui noceatur."—Cic. invent. 2.53.160; de re publ. 3.11.18; 3.15.24 and particularly de leg. 1.6.19: "eamque rem (i.e. legem) illi Graeco putant nomine a suum cuique tribuendo appellatam" (cf. the note by Keyes in the Loeb Classical Library edition: νόμος from νέμω i.e. to distribute).

of the three tenets has played any integral part in the imposing system of the Roman Law. The extant thousands of rulings and discussions of the jurists would stand and form a coherent whole as they do, if those tenets were completely missing.<sup>148</sup> In fact, the approach of the classical authors would have been different, if they had been guided by a conscious attachment to the three precepts. The first demand "live honestly" is not only counter-balanced by the other saying "Not everything permissible is honest."<sup>149</sup> It is specifically disregarded when Pomponius as well as Paul and Ulpian hold that in stating a price or a rent the contracting parties are free to take advantage of one another, and this in accordance with natural law (*naturaliter*).<sup>150</sup> It is no less contrary to the fact that the master may treat his slave with reckless severity if only he refrains from unwarranted killing or inhuman measures.<sup>151</sup> The second tenet "harm no one"<sup>152</sup> is called in question by the rule "no one is considered to act fraudulently who keeps within the limits of his rights."<sup>153</sup> If, in particular, a man diverted the water flowing through his property to his own exclusive

<sup>148</sup> It seems worthwhile to quote J. Bryce (*supra* n. 4) 591 in whose view such tenets "had after all not much more to do with the way in which they (the Romans) built up the law than the flutings of the columns or the carvings on the windows have to do with the solid structure of an edifice. These decorations adorned the Temple of Justice, but were never suffered to interfere either with its stability or with its convenience for the use of men."

<sup>149</sup> Paul. D. 50.17.144 pr.: "Non omne quod licet honestum est"; cf. even Cio. p. Balbo 3.8: "est enim aliquid quod non oporteat etiamsi licet." On Modest. D. 23.2.42 pr. = D. 50.17.197 see M. Kaser, *SZ* 60, 118.

<sup>150</sup> Pomp.-Ulp. D. 4.4.16.4; Paul. D. 19.2.22.3.

<sup>151</sup> Th. Mommsen, *Römisches Strafrecht* (1899) 616f, Schulz (*supra* n. 101) 218 ff.

<sup>152</sup> This goes far beyond the rule 'hominem homini insidiari nefas esse' in Flor. D. 1.1.3 (*supra* n. 63).

<sup>153</sup> Gai. D. 50.17.55: "Nullus videtur dolo facere qui suo iure utitur."

use while hitherto it had also served the needs of his neighbor, the neighbor could not bring action, unless he had a pertinent easement provided for by agreement.<sup>154</sup> Nor could the heir of a deceased be forced to pay a bequest if the will was void due to an inadvertence in drawing it up.<sup>155</sup> The third proposition "render every man his own," great as it is as an ethical principle, seems, from a legal point of view, to beg the question. For everything depends on what in a given case is considered to be A's due rather than B's. This is, after all, the question which virtually underlies any problem in the private law. Is a buyer bound to pay for the thing accidentally destroyed before delivery? Is a buyer bound to return to the owner the thing he got from his seller whom he had reason to believe to be the owner? The tenet would not yield an answer.

The classical jurists, however, examined these and numberless other problems in their profound and reasoned way without caring much for generalities. They did insist upon the nullity of transactions at variance with good morals.<sup>156</sup> They did set aside a vast province of legal relations to be governed by the principles of *bona fides* or *bonum et aequum*. But they also saw fit to subject other fields to formalities and rigid rules where they believed them necessary for the benefit of clarity, of the security of creditors, the power of the head of the Roman family or other interests they thought worth protecting. All in all, they did an admirable job in balancing strict

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<sup>154</sup> Ofil.-Labeo-Ulp. D. 39.3.1.21; Treb.-Ulp. D. 39.2.24.12; Lab.-Ulp. D. 43.8.2.13; Proc.-Ulp. D. 39.2.26.

<sup>155</sup> Cf. SZ. 48, 675.

<sup>156</sup> Recently discussed by M. Kaser, SZ. 60, 144 ff.

and flexible standards. But the idea of natural law had no place in these considerations.<sup>157</sup>

And yet one question, we may in this gathering say: *the* question remains. Why, you will probably ask, were the Roman jurists not moved by the fundamental problem of a law far above what many would denounce and Cicero did belittle as technicalities in comparison? Why did they not see the wood for the trees? Why did they not notice the law for the rules? The answer may not differ too much from the one which suggests itself when we try to find the clue for the aversion to the natural law on the part of the great majority among outstanding jurists in the last 150 years, from Savigny<sup>158</sup> to Gierke,<sup>159</sup>

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<sup>157</sup> The sporadic passages relating equity and natural law have correctly been traced to postclassical tampering. The most general text is Paul. D. 1.1.11: "Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale. Altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile." Here the antithesis of *ius naturale* and *ius civile* is stated in a way both uncommon and incongruous; if followed through, it would almost suggest that *ius civile* was held to be in contrast with *bonum et aequum*; see also Lombardi 224 ff, 384 and the critical remarks of Kaser, *Zeitschrift für ausländisches und internationales Privatrecht* 12 (1938) 328f on Maschi (*supra* n. 51) 178 ff. Gai. D. 4.5.8 has been attacked from many points of view: Perozzi, (*supra* n. 63) I 517 n. 2, II 24 n. 1, Lenel, *Edictum perpetuum*, 3rd ed. (1927) 305 n. 4, V. Arangio-Ruiz, *Responsabilità Contrattuale*, 2nd ed. (1933) 246, H. Siber, *Naturalis obligatio* (1925) 16 and others (see *Ind. int.*); the connection, at least, between the two sentences is most questionable. The opening words of Ulp. D. 47.4.1.1 which seem unique in opposing *naturalis* and *civilis aequitas* defy explanation; cf., moreover, Pringsheim, *SZ.* 42 (1921) 667 n. 5. For Pomp. D. 12.6.14 and D. 50.17.206 see Pringsheim, *SZ.* 52 (1932) 139 f, 145 n. 5. Ps.-Dosithei fragm. 1 (*Jurisprudentiae Anteiustinianae* Vol. I, edd. Seckel et Kübler, [1908] 420) is too obscure in regard to both text and origin to furnish evidence for the classical thought.

<sup>158</sup> *Of the Vocation of Our Age for Legislation and Jurisprudence*, transl. by Hayward (1831) 17 ff, 61 ff; *System of the Modern Roman Law*, transl. by Holloway, I (1867) 11 ff. Cf. also Bodenheimer, (*supra* n. 5) 235 ff.

<sup>159</sup> *Deutsches Privatrecht* I (1895) 181 f.



from Austin<sup>160</sup> to Holmes.<sup>161</sup> These men lived in peaceful ages. The wars they experienced and the injustices they saw happening in their lifetime did not affect the validity of basic human rights. These rights were taken for granted. The relation between individual and government did not yet hold the outstanding position in legal discussion. Lawyers, as distinguished from philosophers and political scientists, kept immersed in problems of private law, and the remedies they thought of were ordinary actions brought in court. In a similar way, the Roman period before us was marked by peace. Life in the capital where most classical writings were conceived knew little of the implications of the wars fought far out on the periphery of the empire. To be sure, it witnessed the wrongs done by such voluptuous emperors as Caligula and Nero, Domitian and Commodus. But their regimes were never aimed at a systematic interference with civic rights as they then were understood. Mass extermination, deportation or expropriation of citizens was something not even imagined as a potentiality. Nor did anyone consider the overthrow of monarchy or a radical change in the economic or social order as imminent or worth visualizing.

Quite different is the outlook when mankind in general or some country in particular faces a cataclysm threatening to destroy or distort the fundamental liberties. The problems arising under such conditions transcend the normal means of legal approach. Court procedures are either not available or utterly futile. Only wars or revo-

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160 *Lectures on Jurisprudence*, 5th ed. (1885) 154 ff, 175 ff, 567 ff.

161 *Harvard Law Review* 32 (1919) 40 ff.

lutions may help the victims if they live to see them. And responsible lawyers, confronted with the complete inadequacy of their usual resources, turn to the ultimate groundwork of justice for a solution. These are the great moments of the natural law.

At such a juncture did Jefferson invoke the "Laws of Nature," "when," as the Declaration states, "a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce mankind under absolute despotism." At such a juncture has mankind arrived in these days under the shocking impression of unbelievable mass crimes committed under totalitarian rulers in conformity with their positive laws. Full of fear that the waves of such lawlessness may spread, men are appealing to that higher law which holds out the promise of ensuring their basic individual rights against encroachments of tyrannical powers. In this state of mind they find comfort in the works of past philosophers and theologians, in the constitutions and legal writings of many countries and periods. The classical jurists themselves offer only sporadic support. But some of their pertinent statements, supplemented by postclassical additions, were given a prominent place in Justinian's *Corpus juris*.<sup>162</sup> From that time they have never ceased to form a vital link in the chain of arguments for the recognition of a law of nature.

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<sup>162</sup> D. 1.1.1.2, 3, 4; 1.1.3; 1.1.4; 1.1.6 pr.; 1.1.10.1; 1.1.11; 1.5.4.; 50.17.32. Inst. Tit. 1.1 and 1.2.

## MEDIEVAL CONCEPTIONS OF NATURAL LAW

*Gordon Hall Gerould*

**D**URING the slow decline of the Roman world conceptions of justice and respect for legal procedures did not perish. Even when the power diminished to give the conceptions adequate support in practice, the respect in which they were held appears to have continued. Though confusion and violence mounted as the result of forces which men of the period did not know how to combat, memories of a better-ordered world persisted. Procedures that had once been effective were clung to even when their present usefulness was impaired, and they were thus preserved as a heritage of value to later centuries. The principles of justice, moreover, which formed the basis of Roman law, still commanded veneration; and they were slowly modified and invigorated by the far nobler doctrines of the Christian Church. Anyone who reads the letters which St. Gregory the Great wrote at the troubled close of a disastrous century cannot fail to see that in his mind and heart reverence for the divine law was completely in unison with a sense of equity handed down from an earlier time. Along with his zeal as defender of the faith and his sternness in reproving error went an eager care that justice be done to men of all degrees: to ecclesiastics if falsely accused, to peasants if they were in danger of oppression, to Jews if there had been interference with their worship. His rectitude, a

strict adherence to law both human and divine, was as marked as his Christian humility and kindness. If it be said that St. Gregory was not typical of his age — and in what age would there be many like him? — he nevertheless showed that conceptions of orderly justice were not alien to his century.

Earlier in the sixth century, indeed, the unwieldy corpus of Roman law had been explored and to some degree codified at Constantinople. It is well to remember that Justinian, through whose initiative this was accomplished, was a barbarian, not a member of one of the races which had been drawn into the immediate orbit of Rome and felt her civilizing influence. If the compilers of the *Institutes*, the legal manual which rounded out the *Corpus Iuris*, erred in setting down as their basic axiom the sentence quoted from a third century commentator: “*Ius naturale est quod natura omnia animalia docuit*,” the confusion in terms did little harm to the thinking of the medieval period that was to follow. The dictum at least asserted the supremacy of law in the world, and not till relatively modern times did men often forget that natural law as applied to rational beings does not mean an absence of law and a descent to a so-called “state of nature.”

By the early part of the seventh century, when Isidore of Seville explicitly stated that the divine law rested “upon nature,” the human “upon custom,” churchmen and jurists had agreed upon the identification of the law of nature with the law of God, which was to be the foundation for the theories, political and legalistic, of the Middle Ages. The doctrine had not yet been perfectly

explored, or the notions derived from Greek and Roman philosophy and practice fully adapted to Christian belief, but a basis for later study had been established.

During the centuries that followed, the eighth, ninth, and tenth, there appears to have been little speculation as to problems of government or jurisprudence. In the struggle for power and place among rival dynasties there would have been little incentive for calm study of the social and political organism. The Church was extending and strengthening its domain; for a moment the Empire of the West seemed to be recovering something of its former glory, only to sink again into feeble discord; and regional groups of mixed blood were by slow degrees settling into place as inchoate nations. Intellectual activity did not lessen, as we know from the record of achievement in various fields. There were devoted scholars like Bede of Jarrow, who in a secluded monastery close to the edge of the known world displayed a breadth of interest and a capacity for taking pains that would have been notable at any era. In one way and another Christian civilization was extended, even though the Iberian peninsula, not without later profit to the rest of Europe, fell into the hands of the Moslems. We cannot suppose that men failed to think about the laws they were endeavoring to enforce, but we need not be surprised that they did not attempt to define in new ways the foundations of juristic practice. The law-givers were engrossed in war and in improvised expedients of government, while men of learning tried as best they could to perpetuate the civilizing ideas of the past. It was a period of absorption and instruction, marked, however, by one phenomenon

which gave evidence of an intellectual vigor newly developed and prophetic of activities in various fields during later centuries. In certain languages of the north hitherto never put to literary use there appeared poetry and prose of a high order. Europe was making ready for the triumphs of imagination and reason that distinguish the Middle Ages.

Before the middle of the twelfth century, as the discussions of many basic problems of theology and philosophy grew more and more active, the validity of governmental control could not fail to come into question. How was the good order to be secured which was so necessary for society, and on what grounds could it be demanded? The disruption out of which the European world was emerging, the violent passions which still convulsed it and which led to ventures frequently noble in purpose but sordid in execution, gave the matter an immediate interest which it would not have had under other conditions. Men of good will craved security as they must always do when there is no peace in the world. They wished to find out how to get order, since they lived in a time still troubled by inherited confusions. Inquiry as to the foundations of law was not then what we call an "academic question": such inquiry was a matter of vital concern. Whatever may be true of it in other eras, the art of jurisprudence was of tremendous and troubling importance in the Middle Ages. Quite possibly laymen in later periods, lost in a fog of carefully exact phrases, have sometimes underestimated its value.

