The doctrine of the natural law is as old as philosophy. Just as wonder, according to Aristotle, lies at the beginning of philosophy, so, too, is it found at the beginning of the doctrine of natural law.

In the early periods of all peoples the mores and laws, undifferentiated from the norms of religion, were looked upon as being exclusively of divine origin. The order according to which a people lives is a divinely instituted order, a holy order. This is true of the ancient Greeks, among whom all law was stamped with the seal of the divine. It likewise holds good for the early Germans: their law bore in the primitive period a distinctly sacred character. Nor is it any less true of the Roman people, whose legal genius enabled its law twice to become a world law.1 For

1. "It is owing to their wonder that men both now begin and at first began to philosophize; they wondered originally at the obvious difficulties, then advanced little by little and stated difficulties about the greater matters, e.g., about the phenomena of the moon and those of the sun and the stars, and about the genesis of the universe. And a man who is puzzled and wonders thinks himself ignorant (whence even the lover of myth is in a sense a lover of Wisdom, for the myth is composed of wonders); therefore since they philosophized in order to escape from ignorance, evidently they were pursuing science in order to know, and not for any utilitarian end" (Metaphysics, A. 5, 98b10; trans. W. D. Ross).

2. That is, in the third and fourth centuries of the Christian era, after all the free inhabitants of the Roman Empire had been made citizens (312), and in the Middle Ages through its incorporation in the canon law of the Church, in its systematic study in the universities, and its subsequent reception in Western Europe. Cf. Roscoe Pound, "The Church in Legal History," in Jubilee Law Lectures, 1889-1919. School of Law,
among the Romans, too, law in the earliest times was divine law. Moreover, even the later period, when the Romans had already hit upon the distinction between strictly sacred law (sacrum) and profane law (sanctum), still afforded clear evidence of the sacred origin of Roman law: the pontiff remained the dispenser and custodian of the law until Roman legal reason emancipated itself from this sacred law of the priests.

This theological cast of all primitive law has two characteristics. Such law is essentially unchangeable through human ordinances, and it has everywhere the same force within the same cultural environment.

The idea of a natural law can emerge only when men come to perceive that not all law is unalterable and unchanging divine law. It can emerge only when critical reason, looking back over history, notes the profound changes that have occurred in the realm of law and mores and becomes aware of the diversity of the legal and moral institutions of its own people in the course of its history; and when, furthermore, gazing beyond the confines of its own city-state or tribe, it notices the dissimilarity of the institutions of neighboring peoples. When, therefore, human reason wonderfully verifies this diversity, it first arrives at the distinction between divine and human law. But it soon has to grapple with the natural law, with the question of the moral basis of human laws. This is at the same time the problem of why laws are binding. How can laws bind the conscience of an individual? Wherein lies, properly speaking, the ethical foundation of the coercive power of the state's legal and moral order? Closely connected with these problems is the question of the best laws or best state, a matter which from the time of Plato has engaged the attention of nearly all exponents of the great systems of natural law. Before long, however, a related idea made its appearance. This was the view that the tribal deities are not the ultimate form of the religious background of reality. For if an eternal, immutable law obliges men to obey particular laws, behind the popular images of tribal deities exists an eternal, all-wise Lawgiver who has the power to bind and to loose.\(^3\)

It is quite understandable, then, that the philosophical conception of the natural law should have made its first appearance in the area of Western culture among the ancient Greeks. This dynamic people was endowed with a penetrating critical intelligence, with an early maturing consciousness of the individual mind, and with great power of political organization. Indeed, Western political philosophy likewise originated in this gifted people.

It is a remarkable fact that at the very beginning of the Greek philosophy of law (or rather of the laws), and thence of the natural law, a distinction came to light which has survived down to the present time, a distinction between two conceptions of the natural law. One is the idea of a revolutionary and individualistic natural law essentially bound up with the basic doctrine of the state of nature as well as with the concept of the state as a social unit which rests upon a free contract, is arbitrary and artificial, is determined by utility, and is not metaphysically necessary. The other is the idea of a natural law grounded in metaphysics that does not exist in a mythical state of nature before the "laws," but lives and ought to live in them—a natural law which one would find, though somewhat ineptly, style conservative. It is further significant that the notion of God as supreme Lawgiver is intimately connected with the latter conception. Both of these tendencies are already plainly visible in the first Sophists and in Heraclitus, the great forerunner of Plato.