Such speculations were focussed by the compilation shortly before 1150 of the work usually known as the

*Decretum* of Gratian, though that somewhat shadowy figure may well have had the help of other scholars in a vast undertaking comparable with the one instigated by Justinian six centuries earlier. The canons of the Church were in a state of confusion, and probably only at Bologna could the work of setting them in order have so well been undertaken. In establishing, as it did, the principles of Canon Law, the *Decretum* based all justice on natural law, which was older than *ius gentium* or *ius civile*, terms in a tripartite division taken over from Isidore of Seville. The law of nature, indeed, goes back to the beginning of human creatures (*ab exordio rationalis creaturae*), and it is immutable, since moral precepts do not change. Any customs or legislative enactments which run counter to it *vana et irrita sunt habenda*. By asserting at the outset that natural law is *quod in lege et evangelio continetur*, "by which everyone is commanded to do to another what he wishes to be done to himself, and is forbidden to do to another what he is unwilling to have done to himself," the *Decretum* identified it with the divine law. This assimilation though fundamental was not so logically deduced, however, that it required no further exposition. What is the true bond between the law of God embodied in the Golden Rule and natural law?

This question was perhaps best answered by Rufinus, a canonist of Bologna and Bishop of Assisi, who wrote a *Summa Decretorum* some ten years after the completion of the *Decretum*.<sup>1</sup> He postulated a "certain power implanted by nature in the human creature, impelling him to do good and to avoid the contrary." This divinely

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<sup>1</sup> Ed., with elaborate introduction by H. Singer, 1902.

ordered power is the law of nature.<sup>2</sup> Though a succession of learned continental jurists continued to refine the doctrine of the *Decretum* throughout the remainder of the twelfth century and well into the thirteenth, it is not apparent that they did very much more to clarify the fundamental problems of jurisprudence.

Meanwhile, in 1150, John of Salisbury produced his influential *Polycraticus*, which without dealing specifically with natural law in detail expressed ideas as to the source and the basis of justice which were of great consequence. "Law is the gift of God, the mould of equity, the pattern of justice, the image of the divine will," he wrote.<sup>3</sup> Since nature is the will of God, according to Plato, nothing takes place contrary to nature;<sup>4</sup> and the true prince is he who acts in accordance with law, while the tyrant is he who fails to observe the law and plunges a people into servitude. This distinction was to become a commonplace in the following century and thereafter. Equity, John declared, is a harmony of things, *rerum convenientia est*, "which equalizes everything by reason, assigning to everyone what is his own." Law is the interpreter of equity.<sup>5</sup> Throughout all its stages the Golden Rule remains immutable.<sup>6</sup> No more than Gratian, it will be observed, and less clearly than Rufinus, did John undertake to explain how the law of nature operates to control human behavior except by divine ordinance. That

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<sup>2</sup> *Est itaque naturale ius vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium.* Pars I, Dist. 1.

<sup>3</sup> *Polycraticus*, ed. C. C. I. Webb, 1909, viii, Ch. 17.

<sup>4</sup> *Op. cit.* 1, Ch. 12.

<sup>5</sup> *Op. cit.* iv, Ch. 2.

<sup>6</sup> *Op. cit.* iv, Ch. 7.



problem was left for solution to the theologians of the next century.

Until the earlier part of the thirteenth century, indeed, the discussion of natural law had been carried on for the most part by jurists. Theologians had been concerned to explain such deviations from approved social behavior as the polygamy of certain Old Testament figures, but they did not enter conspicuously into inquiries about most legal questions. The scholarly ardor of the new orders of teachers and preachers, however, which resulted in fruitful speculations along so many lines, brought many problems of jurisprudence into fresh review, and among them what we may call the nature of nature. Dominicans took the lead in the search for a clear definition of natural law and its function in the universal scheme, though other ecclesiastical philosophers were equally concerned with the question.

William of Auxerre, who embodied his teachings in a *Summa Aurea* somewhat before 1225, illustrates very well the direction in which the thought of the time was moving, which was toward the solutions arrived at by St. Thomas later in the century. William recognized, as had the later canonists, that the term natural law was used in at least three different senses: 1. a *concordia omnium rerum*; 2. the conception of the Roman jurists, involving all instinctive functions and therefore all animate creatures; and 3. *quod dictat naturalis ratio*, which affects human beings only. It is in the last-named sense that natural law serves as the *origo et principium omnium virtutum et motuum ipsarum*, operating as it does both through the teachings of experience and through percep-

tions divinely implanted in the human mind. The emphasis given reason and the frank acknowledgment that man, being what he is, must live as best he can under imperfect conditions preserve the doctrine from cloudy idealism. Only by the path of reason can he find the guidance which will free him from error.<sup>7</sup>

Some two decades after William of Auxerre wrote, Albertus Magnus completed his *Summa de Creaturis*, the third part of which contains his views on the law of nature.<sup>8</sup> His treatment of the matter reveals, as one might expect, the independent and trenchant quality of his mind. He would have nothing to do with the Roman opinion that the term natural law should be used as governing animals as well as men, and he discarded the refinements of the commentators on Gratian. To him *est ius naturale nihil aliud quam ius rationis*. The law of nature, thus defined and limited, was present in every field of human action, even the most instinctive, *natura ut natura*, for reason is not totally divorced from them. Procreation, the education of the young, the preservation of life are in the domain of natural law, thus considered. In another way acts of moral virtue, the concern of justice or religion, for example, are both rational and yet anchored in nature, which has the seeds of good in it. There is, again, a third category of acts, which are based on fundamental axioms of natural law and are deduced from it

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<sup>7</sup> My citations are taken from O. Lottin, *Le droit naturel chez Saint Thomas*, 2nd ed., 1931, pp. 33-35.

<sup>8</sup> Not included in editions, but conclusively shown to be genuine by M. Grabmann, *Drei ungedruckte Teile der Summa de Creaturis Alberts des Grossen*, Heft 13 of *Quellen und Forschungen zur Geschichte der Dominikanerordens in Deutschland*, 1919. I follow the synopsis with copious citations from MS. Bibl. royale de Bruxelles 603 in Lottin, *op. cit.*, pp. 42-44.

by human reason. By such means authority in government has been established to secure the good of society, and private property has been found necessary. The law of nature, Albertus asserted, is not the finality—*conclusio*—of law so much as the first principle of it. Institutions may vary with circumstances, but the obligations laid upon man by the Decalogue are there because in the beginning he was endowed with reason.

It is no disparagement of the other great thinkers who made the thirteenth century illustrious to say that of them all Thomas Aquinas had the acutest mind and the most compelling power of exposition. Certainly his analysis better than any other brought into sharp focus the conception of natural law which prevailed, however expressed, during the later medieval centuries. At least three times he dealt with the subject, most fully in his last great work, the *Summa Theologiae*. Though in some details of emphasis his ideas changed during the two decades in which he reverted to the problem, particularly through his greater regard for Roman law as time went on,<sup>9</sup> his general position was clear from the beginning. Throughout he kept constantly in view and reiterated the three axioms upon which he rested his arguments for the existence of natural law. 1. There is a divine order in the universe, an eternal law. 2. Man is a social and political animal, and cannot live by and to himself. 3. Man has been endowed with reason.

With these axioms as premises, St. Thomas approached the problem as to whether there is prevailing in us any natural law,<sup>10</sup> and asked how it could be operative in

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<sup>9</sup> See O. Lottin, *op. cit.*, pp. 61-63.

<sup>10</sup> *Summa Pars I-II*, Ques. xci, Art. 2.

man, since man is governed by divine law. Is there not a contradiction in saying that both have validity? St. Thomas denied the contradiction, and went to the heart of the matter by explaining that man, inasmuch as he is a rational creature, participates in eternal reason. "And such participation by the rational creature in eternal law," he went on, "is called natural law." And further: "The light of natural reason, by which we discern what is good and what is evil, which pertains to natural law, is nothing else than the impress of the divine light in us." This from the *Summa*. In *De Regimine Principum* St. Thomas had already used an analogy which helps one to a clear understanding of his thought. "For, just as the universe of corporeal creatures and all spiritual powers come under divine government, in like manner are the members of the body and the other powers of the soul controlled by reason, and thus, in a certain proportionate manner, reason is to man what God is to the world."<sup>11</sup> The scope of divine law, obviously, is immensely wider than that of natural law, since it governs all created things, and is the basis of human law, even though the latter sometimes follows it imperfectly.<sup>12</sup>

St. Thomas was not blind, of course, to those attributes shared by man with other animals which had so often led jurists to make the law of nature cover the whole range of animate life. He did not for a moment deny that tendencies in man which are irrational and instinctive are indeed "natural," for man has a double nature, being at once a creature of instinct and a creature en-

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<sup>11</sup> I, Ch. 12. Quoted from the translation by the Rev. Gerald B. Phelan, *On the Governance of Rulers*, 1935.

<sup>12</sup> *Summa* I-II, Ques. xciii, Art. 1 and 3.

dowed with reason. Natural law, in the view of St. Thomas, holds sway over all actions of man whatsoever, but only through the operation of reason.<sup>13</sup> Here as elsewhere, it must be said, the Angelic Doctor did not evade observed realities. His common sense was as admirable as his subtle logic.

Similarly, there is a difference in the way the law of nature exercises control. Though the rational spirit is inclined to virtue, not all virtuous acts are equally spontaneous.<sup>14</sup> Precepts against murder or theft are so clear to human reason that they need no teaching; others must be learned from one's elders, like respect for the aged; and still others, like "Do not take the name of thy God in vain," are established by divine injunction.<sup>15</sup> All such rules of conduct, however, spring from one root.<sup>16</sup> Whatever can be controlled by reason lies within the domain of natural law. The views of St. Thomas concerning its operation in the experience of the individual have been well summed up by a recent writer as follows: ". . . the best description of its purpose and meaning is perhaps that which has been made many times, of a bridge thrown, as it were, across the gulf which divides man from his divine Creator. In natural law is expressed the dignity and power of man, and thus of his reason, which allows him, alone of created beings, to participate intellectually and actively in the rational order of the universe."<sup>17</sup>

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<sup>13</sup> *Summa* I-II Ques. xciv, Art. 2.

<sup>14</sup> *Summa* I-II Ques. xciv, Art. 3.

<sup>15</sup> *Summa* I-II, Ques. c, Art. 1.

<sup>16</sup> *Summa* I-II Ques. xciv, Art. 2.

<sup>17</sup> A. P. d'Entreves, *The Medieval Contribution to Political Thought*, 1939, p. 21.

As with individuals, so with the human multitude. The difference between the way the two are affected is one of quantity but not of quality.<sup>18</sup> St. Thomas contends that Isidore's statement, *Ius naturale est commune omni nationi*, is true if it be meant that the first principle of it are everywhere the same, again because "all the inclinations of men" are guided by reason. Although these principles are immutable, natural law must be supplemented to meet conditions as they exist or come into being. Because of the corruption of human nature, intrinsically sound though it be, men may fail to distinguish between good and evil, and thus they do need control. Further than that, the possession of all things in common and individual liberty of action have been modified for the sake of the general good, not because men are evil but because they must live with one another. There must be positive law, controls somehow established.<sup>19</sup> What St. Thomas called *subjectio civilis*, the relationship of obedience to authority, a political relationship, is a necessity in no way derogatory to man. As long as positive law does not contravene the principles of natural law, upon which it is based, it may rightly take different forms, since those principles cannot be applied in the same way to "the great variety of human affairs."<sup>20</sup>

It is impossible in brief space to give an adequate notion of the elaborate pattern of thought by which St. Thomas explained the meaning of natural law and its operation in the scheme of things. The complexities are

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<sup>18</sup> *De Reg. Prin.* I, Ch. xiv.

<sup>19</sup> *Summa* I-II, Ques. xciv, Art. 4-5; I, Ques. xcii, Art. 1; I, Ques. xcvi, Art. 4.

<sup>20</sup> *Summa* I-II, Ques. xcv, Art. 2.

present because he probed deeply and weighed with deliberate care so many questions converging on the central theme. Man as an individual being, man as a member of society, man as a child of God, all had to be taken into account. In following through what he wrote about natural law on various occasions one is equally impressed by his honest candor, his acumen, and his expository power. He took into account the views that had been held by juristic thinkers from Aristotle onward, and he was not impatient of their wisdom, but he came to conclusions for himself which rested on solid foundations and were inescapable by logical deduction from his premises. There was no confusion in his thought, but throughout a clear-sighted understanding of the nature of man. As has been said, he brought into focus medieval conceptions of the law of nature, and, more than that, he so firmly established those conceptions that nothing essential was added to them or subtracted from them by later political philosophers of his era.

The comments of a great English jurist, Sir Frederick Pollock, on the general outcome of medieval thinking about natural law, which was brought to a brilliant climax by St. Thomas, are worth pondering. "The so-called 'state of nature' is, from the point of view of the schoolmen, merely human society conceived as governed by the 'secondary law of nature' in default of positive ordinance, or any human society so far as it is actually found in that condition. What the canonists and schoolmen added to the classical Roman theory was the identification of the law of nature with the law of God as revealed in human reason. . . . The natural revelation

through reason and the supernatural revelation committed to the Church are equally divine, and cannot contradict one another; and the law of nature is no less paramount to any positive rule or custom of human origin than express revelation itself. . . . Hence the scholastic theory . . . was on the whole rationalist and progressive. . . . Nothing can more strongly illustrate the confusion which resulted from neglecting this distinction" (between fundamental principles and rules deduced from them which may be modified as convenient) "than the modern belief that natural law as a whole depends on the 'state of nature,' or assumes it to be better than civilization. The scholastic habit of mind was alien from ours in many ways; but at any rate the schoolmen took some pains to know what they were talking about."<sup>21</sup>

To say that Thomistic conceptions of natural law so prevailed during the later medieval centuries that little essential modification of them by later writers can be discerned does not imply any lack of interest in the subject by political thinkers. What impresses one is that men so diverse in their interests and tendencies as Egidius Romanus, William Occam, and John Wyclif, had little to say about the law of nature which had not already been said and accordingly agree with one another to a notable extent. One can only conclude that the influence of Aristotle and St. Thomas was so pervasive, and that the arguments of the latter were so solidly based that new arguments led to similar conclusions. Not until the sixteenth century, when a different approach was made to the problem, did any fundamental change appear.

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<sup>21</sup> H. S. Maine, *Ancient Law*, ed. F. Pollock, issue of 1924, pp. 114-115.



I do not find that the makers of what we call imaginative literature, the poets and story-tellers of the period, were much concerned with the law of nature in its juristic and philosophical sense, at least to the extent of frequent allusion to it. Those among them who were seriously concerned with problems of human fate could not well have been unaware of views about the ordering of the world which were so unanimously held; but the law of nature had been thoroughly integrated with divine law, most satisfactorily by St. Thomas, and no doubt could be taken for granted. The absolutism of Dante, which pervades the *Divine Comedy* and is explicit in *De Monarchia* and the *Convivio*, rests upon assumptions in which he was at one with St. Thomas, even though he held divergent views as to the relative authority of church and state. During the latter part of the same century, Geoffrey Chaucer, who was a widely read man and had some practical acquaintance with legal matters, used the term *natural law*, or *law of kind*, as well as the adjective *natural*, in contexts which clearly indicate an understanding of the juristic theory, but did not dwell upon it. The same assumptions are clearly evident also in *Piers Plowman*, that great allegory of spiritual education by Chaucer's contemporary Langland. His professed disciple Thomas Occleve, it may not be amiss to note, made a verse translation of a famous treatise on government by Egidius Romanus, of which there was also a version in French prose.

It was through the lively discussion of governmental theory, indeed, that interest in natural law made itself most apparent as the Middle Ages drew to a close. The treatises of Sir John Fortescue, the English Lord Chief

Justice whose long and active career ended between 1477 and 1479, furnish perhaps the best illustration that could be found. Fortescue's two Latin works, *De Natura Legis Naturae*<sup>22</sup> and *De Laudibus Legum Anglie*<sup>23</sup> leaned heavily on St. Thomas and Egidius in their review of the history and theory of natural law, but in the application of it to political organization they showed such independence of thought that they must always be regarded as important monuments of jurisprudence. In them, as well as in *The Governance of England*,<sup>24</sup> which is of major interest as the first work on constitutional theory to be written in English, the primacy of natural law is firmly upheld. Though the English book is little more than a translation and recasting of the relevant portions of *De Laudibus*, it serves to show the vigor of the conviction held by all thoughtful men of the period that law is more than an artificial convention. It was to them, as it must always be in a healthy society, the implement and indeed the synonym of justice.

Though it is true that medieval jurists and philosophers were led by their desire for a well-ordered world to a faith now repugnant to us in the undivided authority of individuals, they were saved by their belief in a law of nature, divinely instituted, from thinking the state more important than man. No king, no legislature could contravene natural law with impunity, and tyranny of any sort was abhorrent. What St. Thomas taught was what his predecessors and followers from Gratian to Fortescue asserted: the dignity of man under the sovereignty of God.

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22 Ed. Lord Clermont, 1864.

23 Ed. S. B. Chrimes, 1942.

24 Ed. C. Plummer, 1885.

## THE NATURAL LAW IN THE RENAISSANCE PERIOD\*

*Heinrich A. Rommen*

### I

**T**HE Renaissance period is usually associated with the Arts and with Literature; it is considered as a new birth of the Greek and Roman classics but also as the discovery of a new sense of life, as a period in which the autonomous individual, as the person in a pronounced meaning, escapes from the pre-eminence of the clergy and a morality determined by the Church. Nourished by the rediscovered philosophy of life of the classics, an emancipation takes place of the man of the world, of the man of secular learning, and of the artist and the poet, who set themselves up as of their own right beside, not against, the secular clergy and the learned monk. In politics this means the dissolution of the medieval union of Church and Empire in favor of the now fully developed nation-states and city-republics which stress their autonomy against the Church as against the Empire. While the Renaissance, thus conceived, was of tremendous significance, it is nevertheless true that as such it contributed little for the development of the theory of Natural Law. The reason for this is that the Humanists were admirers of the stoic philosophy and of the great orator, Cicero, the elegant popularizer of the stoic philosophy and of the philosophical ideas of the Roman Law, which,

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at that time, freed from the Canon Law, conquered the world again. But for this reason the philosophers of the Renaissance, in the customary meaning, have little to contribute to our theme, since they are satisfied with what they read and reread in their beloved ancients. One could, of course, object that Machiavelli should here be mentioned as the great sceptic of the idea of the Natural Law, as the man who first separated Politics and Ethics, who first was concerned with a political science free from value-judgments, interested only in the means, in the techniques of gaining and holding an in itself morally indifferent Power in which he saw the only meaning of Politics. Yet the spirit of the time did not permit him — just as a century later, it did not permit Hobbes — to state openly his utter contempt of the Natural Law.

When we speak of the Natural Law in the Renaissance period, we must look elsewhere. We must turn our attention to another field, much neglected — the great revival of the philosophy of the Natural Law in the second flowering of Scholasticism. This also was a Renaissance, namely of the aristotelean-thomistic philosophy. As the other Renaissance had to overcome the empty subtleties of the Nominalists in their meaningless hairsplitting and their consequently crude Latin, so the second flowering of scholasticism had to overcome the same decay of the scholastic method and the philosophy of the *via moderna*. Just as the one went back to the stoics as its great masters, so this other Renaissance went back to St. Thomas. Yet it had to conduct its great controversies, at the same time, against the Reformers, whose exclusive Supernaturalism led to a distrust in philosophy, in natural reason, and to a

hollowing out, as a consequence, of the very substance of the Natural Law. We are, therefore, justified if we restrict ourselves in the following discussion to that other Renaissance which alone has contributed positively to the theory of Natural Law, by saving the idea of Natural Law from the stranglehold of Nominalism and by protecting it against the suffocating Supernaturalism of the Reformers.

The great line of Natural Law philosophers begins with Vittoria, who introduced the *Summa Theologica* instead of the Sentences of Peter of Lombard as the basis of teaching — a practice which became general when St. Ignatius ordained that the professors of his order make the *Summa* the basis of their studies and courses, and reaches to St. Robert Bellarmine. Though originating in the Iberian Peninsula, and in its world famous universities, such as Salamanca the Great, and Coimbra the Glorious, attended by students from all nations, this Second flowering of Scholasticism spread through the whole of Christian civilization, as is proven when one considers the publication places of the works of Suarez, Soto, Lessius, Bellarmine, and Molina and their use as texts in the leading universities of France, Italy, and Germany. For instance, the *De Legibus* of Suarez, the Masterwork in legal and political theory and in Natural Law, was published in Coimbra, Cologne, Lyon, Antwerpen and Mayence.

While a Renaissance is at the same time a revival of a great earlier period and an overcoming of a desolate period before it, it must be more than a mere repetition to be pregnant of the future: it must be a new rethinking

and broadening, a "*vetera novis augere et perficere.*" Nominalism and its consequence at least in part, the Reformation, constituted the dissolving desolate period in the theory of the Natural Law: the development of what was implicit in St. Thomas, and an enrichment of the theory of its application to the problems of its time was its own everlasting contribution.

## II

The idea of Natural Law finds its full meaning only if certain fundamental verities are accepted, otherwise a corrosive criticism all too easily produces that kind of cynical relativism which we know in the philosophy of law as positivism. True, the Natural Law is so "engraved in the hearts of men" that it cannot be wholly wiped out at any time in all the people. Yet that corrosive criticism, first decomposing the idea of Natural Law in the minds of the legal profession and the Intellectuals, oozes down slowly into the mind of the so-called common man and then produces the loss of common moral principles and indubitable convictions of what is justice, which finally leads to the assertion that the Bill of Rights is a propagandist trick of the Bourgeoise mind to fool the Proletariat. If anywhere, then here, the good and ever-valid rule "*Principiis obsta*" should be followed. It is on account of this that the verities which are philosophically fundamental for the idea of Natural Law deserve our attention.

The following are such fundamental verities. The human mind recognizes the essence or the nature of things out of which the order of the Universe presented in the

Eternal Law arises, so that man recognizes in the natures of created things also the order of creation as a whole. Furthermore, the essence of a thing is also its end; the *causa formalis* becomes in the process of production or self-realization of a thing the *causa finalis*, the rule for acts which realizes the idea, the nature of a thing. A created thing is the more perfect the fuller it "realizes" its idea; it has the more goodness, the more it is a realization of the idea or nature. Finally, the intellect is superior to the will in God as well as in Men. The intellect recognizes the nature of created things and the order of the universe, and *per analogiam* and imperfectly, the Creator and His Eternal Law, by which the order was created and is preserved. The natures and their order recognized by the intellect as "oughtness," as to be realized by free acts of man, become then the rule of action for the will. St. Thomas points out frequently this interdependence of the ideas of Truth, objective order, and of Justice. For instance, he points out that the Justice of God which constitutes the order among the things in conformity to God's Wisdom, which is the Law of the Order, may appropriately be called Truth. (S. Th. I, qu. 21, a. 2) The natures of the created things and the order in the Creation are thus in the last analysis related to God's Intellect and Wisdom. Consequently, this order, the *Lex Aeterna* and the Natural Law which, by participation, is the same *Lex Aeterna* applied to the free act of rational beings, is necessarily immutable. This means that perjury or the killing of an innocent is always and under all circumstances wrong, that they are in themselves by nature wrong, not exclusively by the positive Will of God or of a

human legislator. Even God cannot make by His omnipotent Will, by positive order, that right what is by contradiction to God's Essence and Wisdom intrinsically wrong, because this is metaphysically against God's very Essence. The Natural Law is, ergo, truly natural, i.e. a dictamen of Reason recognizing the intrinsic goodness or evil of certain free acts, because they agree with or contradict nature and the natural order, and it is immutable as participation of the *Lex Aeterna*, which issues from God's Intellect and Wisdom and rules the Creation.

Occam, the *venerabilis inceptor*, held that God is primarily absolute and omnipotent Will and that the natures and essences of things are not recognizable by man's intellect, and consequently that the natural order of being, which belongs to practical reason, advising us what ought to be done or omitted is not knowable to us. In God, so Occam says, there cannot be any necessity; the decree of God, the *Lex Aeterna* and the *Lex Naturalis*, do not issue necessarily from the Essence of Him who promulgated them. For that would make the absolute freedom and the absolutely arbitrary omnipotent Will of God dependent on a superior necessity. All precepts of the Eternal and of the Natural Law are only absolutely arbitrary decrees of God's omnipotent Will. That which Occam continues to call natural law is neither Natural Law because it is *arbitrarily* posited by God, nor is it immutable because God in His arbitrary infinite freedom could without any contradiction to His Wisdom and Goodness ordain something wholly contradictory to the now posited natural law, else God would not be wholly free and omnipotent. God could, therefore, without inner contradiction



ordain that the created will hate Him and that this hatred should be meritorious. (In. Sent. IV, qu. 14 D) Occam denies an intrinsic goodness or evilness of a human act, such as the love of God or the hatred of God.

Occam, thus, in his metaphysics, has torn asunder God and His Creation, insofar as he teaches that, besides God being the external creative cause, there exists no intrinsic relation between God and the World, between God's Essence and the moral order, the foundation of which is the general *analogia entis* and the God-likeness of man. There is neither in man nor in the Creation a natural, a necessary and fundamental order to God as the origin and as the ultimate end of all being, which in its immutability would become for the free rational being the ever-valid moral norm of its acts. The absolute unity of Reason and Will in God is denied and a "theological irrationalism" arises. The Natural Law is hollowed out in its substance though the term is still used, and in its place steps a moral positivism, the doctrine that we know what is right and wrong only *sola fide*.