Heraclitus of Ephesus (cir. 535–470 B.C.) is famous for his thesis that "all things flow; nothing abides." But this ceaseless changing of things led him directly to the idea of an eternal norm and harmony, which exists unchangeable amid the continual variation of phenomena. A fundamental law, a divine common logos, a universal reason holds sway: not chance, lawlessness, or irrational change. Natural occurrences are ruled by a reason that establishes order. Man's nature as well as his

\(^3\) See, in general, Otto Kerber, Religions of Mankind, trans. by E. I. Watkin (New York: Sheed and Ward, 1936), chaps. 1 and 2.
earned for them, among posterity, the sinister reputation of philosophical rotepanders, rationalistic revolutionaries, and contemners of the law. For this reputation Plato has been particularly responsible. But this judgment is, to say the least, far too harsh. That the Sophists had of necessity to appeal to the Greeks as revolutionary rationalists is explained, on the one hand, by their reckless criticism of contemporary social institutions and their cynical skepticism in political matters, and, on the other, by the high esteem in which their opponents held the laws and the polis, or city-state.

Their laws were the pride of the citizens of the Greek polis, and the Sophists were mostly foreigners. Heraclitus had looked upon the laws as equal in worth to the walls of the city. The philosophers spoke of the nomos, or laws, with the greatest respect: the peoples who had no polis were to them barbarians. Hence it happened, too, that Socrates, despite his distinction between what is naturally right and legally right, pronounced the laws of Athens to be "right" without qualification. The citizens, consequently, were under obligation to obey them, even as he also obeyed them to the bitter end. For Plato likewise the laws of Athens were for the most part something inviolable. He regarded the social order founded upon them as good, even if capable of improvement; never did he term it bad. Therefore to these aristocrats in political outlook as well as in thought, the social criticism of the Sophists necessarily passed not only for an attack upon the foundations of a particular order of a particular polis, but also for a malicious assault upon the right order of the polis itself.

Moreover, in point of fact the Sophists had much in common with the revolutionary natural-law ideas of the eighteenth-century Enlightenment, especially with Rousseau's doctrine and its reckless criticism of existing society. In the case of the conservative natural law (if one wishes to speak of a political tendency) the distinction between natural and positive law served to justify and improve the existing positive law. It was, however, the tendency, an avowedly political tendency, of the natural-law concept of the Sophists to point out, by contrasting the current positive law with what is right by nature, not merely the accidental need for reform of the laws but the substantial wrongness of the laws. To the Sophists the laws were not venerable because of tradition


5. Fragment 44; ibid., p. 31.
or by reason of having stood the actual test of life in the city-state: they were artificial constructs and served the interests of the powerful (Thrasymuchus). Thus the laws possessed no inherent value, for only what is right by nature can have such value, and to this the Sophists were continually appealing. They did not deny, therefore, the form of the natural law and what is moral by nature. They merely brought out the sharp contrast between the prevailing order of the city-state and the natural law as they preached it, and they ridiculed Socrates who looked upon the laws of Athens as purely and simply "just." Callicles, who was the first to advance the thesis that might makes right, wished thereby to give expression to a fact which he was criticizing: This was that the ruling classes, while they declared their laws, i.e., those which worked to their advantage, to be naturally just, were misusing the idea of truly natural justice, and were desirous only of subjecting the people to their class interests.

By contrasting, in the light of their social criticism, what is naturally right with what is legally right, the Sophists attained at this early date to the notion of the rights of man and to the idea of mankind. The unwritten laws, said Hippias, are eternal and unalterable: they spring from a higher source than the decrees of men. To Hippias' way of thinking, all men are by nature relatives and fellow citizens, even if they are not such in the eyes of the law. Therewith the distinction between Greeks and barbarians, fundamental for Greek cultural consciousness, vanished into thin air. "God made all men free; nature has made no man a slave" (Alicidas). The whole ethical and legal foundation was thereby taken away from slavery, which was in turn the very basis of the Greek social and economic system. Nevertheless Plato held fast to the institution of slavery, and Aristotle was ever striving to justify it by means of his theory that certain men are slaves by nature.