We have long since given up the idea that the Reformation "erupted" so to speak, out of the Christian conscience so crudely deceived by the superstitions of Romanism, so ruthlessly violated by the arrogance of a power-hungry, morally corrupt Curia. Many of the theological doctrines which were espoused by the Reformers are only the ultimate and ruthlessly drawn conclusions from the speculations and discussions of the adherents of the *via moderna* in its two branches: first, Fideism, which means a crippling of natural Theology and an utter weakening of the *Praeambula fidei*, because human rea-

son is not to be trusted, from which issues the outspoken tendency towards positivism; second, a particular form of mystical Theology centered around the individual person, his religious experiences, his subjective longings culminating in the question: How do I find a merciful God in the abyss of my essential sinfulness? The Reformers rejected as superstitious, as pagan, the doctrine of the sacraments and the sacramentals, the hierarchical structure of the Church, the Papal authority and that of Tradition, and the Canon Law. Luther's public burning of the *Corpus Juris Canonici* set him irrevocably on the road to "Protestantism." The Catholic morality was, in their eyes, a despicable Pelagianism, with rules for a meritorious bargaining with God by doing external good works, such as giving alms, fasting, indulgences, etc. To them the very essence of man under the curse of original sin became the utter depravation of man's nature. Our nature is wholly depraved, our will unable to realize the good, our reason blind to truth. Nature is not vulnerated or weakened by original sin, it is destroyed. Nothing good remains in us. Of our God-given natural gifts (*donum naturale*) remain only "deformed ruins." Thus from the part of Theology the very foundations of the Natural Law are denied, particularly the inner relation between the Eternal Law and the Natural Law by reason of the participation and conformity of the Natural Law with the divine revealed law as the Catholic tradition taught. As a consequence arises that significant dualism between the Kingdom of God and the World, of the Spiritual and the Secular, which Ernst Troeltsch has pointed out. Yet it would be foolish to deny that the Reformers explicitly

reject the Natural Law; they do that as little as the Occamists did. They follow rather the tradition, cite the Natural Law, use the term, and only slowly, if at all, do they become aware that between the Natural Law and their Theology there exists an irreconcilable contradiction. This is today a kind of *opinio communis* of scholars in this field. The Reformers push this idea of the Natural Law more and more into the background, just because of this contradiction between the Natural Law and their Theology in the doctrines on the state and law, and use the Bible and what they conceive the positive Divine Law in the Bible as the basis of their political, juridical and moral doctrine. (This is indirectly confirmed by the observation that the Theology of Crisis and its founder, Karl Barth, who wants to revive, as against the liberal Protestant Theology, the original doctrine of the Reformers, vehemently attacks the idea of Natural Law as one basis of Christian ethics, and instead recognizes only the other basis, the revealed, that is, the positive, Divine Law.) But if later the Faith in the Divine Law fades away by reason of Bible criticism and the rise of deistic Rationalism, then the Divine Law as revealed Law disappears and in Morality and Law remains only relativist positivism. This positivism produces then what Leo XIII called the *Modern Law* emancipated from the Divine Law, and deviating from the Christian and the Natural Law. (*Immortale Dei*) Yet the links which, according to the theory of participation of all laws, bind human law to the Natural, and this to the Eternal Law, may never be broken without penalty. Furthermore, only if in the personal God the absolute unity of

His reason and of His will is upheld, and only if the intellect is considered superior to the Will, can the conformity of the Eternal Law and the Natural Law, of the revealed Divine Law and of the Natural Law be accepted.

### III

It was the providential task of the great masters of the second flowering of Scholasticism to reassert these fundamental verities against the Reformers and Occamism. They were able to do so, because they went back, as we said already, to St. Thomas, whom they revered as the *Doctor Angelicus*, and from whose doctrines they deviated only after the most scrupulous research. They show this so salutary combination of loyalty to St. Thomas and yet they possess a personal independence which characterizes all the great philosophical schools in the history of the human mind. Consequently this revival of Scholasticism is not a mere philological one, so to speak; it is not a mere repetition of the tradition, but a re-thinking and a renewal. Not only had the tradition to be sifted and freed of obsolete matter, but new experiences and the new spirit of the era had to be assimilated insofar as it was possible, without the surrender of such doctrines as once and for all belong to the *Philosophia Perennis*. In other words the task of these masters was, as the great historian of Theology, Petavius, succinctly put it, to evolve what had been implicit and to develop fully what the masters of the Middle Ages had left more in the stage of fundamental theses. Furthermore, they enriched the doctrine of Natural Law in two directions: first, by refuting such subtle attacks on its philosophical foundations as were

espoused by the Occamists, and had never been made before; and by this refutation Suarez, Soto, Molina and Bellarmine had to enlarge the field of inquiry and of explication of all the parts of the doctrine which had been scarcely touched before; secondly, they stood in their time before new problems that cried for solutions, problems which, again, could not even have been anticipated in the Middle Ages, such problems as the *Jus inter Gentes*, the relations between pagan and Christian States, the Divine Right theory of kings etc., and in answering such questions, they prepared the way for a further development of Natural Law as the basis for the natural rights as they have found their positive constitutional form in our modern Bill of Rights.

Though they kept the proved and honored scholastic method, they nevertheless show some distinctive methodological features which we do not yet find in the Middle Ages. They are, so to speak, nearer to the concrete problems of their era; they are great controversialists as the works of Bellarmine and Suarez against the Divine Right-theory and Vittoria's treatises for the Indians so distinctly show. In all these controversies they have to base their arguments, to a great degree, on the Natural Law, as we will see. They are, moreover, more history-conscious than the Middle Ages were. This is caused by their stronger regard for the Individual, the person as a secondary cause, that in the World, in History, the field of contingent Being produces, by its free decisions, by its free initiative under the Divine and Natural Law, its civilization. That is no wonder, if we imagine what an expansion of experience and learning had taken place:

the great discovery of the New World, the rise of the nation-states and their national laws as against the Imperium and its Civil Law stemming from the Romans, the rise of international trade, the great religious controversies caused by the Reformation, the danger to the Church universal by the rising national churches, the formation of a new class, the lay "intelligentsia" so mightily furthered by the Renaissance. All these produce, so to speak, a change in the intellectual climate. The tendency to autonomy, to freedom from the guardianship of the theologians in philosophy, politics, literature and in the sciences and in secular culture permeate this period. This need not mean enmity to the Faith, to the Church-authority. But it means a new relation between Church and State, between Community and person, between contemplative and active life in the World. It means a "*weltzugewandte Frommigkeit*" not flight from the world, but Christian ethics for this new world of a more autonomous political and cultural consciousness of the contemporaries. It is significant of the more "personalist" tendency of this era that the greatest controversy in theology is that of the relation between free Will and Grace, known better as the controversy between Thomists and Molinists.

The method of the Masters of the second flowering of Scholasticism, compared to that of the Middle Ages, is more empirical and, by reason of the great amount of knowledge meanwhile accumulated, is comparative-analytical, as is appropriate to the contingent character of historical reality. In our subject this means a more critical attitude towards existing social and political

forms, an avoidance of the temptation to declare something as "natural" because it has been accepted, without being questioned, for a long time. The institution of slavery is thus much more critically studied and firmly rejected than was ever done in the Middle Ages. In legal and political philosophy we find, for instance, that Suarez is not only concerned with a more accurate statement of the relation between the common good and the private good of the persons, but also with the limitations of the human law. Thus he has already the doctrine against the *ex post facto* law. Suarez makes one exception — provided that the act is not a grave and imputable violation of the first and generally known principles of the Natural Law. (*cp.* the juridical basis of the Nuernberg Trials in the matter of Crimes against Humanity); in such a case a crime is recognized by all as such even without a positive law declaring it a crime. The same tendency appears in the answer to the question, whether the state can command an internal act and punish for an internal act. The answer is that by its very nature the intimate sphere of the person is closed to the positive law which must and can be satisfied with the external conformity to its law, and not with the internal motivation of this conformity, for the human laws are concerned with the external peace of the human community. The comparative-analytical approach is obvious in every chapter of the works of these masters. They cite profusely not only the Roman civil law, but also the laws of France, of Spain, of Venice, of Florence, etc. When Molina studies the problems of slavery, he tells us about the inquiries he made about the Negro slave trade with ship

owners and with traders, with the port authorities and with the central authorities; he cites the various pertinent documents in nine columns of his *De Justitia et de Jure*. Vittoria tells us that he observed Indians and that he objected to the claim that they were barbarians and by nature slaves of the civilized Spaniard, by pointing out to his opponents that there were many peasant-folk in Spain who were not more intelligent or well-bred than these Indians, and yet nobody denied civil liberty to these peasant folk.

This historical-analytical and comparative-empirical character of the method of the great Doctors explains why they often give up the commentary, which was up to that time the usual form of scholarly work. Instead they write their voluminous treatises "On the Laws" or "On Justice and the Laws" in which they treat extensively and with great detail the subject matter that St. Thomas treats in the nineteen *quaestiones* of the first part of the second volume of the *Summa Theologica*. The familiarity of the Doctors with the contemporary literature in civil and canon law, with the philosophers and theologians of the medieval era and of the following centuries is astonishing. On a question which one might think St. Thomas has sufficiently or even exhaustively treated, we may find a multitude of new points of view. This broadness does not produce a certain superficiality as one might suspect, but on the contrary almost all scholars who have studied the works of our masters from Grotius on assert that they are of an amazing profundity and rich in fine but well proved and scholarly distinctions. It is thus easily comprehended that these works were used



even in Protestant Universities as textbooks and why they present truly encyclopedic works for the jurist and political philosopher of our time, as is affirmed by such eminent scholars as Hauriou, Mesnard, Barcia Trelles, del Vecchio etc., and that they represent one of the high-marks in the history of Natural Law theory.

#### IV

Let us now discuss some of the particular themes which occupied the minds of the masters under the heading "Natural Law." One important result of their effort was the abolishment of the distinction between a primary Natural Law as it existed before the Fall of Man and a second Natural Law valid after that event. This theory goes back to the stoic philosophy and the Roman Law and was upheld by the Medieval Theologians. The stoics and the Roman Law used it to find an explanation for some generally accepted social institutions such as war, slavery, private property or the division of goods, with its implied injustices of the few wealthy, and the many poor institutions, which could not be considered as just in the sense of the ideal Natural Law. The Roman jurists ascribed these institutions, e.g. slavery, to the *Jus Gentium*, because according to the Natural Law all men are born free. The *Jus Gentium* is then a kind of secondary Natural Law, which Reason has instituted and which all nations observe. In the Middle Ages the distinction served partly for the same purposes; partly to save on the one hand, the immutability of the Natural Law, and on the other hand to explain certain sentences in the Scriptures, when God is said to have ordered something which is against the Natural Law. This distinction and

the vague ambiguous character of the *Jus Gentium* which contains, first, the conclusions from the first principles of the Natural Law, second, those positive legal institutions which the jurists found among all or almost all nations at all times, and third, also the principal institutions of the international public law, is either given up or freed from ambiguity. Suarez, for instance, declares that all necessary conclusions from the Natural Law belong to it and not the *Jus Gentium*. This is, according to Suarez, *proprie dictum*, a general law of civilized nations ruling such general legal matters as contracts, forms of properties, the legal division of property among men; it is in its character positive law and represents a general theory of such positive legal institutions which we find among almost all civilized nations because they have been instituted *natura instigante*. But they are not of the Natural Law and they are not immutable either; for they are the product of human convention and of consent. From this *Jus Gentium* in the sense of such a general law, common to civilized nations, Suarez distinguishes, then, the *Jus Gentium* in the strict sense as a *Jus inter Gentes*, as the positive part of the public international law which rules the relations between nations as subjects of rights and duties, as members of the community of nations. The positive law of war and peace, of legations and armistices, of international intercourse and trade is meant here, as it was introduced by conventions, treaties and customs. Quite evidently the Natural Law is valid for the relations among nations also, and so is the Divine Law. Suarez is not a positivist in the doctrine of the Law of Nations.

Suarez has no use for a distinction between the primary and secondary Natural Law. The fall of man has not changed the Natural Law as such, but has only added to the political authority the compulsory power which it would not have needed before the fall. The exegetical difficulties are matters of exegesis, not of the Natural Law. The consequence of the abandonment of this distinction is that such bothersome institutions as forms of servitude, warfare, forms of government (Monarchy as a more natural form of government) are now all strictly institutions of positive human law and therefore changeable. The right to conduct a just war in order to enforce one's rights may become obsolete by the introduction of an obligatory procedure of international arbitration. Slavery is now an imperfection of the human positive law and cannot any more be espoused as existing by nature, as we will show below. We may now understand why a modern scholar (J. Koster) says that after the labors of Suarez, after his classification of fundamental concepts, the fruits on the tree of international law were ripe for Grotius to pluck. The masters of the second flowering of Scholasticism are the actual founders of the modern theory of the International Law, as Hugo Grotius himself admits, when he speaks of the *Magistri Hispanorum* and the gratitude he owes them for their pioneering work. He follows the Scholastics to a great degree and mentions their books on almost every page of *De Jure Belli ac Pace*.

## V

A very interesting application of the Natural Law in a concrete situation is the criticism of the colonial method

in America by the masters of the second flowering of Scholasticism. The espousers of the rather ruthless conquest of the Americas by the Conquistadores were first attacked by the missionaries sent to convert the Indians under the leadership of Las Casas. This missionary bishop asked to have Vittoria as his theological consultant. Vittoria and almost all the other Doctors in their special treatises on the Indians and on the *Jus Belli*, or in their general treatises "On Law and Justice," treated broadly and with great care the moral and juridical issues in this burning problem. They all became the defenders of the human dignity of the Indians and of the independence of their states. One by one they tear to pieces all the arguments of the espousers of that colonial imperialism and defend against these, the rights of the Indians on the basis of the Natural Law. Sepulveda, a court theologian of the Spanish Monarchs, justified the conquest of the Indian states and the brutal methods of colonization with these theses: first, the Pope is the Supreme Lord of the World — a thesis, formed in the Middle Ages by the canonists or curialists in their fight against the claims of the Emperor to the supremacy of the World, that small world of Christendom and its arch-enemies, the Mohammedans — therefore the Pope has the right, especially in order to spread the Christian Faith, to grant Christian Kings the political overlordship of the newly discovered Americas. The rulers of Spain and Portugal consequently could claim to be the legitimate sovereigns of these territories, their inhabitants and their chieftains, with the promulgation of Alexander VI's edicts, especially the edict *Inter Cetera* of 1493. This "*Donatio*" by the Pope was,

of course, kept in the terms of the Feudal Law; and it was the kings who applied to the Popes for the "grant" of these territories as "fiefs" according to the Feudal Law. Nevertheless at that time the Feudal Law was already giving way to the modern law of national sovereignty, and the political meaning of the Edict was in the last analysis to establish the political sovereignty of the conquering discoverers. Some theologians used the theocratic ideas of a Henry of Segusia for the same purpose; the Pope, representing the Church, has received from God the Lordship of the World for the Christianization of the World. By reason of this divine authority, the Pope may appoint Christian kings as legitimate political rulers over pagan nations. Another title to the same sovereignty was deduced from the medieval theory cast also in the formula of Feudal Law, that the Emperor was the supreme lord of the world and that he consequently could grant these territories as fiefs of the Christian princes. A third claim was based on the right and duty of Christian kings to suppress the pagan barbarism, the habitual blasphemies and the idolatry of the pagans, so offensive to God and His Christendom. Finally it was claimed that the Christian civilized nations had by Natural Law according to Aristotle, and with the approval of St. Thomas Aquinas, Duns Scotus and many other authorities, the right to subject the Indians, because they were only "speaking animals," because they were full of vices and bare of intellect and unable to rule themselves. They were, therefore, by nature slaves and could, nay, ought to be subjected, in their own interests, to the "*Regimen despoticum*" of Christian rulers. (Lest we judge too hard about these

arguments, let us remember that many of these were literally repeated by the Puritans in New England against the Indians and by the defenders of Negro slavery in the South.)

One by one the masters tear these arguments to pieces. The thesis so generally accepted in the Middle Ages, that the Pope or the Christian Emperor is the Lord of the World by divine institution or by succession to the Roman Emperor is rejected and, instead, the so-called Natural Law theory of the State, as St. Thomas had established it, though without drawing all the consequences of his time, is elaborated. The state exists and the rulers rule by force of the Natural Law. Man lived in true states before there was a Church and a Pope. The rights and duties of rulers and ruled, because they follow from the Natural Law, are and remain independent of the State of Grace. *Non eripit mortalia, qui regna dat coelestia.* In the Scriptures we find not one sentence by which it could be proved that Christ conferred any *political* power on St. Peter or the Apostles; neither did Christ exempt the Christians from the rule of pagan princes. Referring to the famous *Donatio Constantina*, the Masters assert that this is a spurious document of no value at all. By Divine Law, the Pope is not Master of the World. Neither is he that by Natural Law. By Natural Law, on the contrary, the pagan states of the Indians are fully sovereign states. If the Pope claims any rights of intervention into the internal affairs of these sovereign states, this claim must be based on the Natural Law or on the Law of Nations. To send armed forces into the lands of the Indians with the pretense that they only served to

protect the missionaries is unlawful and would give these states a cause for a just war. But what if the pagan sovereigns do not admit the missionaries or forcefully deport them? Then, say the Masters, the Pope may appeal to Christian princes to compel the pagan states to admit the missionaries. Why? Because the pagan states were then violating a recognized rule of the Law of Nations, they were in the wrong. For at that time it was held that the rule of free travel, intercourse and sojourn in the territories of the states was part of the Law of Nations and thus established a right of the missionaries to sojourn there and preach the Gospel. (Yet Las Casas would not even accept this argument.) What is interesting here is that the whole argument is based on the Natural Law and on the Law of Nations and that all claims based on the theocratic ideas of the Curialists are simply shoved aside.

The same arguments apply to the thesis that the Emperor is Lord of the World. The partisans of the *Imperium Sacrum* held that the Christian Emperor is instituted by Christ as ruler over Christendom, or that he gained the rule of the World by translation of the Roman Empire or by succession into the rights of the Old Roman Emperor, as the Jurist Bartolus, the famous post-glossator, tried to prove from Roman Law, coming to the strange conclusion that he who denies that the Emperor is Lord of the World, is certainly a heretic. But the Masters argue that such claims are absurd; they are not based on any positive law, they are disproved by history, which shows that even at the time of the Roman Emperor there existed independent states and certainly even at the time

of Bartolus, the East-Roman Byzantine Emperor was sovereign and also the Kings of Spain and France have been sovereign kings for centuries. We see that the medieval theocratic and empirical theories based on the *Civitate Dei* of St. Augustine found no love with the Masters. In addition, and thus crowning their arguments, by Natural Law the Masters assert that the states of the Indians are as perfect societies truly sovereign. They have their own laws and constitutions, their courts and administrative offices. Any attempt of the Emperor to enforce his specious overlordship would grant the pagan states a cause for a just war of defense.

What of the pagan barbarism, the idolatry, the "unnatural" vices of the Indians as causes for conquest? In this matter it is again interesting to observe that, if a right of intervention is at all acknowledged, this right is based rather on the Natural Law and on the Law of Nations than on the Canon Law. Some of the Masters make here a distinction between the Natural Moral Law and the Natural Juridical Law. Idolatry, for instance, is a violation of the first, not of the second. The temporal state does also not prohibit by its law all vices and sins, but — rightly — only those which directly intervene in the protected sphere of another person and those which endanger the proper end of the State, the common good. Similarly there exists no cause for the intervention of Christian States or for the Church on the basis of Natural Law in the cases of idolatry and similar violations of the moral law. But if the pagan rulers oppress their subjects who have been converted and if their emigration is not feasible on account of their great number or they are forcefully



hindered from doing so, or if the pagan priests perform human sacrifices, then, under due consideration of all circumstances the Christian princes would have an indubitable right to intervene by reason of the defense of Innocents, even by warfare. This right of intervention is based on the Natural Law and on the nature of the community of nations, which must demand of its members a minimum standard of civilized morality; and it is significant that Molina expressly states that the Natural Law exclusively and not any papal authorization gives this right of intervention. Yet it is interesting that this right of intervention for the defense of Innocents was considered by some missionaries and by the great Dominican Theologian Domingo de Soto as infeasible, because it would make the spread of the Faith more difficult or the ensuing war would cause much more suffering, *i.e.* the use of the right of intervention would be unjust. In connection with this discussion, the Masters of the second flowering of Scholasticism have developed also their theory of the just war which in some directions is an advancement over the medieval doctrine. Since their doctrine is known generally, let us only state that it is based again on the Natural Law and was the basis of Hugo Grotius's doctrine of the just war.

## VI

A most instructive application of the Natural Law may be found in the criticism by the Masters of the Divine Right theory. This theory, formulated in Byzantium, and espoused later by the partisans of the mediaeval emperors, became essential for the justification and the

definite securing of absolute monarchy as against the theretofore unquestioned doctrine of the Divine Right of the Pope. In accord with the religious spirit of the era of the Reformation and its theological irrationalism (inimical to the idea of Natural Law), it seemed that only by a divine call could the rule of the princes be firmly established. Political authority, whether it were the monarchy of which Luther spoke, or the aristocracy of the virtuous predestined *viri egregii*, after the example of the men described in the Book of Judges, as Calvin taught, by reason of the decomposition of the Natural Law by the reformist theology, had to be based on a divine act of institution. Furthermore, the Protestant prince had to become also the *Summus Episcopus*; he had to unite in his hands the supreme temporal and spiritual authority. The democratic ideas of ecclesiastical constitution which were to characterize the non-conformists were not yet developed.

The Divine Right theory served two ends: first, it gave the prince an originary power independent of and unlimited by any covenant with the estates representing the people; second, it established the prince as the sovereign spiritual authority as against the national Hierarchy and, particularly, the Pope. *Dei gratia* meant "neither by the people's, nor by the Pope's, grace." These ideas, in a somewhat attenuated form, were prevalent in the Catholic monarchies. Nevertheless, it was also affirmed that the office of the prince is immediately instituted by God — like the office of the Pope; although to the Pope, concurrently with ecumenical councils, belongs the supreme doctrinal authority, to the prince belongs

the jurisdictional and administrative authority in the Church of the Realm. The prince has exclusively the constituent power in his realm, and any participation by the estates, or by the people, is thinkable only by an arbitrarily revocable grant of the prince. This implies that there is no room for an active or a passive right to resistance based on Natural Law. Only meek obedience is the duty of the citizens, at least as long as the prince does not openly act against the Scriptures — that is, as long as he does not become a “heretic.” Against the heretical prince the orthodox must, of course, rise in arms. (In connection with this it is interesting to compare the Thomistic doctrine that the theological heresy of the prince as such does not destroy the mutual rights and duties of authority and citizens based on Natural Law, at least as long as the concrete political common-good is not directly affected by the heresy of the prince.) If the Natural Law is to be considered of any value, then the prince is to be considered the sole and sovereign interpreter of it because his authority is of directly divine institution. As Hobbes expressed it: a law of the prince may be iniquitous, but “it is not unjust,” because the Natural Law, in Hobbes’ view, is actually wholly immersed in the positive law of the Leviathan, and, therefore, it becomes a meaningless term. Among the consequences of this were the nefarious principle of “*Cujus regio, ejus religio*,” the theoretical impossibility of any form of civil tolerance; the identification of political and ecclesiastical religious loyalty, which issued in the ruthless oppression of religious non-conformists because politically they committed treason by their religious heterodoxy.

Against this Divine Right theory arose the great Doctors of the sixteenth and seventeenth centuries to develop more fully the Thomistic Natural Law theory of the State and of political authority. The State, they taught, is an institution of the Natural Law. Man is by nature a political being. The State as the natural "perfect society" is in its institution and jurisdiction independent of Grace and Supernature. Furthermore, though founded in human nature and therefore necessary for its most perfect realization, the concrete State comes into existence not without the intervention of free human acts. That is, the concrete State is to be thought to come into existence by a consent, by a covenant, by a social contract of the "family-fathers" who *instigante natura* see the necessity to form a more perfect union. The juridical figure of a pact, a true *status* contract, will signify not so much that an historically documented solemn covenant has been formally concluded, but that free human acts have produced the State, not a divine interventive act. Furthermore, with the initial formation of the however-rudimentary body politic, political authority, ultimately deriving from God as the Creator of human political nature, rests immediately with the body politic, which is, therefore, an immediate democracy. Any other form of government, such as representative democracy or monarchy, must consequently be considered as produced by a distinct act of the body politic; *i.e.*, of the people in the political sense — by an act of transfer of political authority. There is no intrinsic reason why this or that person should have by nature a right to political authority since all the partners in the original covenant are free and equal. This

does not invalidate the duty of the covenantors to give up the immediate democracy and to institute a different form of government, a monarchy, for instance, by consent in the interest of the more perfect and more efficient realization of the common good.

But it is clear that all forms of government are derived from an original constituent power of the people. Even though it is indisputable that political authority is ultimately derived from God, *immediately* it is derived from the people. Consequently, all political forms of government — and absolute monarchy, too — are merely creatures of positive, man-made law: not of the Natural Law — and even less of positive, divine law, as the Divine Right theory taught. Demonstration of the validity of the Divine Right theory would require a revealed act of God, of which there is no historical record. Even the rule of Saul and David, so often cited as examples by the Divine Right theorists, is not acceptable to St. Robert Bellarmine as being instituted directly by God.

Since all constitutions, all forms of government, are of positive man-made law only, they are all “limited” by the Natural Law. Every consensual act of transfer of political authority to a person or to a group of persons contains as an unconditional clause: *salvo jure naturale* — and, consequently, *salvis juribus naturalibus*. The legitimacy of political power rests, in the last analysis, upon its service to the common good, because the right to the realization of the common good is also an inalienable right of the people. From this it follows that the people have by Natural Law the right to active and passive resistance, first, against the *usurpator*, and, second, against

the *tyrannus secundum regimen*; i.e., the initially legitimate ruler who gravely violates the common good.

The twin concepts of the limitation of political authority and the right of the people to resist tyranny form, by the way, the content of mediaeval constitutionalism, which rested on three principles: first, the Law is supreme, rather than the king or the estates of the realm separately acting — this is the theory of the supremacy of the Law, *Legem servare hoc est regnare* . . . ; second, the principle that the Law issues from a kind of co-operation between the royal authority and the estates, the former having the right of legislative initiative and the latter, by their consent, limiting the initiative of the king through the public sense of justice that animates the people; third, the principle that the people or the estates have a right to resist an act of the king violating the Law as a “pactum,” a “covenant,” a “*constitutio*,” contracted by the king and the people and binding, therefore, each of them equally. If the king acted against the *pactum*, then the legitimacy of the act (and even of the authority of the king) was destroyed. This pattern of thinking was especially valid if the act of the king was against the Natural Law. That meant also that the king could not infringe upon the solemnly established and agreed upon Liberties and Immunities of the estates, the cities and the towns, the guilds, and other communities from which were then derived the rights of the individual according to the community spirit of the Middle Ages.

Thus it is significant that against the theory of the *Rex legibus solutus*, against the Divine Right theory, which made of the king a “*Pro-Deus*” (Bacon), a “*Deus mor-*

*talis*" (Hobbes), and made consequently an appeal against an act of the king impossible, since there is no appeal against a divinely instituted authority, the Masters established, besides the existing positive constitutional law, the Natural Law as the basis of an appeal against the tyrannical ruler. *Seditio*, i.e., unlawful rebellion against legitimate (in the formal *and* in the material sense) government was clearly distinguished from the right to active as well as passive resistance, that is, lawful revolution. The similarity of the arguments of the Masters of the second flowering of Scholasticism to the arguments of the Declaration of Independence is so evident that it need not be elaborated on.