Three ideas, heavily charged with social explosives for the world of Greek culture, were thus put forward by the Sophists as part and parcel of the natural law. These ideas were thenceforth to be subjected to a ceaseless reprocessing in the history of the mind. Time and again they were to serve revolutionary thinkers as molds and vessels into which these could pour their revolutionary emotions, their schemes for reform, and their political aims. The first idea was that the existing laws serve class interests and are artificial constructions. Only what is naturally moral and naturally right can be properly called moral and right. Next came the idea of the natural-law freedom and equality of all human beings and, as a consequence, the idea of the rights of man as well as the idea of mankind, the civitas maxima, or world community, which is superior to the city-state. According to the third idea, the state, or polis, is nonessential: it owes its origin to a human decision, i.e., to a free contract, not to a necessity of some kind. The political organization of man must therefore have been preceded by a state of nature (portrayed optimistically or pessimistically), in which the pure natural law was in force. According to the optimistic view of the state of nature, this law can in its essential contents be neither altered nor abrogated by the state; in the pessimistic view, which leads to positivism, it is merged in the will of the state. But after the lofty flight of speculation had been exposed to the needed self-criticism, the successors of the Sophists fell quickly into skepticism and into a sheer positivism when the underlying optimistic outlook ran afoul of the facts. This was, for instance, the case with the Epicureans, who were the first legal positivists. The Sophists' criticism of the positive laws, together with the rapidly growing prominence of the notion of utility, led Epicurus, whose sensi- tic epistemology left no room for metaphysics, to doubt that anything can be objectively and naturally right. Utility and pleasure became for him the sole principles of ethics and law. But since the resultant subjectivism must endanger the social order and with it the peaceful enjoyment of pleasure, he inferred from the principle of utility that justice as such is a chimera, that it rather exists only in agreements which have been entered into for the prevention of mutual injuries. Justice thus consists entirely in positive laws. Before men entered into agreements and before there were laws founded upon such agreements, men had lived in a haphazard manner, like wild beasts, lawlessly. The state of nature, upon which the Sophists had placed an optimistic construction but which they had not particularly stressed, was thus interpreted in a pessimistic sense in Epicurean circles. From this, however, sprang also the respect of the Epicureans for the existing laws as well as their emphasis upon the value of the legal notions and customary law of individual peoples. The parallelism between the Sophist and
Epicurean doctrine on the one hand and, on the other, the natural-law schools of modern times is quite unmistakable. Rousseau, Hobbes, Pufendorf, Thomasius, and the adherents of historical schools of law, who variously combine the elements of individual systems, merely repeat and develop these ancient ideas.

The starting point of the Sophists was a criticism of the nomoi of the Athenian democracy. In their role and guise of popular philosophers and in their political and skeptical snoopbery they frequently defended the opposite theories. As if the revolutionary criticism of the nomoi in behalf of slaves and non-citizens, considered barbarians, and the conservative utilitarianism of Epicurus were not sufficiently unsettling, Callicles, if we are to trust tradition, stood forth as champion of the doctrine of the right of the stronger, i.e., that might makes right. A pure materialist in his philosophy, Callicles reached the conclusion that law, such as obtained in the Athenian democracy, was in reality injustice.

For, he contended, the many who are weak have united to fetter with the bands of law the few who are strong. But nature teaches, as a glance at the animal kingdom and at warring states reveals, that the stronger naturally overcomes the weaker. Natural law, then, is the force of the stronger. For this snobbish leader of the oligarchic faction such was the way one could and should get at the Athenian democracy. But other Sophists, among them Hippias, put forward the demagogic formulas of human rights and of the freedom and equality of all to achieve the selfsame purpose—the overthrow of the bourgeois democracy. 6

The metaphysical natural law of Plato as well as the more realistic one of Aristotle formed the high-water mark of moral and natural-law philosophy in Greek civilization. Stoicism, on the other hand, in a remarkable eclectic synthesis of single principles drawn from many philosophers, furnished in its system of natural law the terminology or word vessels into which the Church Fathers were able to pour the first conceptions of the Christian natural law and to impart them to the world of their time.