## VII

Still another characteristic feature of the development of Natural Law doctrine during the second flowering of Scholasticism — and this in a certain consonance with the spirit of the Christian Renaissance and with eighteenth-century theories of human rights — is the elaboration of the concepts of the *Jura Naturalia*, especially those of liberty and property. What was contained implicitly in the thought of St. Thomas was made explicit in the writings of this period. It is true that such a nominalist as Occam in his day stressed the fact that the *Jura Naturalia* were subjective rights existing in consequence of the objective norm. The term *Jus* for St. Thomas, meant primarily the objective *Justum*, the Law, and very seldom did he mean by it the subjective right as it was known to the Roman Law. But for Occam *Jus* becomes "*Potentas licita actum aliquem exercendi*"; and,

significantly, Occam singles out Liberty as such a *Potestas*, natural to man as a person. This natural right of Liberty may not be taken away from man without "guilt" or reasonable cause against his will, though man may voluntarily give up his Liberty. Occam, thus, has quite clearly the idea of Natural Rights; and this is easily understood if we are aware that the most positive among the many negative features of Nominalism was its interest in the individual generally and in the human personal will as a creative cause of human political and cultural life.

The theory of the Natural Rights of the person and of the State finds its full "explication" in the century from Vittoria to Bellarmine. Vittoria points out — in his defense of the Indians against the theses of Sepulveda, who espoused a rather ruthless colonial imperialism, that the Indians, as persons and as citizens of independent states, are not by nature slaves or subjects of civilized Christian nations. When Sepulveda cites the famous Aristotelean thesis that some are by nature slaves, Vittoria tries to excuse Aristotle by pointing out that Aristotle only means that those who by virtue of high intellectual gifts are capable of ruling themselves are shown thereby to be *capable* of ruling those of "brawny bodies." But Aristotle does not mean, according to Vittoria, that what Jefferson was later to call "the natural aristocracy" has a natural right to rule as masters those of weaker minds and lower civilization, who by nature are destined to slavery. Slavery was not conceived by Vittoria as an institution allowed by Natural Law, not even of a secondary Natural Law (as taught by the Stoics and the Mediaeval Scholastics, who held that slavery was immoral in the *status*



*naturae purae* — that is according to primary Natural Law — but excusable as a consequence of sin — according to the secondary Natural Law). For Vittoria slavery as a hereditary status of servitude is exclusively *Jure Humano*; it is not even an institution of the *Jus Gentium* — that somewhat vague medium between the *Jus Naturale* and the *Jus Civile*. When Vittoria discusses monarchy, which he prefers to other forms of government in accordance with the scholastic tradition (though we should be quite clear that monarchy does not mean to him the hereditary absolute monarchy of the seventeenth century), he stresses that Liberty is as well, nay, better, protected under monarchy, the clearly circumscribed and stable rule of one, than under the rule of the few or the many. This idea of Liberty as a right to be best protected under monarchy is new. Before Vittoria, the argument for monarchy was taken from the idea of the objective order requiring an objective authority of one will to protect its own stability; with Vittoria, the argument for monarchy flows from his concept that under monarchy the Liberty of the subjects is best protected.

From Vittoria on, the theory of Liberty as a natural right of persons and of the State is developed further concomitantly with the argument against servitude. The distinction between the primary Natural Law and the secondary is abandoned: the Fall of Man is no longer considered to have any influence upon the core of Natural Law. The *Jus Gentium* becomes, on the one hand, a positive general Law of civilized nations, an “*allgemeines Kulturrecht*”; and, on the other hand, it becomes a *Jus inter Gentes*, the positive part of the Law of Nations. If,

thus, Liberty is a right based on the Natural Law, then all forms of servitude are products of merely human law with its imperfections. Aristotle's argument about slavery as an hereditary status of servitude is declared unacceptable and absurd. Suarez, for instance, stresses that personal Liberty belongs *positively* to Natural Law, that it is a natural *right*, because man as a rational, free being has a natural *dominium* over his Liberty. Liberty can be lost only by free and voluntary surrender or "*ex justa causa*"; *i.e.*, as a punishment for crimes (and it is significant that Suarez continues — just as the State may take away the life of a criminal according to just criminal law). As the life of an innocent man is sacred, so also is his Liberty. For like life, so is Liberty given to each man by the Creator Himself; and by nature all are free and equal. These ideas are applied also to the State as a *persona moralis*. The State is by nature a Free State, with the right of self-determination. The constituent members establish by the social pact, *primaeva institutione*, an immediate democracy: this original democracy ought ordinarily transform itself, by constitutional positive act, into a monarchy, absolute or limited; into an aristocracy; or into an indirect representative democracy. All forms of government are, consequently, of positive historical law. There is no Divine Right of Kings; or of Democratic Majorities.

Similarly, States have a natural right to Liberty and independence from one another under Natural and International Law. Therefore, the great Doctors of this period reject all the arguments of the defenders of colonial imperialism with the counter-argument that the pagan

States of the Indians are by Natural Law free and independent, and that all claims of the Spanish must be based only on the International Law of the community of nations.

It is significant that property and the natural right to property are treated similarly to Liberty. True, the Masters of that time did not need to treat of these problems as widely and profoundly as they required to be treated in the nineteenth century under the impact of Marxist Socialism. Yet the question arose in connection, again, with the rights of the Indians. These have, so the Doctors said, a true *dominium* of their properties, real and movable; to take away their properties would be a violation of Natural Law. Suarez also criticized the doctrine of some jurists who asserted that the temporal king could, by reason of his absolute power, arbitrarily transfer the property of one man to another, or confiscate it. This, declared Suarez, is "*absurdissima*" and also against the natural right that everybody has to his legitimate property. Suarez and others also taught that the division of goods (*i.e.*, private property as a legal institution) is not a consequence of sin, but is convenient to nature and might have been introduced even in the *status naturae purae*. Under the influence of natural reason, private property was introduced among all civilized nations, and everyone has now the natural right to his property as he has the right to the fruits of his labor.

An interesting sidelight on this positive evaluation of Liberty is afforded by a short discussion of the ideas on economic liberty and monopoly held by these Masters of the Scholasticism's second flowering. The main problem

has always been: under what conditions will the prices of goods and services be just? Under what conditions will they be what they should be, according to Natural Law? Will prices have the best chance to be justly established under conditions of a free market and under the rules of ordered free competition? Or is it necessary that the Government regulate the prices and exchanges in order to assure just prices? And how far are monopolies, private and public, permissible, which by their own economic power can control prices?

Among the many theologians who have treated of these problems from the points of view of ethics and the Natural Law, Molina stands out particularly. In his remarkable book, *De Justitia et de Jure*, he demands, first, that economic exchanges must follow the rules of commutative justice — the equality of value and price; and, secondly, that the just price is not influenced by the economic status of persons as exchangers, but is determined absolutely through such factors as costs, supply and demand, which altogether represent the “natural price” under due consideration of the changes in the “value” of money. Molina held that the natural (*i.e.*, the just) price has the greatest chance to be the actual market price under conditions of a free exchange market and stability of money. Regulated prices have much less chance to be just prices, because Government regulation cannot meet the frequent changes that take place among the determining factors of the natural price. He condemns private monopolies as usurpations and enslavements of the free market in contradiction to the Natural Law. He accepts regulation of prices only in emergency situations and rejects

them as ordinary means of directing economic life by the State. State monopolies are accepted on the condition that they serve the common good, because they may be considered as a source of public revenue; but they must never serve private interests in the form of privileges. If the King therefore grants, for reasons of the common good, certain merchants' associations or craftsmen's guilds, *e.g.* printers, monopoly privileges, then the prices must be regulated in harmony with the Natural Law principle of the just price. Molina's views thus show, in accordance with the general tendency, a highly positive evaluation of Liberty in the economic exchanges in a free market, as a natural condition for the realization of the just price. This positive attitude toward ordered Liberty in economic life is further accentuated by his strong criticism of unfair monopolistic practices and by his diffidence toward Government controlled markets and prices.

### VIII

After this survey, which by its very nature is sketchy and cannot be considered at all comprehensive, it is easy to understand why so eminent a jurist and scholar as Joseph Kohler, professor at the University in Berlin, who, recognizing the insufficiency of legal positivism, consequently had delved into the Natural Law Tradition, could write in 1916 that a revival of Natural Law must return to the thought of the Masters of the second flowering of Scholasticism, and not to Hugo Grotius and the Rationalists. It is the tragedy of the rationalist Natural Law as it developed on the European continent that it

ultimately served only as political ideology and propaganda able to attack the *Ancien Régime* and to produce the Revolution and the *Declaration des Droits de l'Homme et du Citoyen* and then be drowned in the Terror-Regime of the Jacobines, or to be forgotten by rising nationalism and the general positivism which got control of the universities and of the courts. The Common Law countries have been luckier, at least to a degree. In its tradition and under the influence of the clerics of the Chancery, the idea of a Natural Law was better preserved than on the European continent. This tradition was protected by the judges who mostly felt that they were intrusted with the Law and the administration of justice; they held in the majority that Law is reason, right reason, that is, positive law must be in agreement with the Natural Law and with natural Justice and Equity. Though there are not absent dark pages in the history of the Common Law, it remains true that all through the centuries, the tradition of Natural Law never was fully abandoned in the history of the Common Law. It was the judges who, animated by the Natural Law, took on the guardianship of the Law as a Rule of Reason and for reasonable free citizens, against absolutist kings and the thread of tyrannical majorities in the legislatures. Jurists and Judges who are philosophically mere pragmatists and positivists cannot be the guardians of the Natural Rights because they have abandoned the sources from which these rights and their dignity are simultaneously derived: the Natural Law.

## STATUS OF NATURAL LAW IN AMERICAN JURISPRUDENCE\*

*Robert N. Wilkin*

THE noted French philosopher, Etienne Gilson, has said truly: "The natural law always buries its undertakers."<sup>1</sup> It now seems that we are witnessing the obsequies of the Natural-Law morticians of our day. And our feelings are expressed by the words of the United States senator who was asked if he expected to attend the last rites for a national character of his day: "No," he said, "I am not going to the funeral, but I approve of it."

The French philosopher's observation was based upon the fact that history reveals man's necessity to return to Natural Law concepts whenever they have been abandoned. Man is forced again and again to return to the "Natural Law way of thinking" because it is an expression of his moral nature. There are principles applicable to man's moral nature which are referred to as laws just as there are principles referred to as laws of his physical nature. The main thesis of this discussion is that we are now in one of those periods when the circumstances of life again force men to accept the principles of Natural Moral Law.

Any lawyer whose professional career began during the first ten years of the present century and who is still alive and able to note the trends of current thought, has

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\* Also printed in 24 *Notre Dame Lawyer* 343 (1949).

<sup>1</sup> HEINRICH A. ROMMEN, *THE NATURAL LAW* 242 (1948).

witnessed two great changes in the philosophy of jurisprudence. When he came to the bar, Coke, Blackstone, Kent, Story, Minor, and Cooley were still respected sources of legal learning, and the Natural Law philosophy of the Founding Fathers was unquestioned. But during the ensuing thirty years there was a great shift from those authorities and that philosophy to what has come to be known as modern positivism or realism. And now within the last eight or ten years there are unmistakable signs of dissatisfaction over the insufficiency, the aridity, of modern positivism, and very definite indications of a revival of Natural Law philosophy.

It is of course impossible to set exact dates or clearly define the boundaries of trends in thought or philosophy. Changes come about gradually, they are never complete. There is always the remnant, the modicum, who adhere to the former course in spite of popular deflections. The boundaries of eras and trends are not clear cut; they feather out. But the general effects of the great trends are nevertheless quite apparent.

### *Positivism*

It is unnecessary to trace in detail the extent or effect of positivism during the early decades of this century. That has been well done by Dean Pound, Mr. Ben Palmer, Mr. Harold McKinnon, Mrs. C. P. Ives, and others. As Mr. McKinnon says:

This teaching nullifies the Declaration of Independence, the preamble of the Constitution and the Bill of Rights. It nullifies twenty-five hundred years of progress in political and legal theory and re-enacts in the present age some of the worst political and



legal errors of ancient times. It is indistinguishable, in its origin and its logical effect, from philosophies which characterized lands against which we have just fought the bloodiest war in history.<sup>2</sup>

### *At Home*

In this country positivism tended to discredit the judicial function and over-emphasize the importance of administrative procedure. The fiat rule of administrative boards was substituted quite extensively for legal procedure of courts.<sup>3</sup> Precedent was disregarded, balance of powers was scoffed at, and the Constitution was openly flouted.

This all came about in a very subtle and indirect way. There was no open or frontal attack, and the overwhelming majority of the legal profession never knew that there was a movement against the basic principles of our jurisprudence until they discovered that all their arguments based on inalienable rights, Natural Law, or the Constitution, were being laughed at by public administrators. The champions of modern Positivism, the self-styled Realists, proceeded mainly by innuendo and cynicism. Inspired by the pragmatism of Professor John Dewey and the skepticism of Justice Oliver Wendell Holmes, they arrogated a disdain for Natural Law and discredited all claims of natural right. It then gradually became their habit to assume, as some said, that "most of the best

<sup>2</sup> Harold R. McKinnon, *The Higher Law*, an address delivered before the conference of Federal Judges of the Ninth Circuit at San Francisco, Sept. 3, 1946. Published by the Gillik Press, Berkeley, Calif., 1946. 33 A.B.A.J. 966 (1947).

<sup>3</sup> JOSEPH C. HUTCHESON, *NEW INSTRUMENTS OF PUBLIC POWER* (California Bar Association, 1946).

thinkers on politics (meaning themselves) of the present day will agree that there is no such thing as a natural right," and that "modern scholars (again themselves) have totally abandoned natural law." One student was told in open class by his law professor that he should never again mention Natural Law, that its concepts were unattainable, antiquated, discredited, and dead as the dodo.

All the younger officers of the Ship of State during the 1930's and early 1940's were men who had been subjected to this modern sophistry during the impressionable years of their education. The older men, it seems, were intimidated by the oncoming intelligentsia; they were afraid to defend the Natural-Law concepts of right and truth and justice lest they be thought puritans, prudes, or old-fashioned. This attitude of skepticism, cynicism, and negation toward the moral and ideal concepts of Natural Law philosophy found a very congenial climate of opinion in the intense scientism, materialism, and secularism which followed World War I.

The critical problems of our national life today have come directly from this materialistic and positivist attitude toward life and law. When the ethical and moral content of our philosophy was abandoned, men felt free to assert without restraint their novel theories and their personal and class selfishness, avarice and greed. As a result of the disrespect for courts and the judicial process there followed a corresponding neglect of the common interest and public welfare. The sole aim in life of most men was profits or wages, and the affairs of government were abandoned to policy amateurs or to self-seeking

politicians who bartered and traded for self-aggrandizement and success of party, bloc, or union. Disputes between the great monopolies of employers and unions led to strikes which paralyzed the economic life of the country. Agents of government merely pampered and pandered instead of enforcing the established principles of law which for centuries had protected the community interest. At a time when our national power reached its maximum strength in the world it seemed to be disintegrating at home.

### *Effect on Judiciary*

The clearest evidence of this disintegration was revealed in the Supreme Court. The number of reversals and dissents exceeded all previous records. The upward sweep of dissents from the year 1910 to 1946 ranged from thirteen per cent to sixty-four per cent.<sup>4</sup> Landmark decisions in constitutional law were overruled with alarming celerity. The constitutional balance of powers was frequently ignored, in accordance with positivist theory, and the legislative function was usurped in order to overrule long-established principles and promulgate the Court's idea of what the "trend and policy" of law should be. The decisions of the Court were not supported by any uniformity of reasoning even by the justices who agreed on decisions. There was no integrating science of law because the fundamental and coordinating principles of our jurisprudence and constitutionalism had been discredited and abandoned. Decisions and opinions were

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<sup>4</sup> Ben W. Palmer, *Dissents and Overrulings: A Study of Developments in the Supreme Court*, 34 A.B.A.J. 554 (July 1948).

improvised according to the predilections of the various justices. Informed observers seemed to hear again the critical words of Cicero as he watched the disintegration of the Roman Republic:

All confidence was banished from the Forum, not by the stroke of any new calamity, but by the general suspicion entertained of the courts of justice, and by the disorder into which they had fallen, and by the constant reversal of previous decisions.<sup>5</sup>

The chief purpose of the law is to habituate that conduct which conserves the public good. When therefore the law loses its certainty and no reliance can be placed in judicial decisions, the law ceases to perform its function. Furthermore, the characteristic of our jurisprudence, which had distinguished it from the systems of law in those countries with which we had gone to war, was its devotion to reason. When judicial decisions departed from precedent and were based upon the mere prepossessions of judges, they lost the distinctive character of Anglo-American jurisprudence and took on a similitude to the arbitrary or fiat rule of totalitarian governments. It was therefore not without reason that some commentators remarked that what we had fought for abroad we had lost at home.

### *Abroad*

The effects of this materialistic and positivist attitude toward life and law were not confined to our country. It had a world-wide effect. It is now generally recognized that one of the influences that brought about the revival

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<sup>5</sup> CICERO, DE LEGE AGRARIA, Oratio II, 3, Fin.

of the positivist philosophy of law in modern times was the assertion of extreme nationalism which followed the break-up of the Holy Roman Empire into separate states.<sup>6</sup> The arbitrary demands of independent states against one another and the fiat rule of such states within their own boundaries could not be justified by the principles of Natural Law. As always, the assertion of arbitrary will was found to be at variance with the moral and ethical ideals of the Law of Nature. The classical philosophers, the Roman jurists, the Scholastic writers, and the great authorities on international law, such as Suarez and Grotius, were therefore abandoned. The champions of statism adopted those principles which soon found expression in the teachings and practices of Machiavelli and later were exemplified in the Fascism of Mussolini and the *Realpolitik* of Hitler. Such theories of government are responsible for the sordid history of power politics and international anarchy which led quite naturally to the two world wars and the fateful climax that now confronts the world.

#### *Effect on Peace*

When the victors in World War II assembled at San Francisco to form some organization for world affairs they disregarded the proposal of China and several other states to establish a government upon universal and fundamental principles of justice and resorted instead to the old hoax of a tenuous and tentative balance of power among independent sovereign nations. The inadequacy

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<sup>6</sup> ROMMEN, *op. cit.*, *supra* note 1, at 128; William Seagle, MEN OF LAW 113-114 (1947); Irving Babbitt, DEMOCRACY AND LEADERSHIP 37, 42, 53 (1939).

of such an organization became apparent two months later when the first atom bomb fell on Hiroshima. The insufficiency of UNO to maintain peace and security in the world has been demonstrated daily by subsequent international events. Now of course United Nations Organization is a step in the right direction and must have our full support in the good that it has done and is doing, but it is to be regretted that it did not establish juridical order at the beginning instead of a balance of powers.

The war was fought for human rights and human dignity, but the victors failed to affirm and assert the eternal principles upon which such rights and dignity depend. On the contrary, they adopted and acted upon the false theories of the nations which they had vanquished. They built the United Nations upon the impossible and immoral doctrine of national sovereignty in international affairs and ignored the universal and eternal principles of Natural Law which had been expounded and exemplified by the great philosophers and jurists for twenty-five hundred years.

It is one of the great tragedies of human history that when this nation came to its apex of power and exerted a force and influence which no other nation had ever possessed, it deserted the basic philosophy of its Founding Fathers,<sup>7</sup> abandoned the principles upon which its legal institutions were built, and insisted not on constitutionalism and the rule of law, but on the veto power for the assertion of arbitrary will. In demanding the right of veto

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<sup>7</sup> Clarence Manion, *The Natural Law Philosophy of the Founding Fathers*, Natural Law Institute, University of Notre Dame, 1947, *THE PROCEEDINGS OF THE NATURAL LAW INSTITUTE*, Vol. I (1949).

it abandoned the states that represented our ideals of government and united with the U.S.S.R., which is the very antithesis of our form of government and our system of jurisprudence.

The struggle of nations for ascendance has by a process of elimination now been brought to a final contest between two great world powers. The juxtaposition of these two great powers, with the attendant rivalry, suspicion, and friction, makes a final world struggle inevitable, if they continue to trust in the might of their own armaments. If the disaster of a third world war is to be averted, the U.S.S.R. and the U.S.A. must acknowledge the impossibility of national sovereignty in international affairs and then unite in an effort to establish juridical order for the world.

### *Revival of Natural Law*

Thus we see that our most critical problems at home and abroad stem directly from the materialistic or positivist philosophy of law and government which had become so prevalent in the twentieth century. But, as already stated, when the effects of this modern sophistry began to appear, there also appeared some definite signs of a counter-movement, a return to Natural Law philosophy. Here again our limitations forbid a detailed account of the trend. But a few of the indisputable signs of a renaissance should be noted.

In 1930 The Harvard University Press published the doctoral thesis of Charles Grove Haines, entitled, *The Revival of Natural Law Concepts*.<sup>8</sup> The expansion of

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<sup>8</sup> CHARLES GROVE HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS* (1930).

such revival since the publication of that book is indicated by the book's growing reputation and the ever-increasing references to it. In June 1942 *The Notre Dame Lawyer* published "The Revival of Natural Law," by Roscoe Pound. This was a publication of four lectures delivered at the College of Law, and in the first paragraph Dean Pound said that in the present century there had been "a revival of what was called juridical idealism, a revival of philosophical jurisprudence, and as it soon came to be called, a revival of natural law."

Dean Pound has been a powerful influence in such revival, because he, like the jurists of Scotland, Italy, and the Catholic faculties whom he mentions, never followed the deflections from Natural Law philosophy which began in the latter part of the nineteenth century. His lectures, books, and articles in the legal magazines continuously and vigorously opposed "the skeptical realism," "the give-it-up political and legal philosophy" of the day, and championed that philosophy which gives us "faith that we can do things and so enables us to do things."

In November 1941 the *Texas Law Review* published a devastating criticism of the positivist philosophy of law. It was written by Moses J. Aronson, Editor of the *Journal of Social Philosophy and Jurisprudence*.<sup>9</sup> A reprint had wide circulation. Its significant title was *The Swan-Song of Legal Realism*. It pointed out that the error of the self-styled *realists* lay in their failure to accept thought, feelings, and prevalent moral intuitions as part of experience. In that regard they are not realists. By rejecting funda-

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<sup>9</sup> Moses J. Aronson, *Book Review*, 20 *TEX. L. REV.* 118 (1941). Reprinted entitled *The Swan-Song of Legal Realism*.



mental insights of human nature, the natural and empirical reality of ideals and standards, they create an illusory theory of realism and a distorted conception of law. The processes that express the synthetical function of our sensibility and understanding, for that very reason, possess the validity of laws of nature, if we mean by nature the totality of phenomena.

This renaissance of Natural Law is revealed more recently in such publications (illustrative but not exhaustive) as:

#### *Magazine Articles*

"Defense Against Leviathan," by Ben W. Palmer.<sup>10</sup>

"The Higher Law," by Harold R. McKinnon.<sup>11</sup>

"Law and Philosophy," by Harold R. McKinnon.<sup>12</sup>

"Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty," by Wendell Phillips Dodge, Jr.<sup>13</sup>

The articles on Dissents and Reversals in the U. S. Supreme Court appearing serially and currently in the American Bar Association Journal, and the accompanying editorials.<sup>14</sup>

#### *Books*

*The American Philosophy of Law*, by LeBuffe and Hayes.<sup>15</sup>

<sup>10</sup> Ben W. Palmer, *Defense Against Leviathan*, 32 A.B.A.J. 328 (1946).

<sup>11</sup> McKinnon, *op. cit. supra* note 2.

<sup>12</sup> HAROLD R. MCKINNON, *LAW AND PHILOSOPHY*, Canadian Bar Review, August-September, 1948 (reprint).

<sup>13</sup> Wendell Phillips Dodge, Jr., *Thomas Aquinas: Advocate of Natural Law and Limited Sovereignty*, 33 A.B.A.J. 1013 (October 1947).

<sup>14</sup> 34 A.B.A.J. 554, 584 *et seq.* (1948).

<sup>15</sup> FRANCIS P. LEBUFFE and JAMES V. HAYES, *THE AMERICAN PHILOSOPHY OF LAW* (1947).

*The Natural Law*, by Heinrich A. Rommen.<sup>16</sup>

*Liberty Against Government* (Chapter II — Roman and English Origins), by Edward S. Corwin.<sup>17</sup>

And last, but not least, The Natural Law Institutes of the University of Notre Dame. These Institutes and the addresses which they sponsored and published have had a direct, stimulating, and constructive force which can hardly be over-estimated.

This renewal of interest in Natural Law philosophy is now being evidenced by citations and references in opinions of the courts and juristic writings. Moreover, the efforts of the United Nations and other agencies to promulgate a Bill of Rights for the world have necessarily called forth appeals to Natural Law philosophy and citations to juristic authorities on Natural Law. The arguments in the Nuremberg trials and the writings in defense of such proceedings also contain references to Natural Law concepts and the juristic writings that support a universal law.

### *Public Opinion*

This revival of Natural Law is supported, moreover, by a change in the climate of public opinion. The intense materialism, scientism, and secularism which favored the positivist philosophy has lost much of its assurance and arrogance since the last war. The bigotry of scientists has abated. From observations in the laboratory and observatory the universe had been growing increasingly mysterious. The great physicists, like Jeans, Millikan and Eddington, recognized a plan and order which did not

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<sup>16</sup> ROMMEN, *op. cit. supra* note 1.

<sup>17</sup> EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948).

exclude God. And the great geologist, Dr. Alfred Church Lane, said shortly before his death that "There are definite signs of God's plan in the story of the earth as recorded in Geology. . . . Belief in God is necessary to the progress of humanity."<sup>18</sup>

When Dr. Einstein and the nuclear scientists themselves began to cry out for the assertion of moral force to save the world from the destructive agencies which science had released, leaders of thought in all fields of endeavor began again to consider the source of man's moral power. The confession of science, made at the time of its own greatest achievement, that it was unable to save mankind from disaster, revived a general concern for those ideals and beliefs which had sustained man's faith and hope in times past.

This shift in public opinion from material to moral considerations was evidenced also in education. Sir Richard Livingston of the University of Oxford voiced the dissatisfaction of many teachers when he said:

If you want a description of our age, here is one. The civilization of means without ends; rich in means beyond any other epoch, and almost beyond human needs; squandering and misusing them, because it has no overruling ideal: an ample body with a meagre soul.

The same feeling was voiced by a schoolman of this country,<sup>19</sup> who said that when we consider the crisis of Western civilization, the possibilities of doom and disaster, we cannot escape the feeling of Arnold that the world

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<sup>18</sup> Alfred Church Lane, *My Faith*, *American Weekly*, July 18, 1948.

<sup>19</sup> J. Fred Waring, *The Alumni Record*. Hudson, Ohio, Spring 1948.

Hath really neither joy, nor love, nor light  
Nor certitude, nor peace, nor help for pain;  
And we are here as on a darkling plain  
Swept with confused alarms of struggle and flight  
Where ignorant armies clash by night.

Such feelings by schoolmen could not be ignored. Educational surveys were instituted by various agencies, including the President of the United States, and the aims and methods of teaching were re-examined. As a result we now hear schoolmen declare that

Citizenship should be grounded in morality that flows from religion, alert to the problems of the day and ready to translate the ethical ideals of religion and democracy into the realities of common life.

And we hear the dean of a state university law school proclaim "the democratic ideal, of which the Christian ethic of sympathy is a religious expression."

In the field of general literature there has been a noticeable trend away from the cynics and skeptics, who derided and scoffed so popularly during the nineteen-twenties, toward an increasing interest in mysticism and religion.<sup>20</sup> Philosophy and religion have gained respectability with the sophisticates, and such works as Toynbee's *Christian Philosophy of History*, Lecomte des Nouey's *Human Destiny*, and *The Road to Reason*, and Liebman's *Peace of Mind* have become best sellers.

Well-informed observers now testify to a general religious awakening. It does not evidence itself in the form of the old-time emotional revival, but appears in such movements as the effort of merchants and manufacturers

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<sup>20</sup> Editorial, 34 A.B.A.J. 1119 (December 1948).

for Christian Ethics in Business. As stated by C. A. Arlington:

“The brotherhood of mankind” is now an article of faith with many who reject the doctrine on which alone it securely rests, the Christian ideal is accepted by many who deny its creed, and what are called the Christian virtues are honored by many who do not know them to be divine.<sup>21</sup>

Such activity can hardly be called *religious* in the true sense of the word. But it does emphasize the moral significance of life and give practical effect to the teaching of religion. We realize this when we read in an influential magazine the statement of a great teacher of economics that “the basis of all ‘sensible and feasible’ economic policies is *moral rather than economic*.”<sup>22</sup> The best exemplification of the practical application of a religious principle is found in the doctrine of trusteeship which is now accepted and implemented by the United Nations. Such concern for backward and unfortunate people is but Christian charity applied to international affairs. Charity and service are substituted for imperialism and exploitation in international relations.

When we read the recent address of Mr. John Foster Dulles, advisor on our bi-partisan foreign policy, we recognize how nearly complete is our return to Natural Law. Speaking on the possibilities of peace in the world, he said:

Two great principles are here involved. One is rec-

<sup>21</sup> C. A. ARLINGTON, *EUROPE, A PERSONAL AND POLITICAL SURVEY* (1948).

<sup>22</sup> William A. Orton, *Business and Ethics*, *Fortune*, October 1948, p. 118.

ognition that there is a moral law and that it provides the only proper sanction for man-made laws. The other principle is that every human individual, as such, has dignity and worth that no man-made law, no human power, can rightly desecrate. . . . Experience shows that when men organize a society in accordance with these two basic beliefs, they can, within such society, have peace with each other.<sup>23</sup>

Those two principles are the very pith and marrow of Natural Law.

### *Cycle of Natural Law*

Thus it comes to pass that we witness the repetition again of a cycle of history of Natural Law. Our generation has seen what Dr. Rommen refers to as the Age of Individualism and Rationalism, the Victory of Positivism, and now the Reappearance of Natural Law. The very force of circumstances, the tragic and fateful crisis that confronts us, compel us, if we are to save humanity from violence and degradation, to turn again to those principles of life which differentiate men from the brutes. And as Macneile Dixon has said, "If there is anything at all to distinguish man from the brutes, it is his very singular faith in absolute and eternal values."

Twenty-five hundred years ago Plato in his discussion of the Laws introduced the doctrine of an ideal law which resulted from the divine ordering of the cosmos. The Stoics developed this idea into the doctrine of a universal law binding all rational beings into a world community. A cosmic law should have cosmic validity, and as a result

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<sup>23</sup> John Foster Dulles, *Which Way to World Peace . . . Revolution or Reform* 3 FREEDOM AND UNION 8 (October 1948).

all mankind should participate in a sphere of rights and duties that transcend political boundaries.<sup>24</sup> To the Roman jurists this became the Law of Nature; i.e., the natural law of man's moral nature, or Natural Moral Law. It was accepted by the Church Fathers because it was consonant with Christian teaching. And through them it came to the Scholastic philosophers of the Middle Ages, who welded it and implemented it into constitutionalism, the theory of government limited by law. That is the source and essence of Western civilization and the very foundation of our own national life.<sup>25</sup>

But the history of Natural Law has not been so direct and smooth as that brief summary would indicate. It has suffered the slings and arrows of misfortune. It has been misused and abused. Like all doctrines that exercise restraint and make for righteousness, it has been opposed by the perversity and evil tendency which is inherent in human nature. Moreover it has been misrepresented by its over-zealous adherents, and then scoffed at by skeptics and cynics. It has been erroneously referred to as support for many false doctrines. Autocracy, vested interests, and reaction have been especially prone to use it as a shield for imperialism. As a result, many have opposed it who should have opposed only its abuse.

But in spite of all opposition, and the numerous periods of neglect and decline, Natural Law comes again into ascendancy, because it is based on man's rational and social nature and the moral order of life. As Emerson said:

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<sup>24</sup> Glenn R. Morrow, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 43 (1948).

<sup>25</sup> ROBERT N. WILKIN, *THE JUDICIAL FUNCTION AND INDUSTRIAL AND INTERNATIONAL DISPUTES* 28-33, 36 (1948); Manion, *op. cit. supra* note 7.

The intuition of the moral sentiment is an insight of the perfection of the laws of the soul. These laws execute themselves.<sup>25a</sup>

And so in our day, at the very time when the positivists were proclaiming their exact science of law, and the modern skeptics, like the sophists of old, were denying all possibility of truth or justice, and the teachers of the intelligentsia were proclaiming the death of Natural Law, an inexorable destiny impels us to recognize it as the controlling factor in our political life and our only hope for peace and security. Our present experience brings back to us the conclusions of the Stoic philosophers, the Roman jurisconsults, and the Church Fathers. And so again the Natural Law returns to bury its undertakers.

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Before I conclude I should like to make two general observations: (1) On constitutionalism, and (2) on the practice of courts.

(1) *Constitutionalism*

Constitutionalism is the true implementation of Natural Law, but it is threatened today by a too far swing toward absolute or unrestrained democracy.

Every normal man is subject to two conflicting impulses. One prompts him to do as he pleases. The other prompts him to do as he ought. One produces conduct that is willful, capricious, arbitrary. The other produces conduct that is reasonable, conscionable, just.

These conflicting impulses are present not only in every individual but in every aggregation of individuals, includ-

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<sup>25a</sup> R. W. Emerson, Address, Divinity College, MISCELLANIES 118 (Houghton, Mifflin & Co. 1882).



ing nations and states. But the impulse to willful and arbitrary conduct becomes stronger in those who exercise the power of government. And, as already stated, the development of extreme nationalism has tended to encourage and defend the exercise of autocratic power, because the selfish tribal instinct is stronger in men than their ethical judgment. Human history is largely the story of conflict between arbitrary wills. And the history of political evolution is the story of what von Jhering referred to as "The struggle for law"; that is, the effort to bring the arbitrary will under the control of reason and ethical judgment.

The culture or civilization of a man or a nation may be measured by the degree to which arbitrary conduct has been brought into rational control. "The wise man does what ought to be done." The supreme accomplishment for control of government is constitutionalism. That is the great achievement of Western civilization. It provides a government not of men but of law, as distinguished from the absolutism or despotism of Eastern civilization. Just as man has found it necessary to have some fixed standards and principles to control his arbitrary will, so the state has need of some permanent principles, embodied in a constitution, which set bounds to its arbitrary impulses as expressed in government or the popular will at a particular moment.

The theory of government-subject-to-law was known to Greek philosophers and Roman jurisconsults. Cicero dealt with the idea in the Commonwealth. But it was never implemented and made effective until the Middle Ages. Prior to that time there was no independent

agency, no permanent judiciary, to give effect to the law and restrain the arbitrary power of governmental agents.

When men of the Church brought humanity up out of the Dark Ages they became ministers of state and for hundreds of years served as justiciars of the law.<sup>26</sup> They were educated in the canon law of the Church and the civil law of Rome. Their training therefore embraced both Christian ethic and Natural Law. They examined the theory of the state and the function of government in the light of the teaching of a universal church. It was therefore natural for them to hold that "the King is under no man but under God and the law." That statement by Bracton, a priest and judge, and quoted so effectively by Coke, Chief Justice, became the cornerstone of constitutionalism.

The clerical judges were able to make their theories effective because of their independent and secure positions as officers of the church and because of their consecration to the service. When church and state became separated and men of the church ceased to fill the judicial offices, the legal profession had been so impressed by their standards that it carried on the same traditions, just as the judges assumed the priestly robes.

Thus we see that constitutionalism, the essence of Western civilization, is dependent on two things:

1. The Natural Law theory of a higher law to which government itself is subject, and
2. Independent courts, presided over by men of learning who are consecrated to judicial service, with

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<sup>26</sup> WILKIN, *op. cit. supra* note 25, at 12 *et. seq.*

authority to restrain abuse of power and arbitrary conduct.

But history teaches that it is the tendency of those who oppose autocracy to arrogate to themselves the same arbitrary power when they become entrusted with the authority of government. Thus when Parliament won its struggle against the Crown, it substituted a form of Parliamentary absolutism to replace the absolute sovereignty of the king. That was the cause of the revolt of the American colonies. The founders of the American republic then based their government squarely on Natural Law and provided independent courts for the protection of the inalienable rights which such law recognizes.

But the people were given the power to choose their representatives in government, and now we see a tendency to enlarge that power into a form of popular absolutism, "the dictatorship of the proletariat." The populace is impatient of any legal restraint, and "is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." Flattered by demagogic references to "the sovereign people," the voters are led to believe that they are absolute sovereigns and that their arbitrary will must prevail. But insofar as that takes place, constitutionalism disintegrates,<sup>27</sup> and, as Madison said:

In a democracy, where a multitude of people exercise in person the legislative function, and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious

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<sup>27</sup> CORWIN, *op. cit. supra* note 17, at 181, 182.

intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. (p. 309)

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. (p. 300)<sup>28</sup>

It is apparent that our peace and security are endangered today by an erroneous conception of sovereignty. It affects both our domestic and foreign affairs. It is wrong because the claim of absolute sovereignty contravenes the fundamental principles of Natural Law, i.e., the concept of a higher law binding on all men and on government itself. As Professors McIlwain and Corwin have said, sovereignty is historically a legal concept and implies legal limitation in its very statement.<sup>29</sup> It can not absolve men or nations from the obligation to be guided by reason rather than arbitrary will.

We can not maintain our free institutions at home or extend them to the world by the assertion of absolute sovereignty and arbitrary will. If freedom and human dignity are to be preserved, we must preserve constitutionalism and the Natural Law, upon which it was founded. As Mark Ethridge says, "We are the trustees of both the ideological and physical forces of Western civilization . . ."

### (2) *Practice in Courts*

Now in closing, if I may be indulged, I should like to take advantage of this opportunity to give some personal

<sup>28</sup> THE FEDERALIST 300, 309 (G. P. Putnam's Sons, 1889).

<sup>29</sup> CORWIN, *op. cit. supra* note 17, at 188.

testimony in support of Natural Law. Ever since I became interested in the philosophy of law I have been hearing the opponents of Natural Law say:

It is impractical. It is idealistic. Its aims and principles are very well for such reflective studies as Ethics and Moral Philosophy, but they have no place in the actual administration of positive law.

As a result of ten years of experience as a trial judge in a United States District Court I am convinced that such assertions are not true. In fact they are mere nonsense. The principles, standards, and precepts of Natural Law are continually employed by courts as the constitutions, statutes, and precedents are interpreted and applied to the ever-varying circumstances of life. They are employed also in the interpretation of wills, contracts, conduct and relationships of life. They are part of man's nature and cannot be separated from his life.

Courts continually use such tests as, What is reasonable? What is true? What is fair? What is just? They do not stop to ask Pilate's question. They are not disturbed by the intricate ratiocinations of the skeptics who think that all such concepts are merely subjective and actually unattainable. Courts are not deterred by such conceits. They believe that "Thinking is very far from knowing." They act upon the admonition of Ruskin that if we "would only just *look* at a thing instead of thinking what it must be like, or *do* a thing instead of thinking it cannot be done, we should all get on far better."

In order to illustrate the attitude of courts toward the assertions of the skeptics, Dean Pound has developed the analogy to the attitude of civil engineers toward the the-

ories of the higher mathematicians. In spite of the discrediting effect of relativity upon the axioms of geometry, he points out that surveyors continue to use those axioms to meet the needs of men for highways, railroads, and bridges. So courts rely on the thoughts and beliefs of common men and give to words their generally accepted meaning, in confidence that in such matters "the children of this world are in their generation wiser than the children of light."

Not only do courts actually employ the ideals and standards of Natural Law; I shall say further, that a judge of sentient mind and heart would hardly be able to endure the responsibilities of office if he were denied the guiding influence and sustaining strength of Natural Law precepts and philosophy.

And so the summation of all my study and experience brings me to agreement with the statement of Professor McIlwain that Cicero's words defining Natural Law are "among the most memorable in political literature":

There is in fact a true law — namely, right reason — which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the Senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule at

Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of a man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men call punishment.<sup>30</sup>

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<sup>30</sup> WILKIN, *ETERNAL LAWYER: A LEGAL BIOGRAPHY OF CICERO* 225 (1947).