7 On these ideas of the Sophists, see the excellent discussion of George H. Sabine, A History of Political Theory (New York: Henry Holt and Co., 1937), pp. 25-34.

The danger of skepticism, to which the extreme rationalism of the Sophists lay exposed, was first clearly perceived by Socrates. The Sophists' juggling of ideas and their paradoxes threatened to dissolve the notion of goodness and morality, just as their extremist social criticism and their libertarian ideology, directed in the name of the natural law against law and custom, called into question the value of the nomoi. Socrates did not merely teach the essence of goodness and justice by his inductive, question-and-answer method. Through the thesis that virtue consists in knowledge, he also showed that there exists a knowable objective world of such values as goodness, beauty, and justice, and that no one does evil for evil's sake but because it somehow, culpably or through ignorance, appears to him as good. Wherefore knowledge means the contemplation of the idea of justice, and so on. The claim, reason, conscience and its voice, he regarded as a reflection and testimony of these ultimate values and of the divinely instituted order of the world. Herein lies the significance of Socrates for the idea of the natural law. It does not lie in his frequently stressed fidelity to the law, although, to counteract the criticism of the Sophists, he placed such emphasis upon the value of the laws that, out of respect for the law's function of safeguarding right, he went so far as to condemn absolutely any disobedience to a particular unjust law. 7

The great masters of Greece, Plato and Aristotle, also directed their

6 On these ideas of the Sophists, see the excellent discussion of George H. Sabine, A History of Political Theory (New York: Henry Holt and Co., 1937), pp. 25-34.

The validity of this particular use of the higher-law doctrine is beside the point.
attacks at the Sophists and their destructive criticism. Plato and Aristotle were chiefly, though not in the same degree, concerned with goodness and with its realization in the state. Their interest, however, did not center in the individual. It is quite common, rather, to speak of both as leaning toward state socialism or totalitarianism. For them, then, in accordance with the idea of order, the first and fundamental aim of justice is not freedom for its own sake, but order. Freedom is aimed at only so far as it realizes order. For this reason the law occupied the foreground of their thought. They were at great pains to discover and to establish the ethical basis of the laws; not like the Sophists, however, in the interest of freedom from the laws. The state and its order as the sphere of morality, as the realization of all virtue, engaged their attention. This explains their preoccupation with the best form of state or government, in which the individual, whom the Sophists made so much of, is swallowed up. If we should think of the natural law in terms of its long accepted identification with socio-philosophical individualism, there would really be little room for the idea of the natural law in Plato or even in Aristotle.

A deeper penetration into the thought of Plato and Aristotle will show, however, that they too distinguish between what is naturally just and what is legally just. Nor is this distinction merely a borrowed formula; it is an integral part of their doctrinal structure. Yet in the case of both we can observe a certain version to the "naturally just," which is accounted for by the Sophists' abuse of this distinction, an abuse which Plato severely censured.

The disciples of Socrates arrived at the notion of something naturally just by quite another route than the one the Sophists had taken. They arrived at it by way of the doctrine of ideas and through teleological thinking. Following in the footsteps of Heraclitus, Plato acknowledges the world of the senses and the world of ideas that become manifest in intellectual contemplation. For speculative reason, sense phenomena are the bridge of memory to the ideas, which dwell and live on in their supermundane, heavenly abode. The things of this world are or exist only so far as they participate in the being of the eternal ideas, or so far as man in his creative capacity of craftsman, artist, and especially lawmaker copies these ideas. Here teleological thinking enters the scene.

In the concept which gropes after and apprehends the essence or the idea of the thing there is contained at the same time also its end, the completion or perfection of the idea of the thing. Inversely, too, the mind lays hold of the essence of a thing by finding the ideal concept which corresponds exactly to the literal meaning. Hence we speak of the true physician, the true judge, the true lawmaker, the true law. These two starting points of Platonic speculation lead then to such conclusions as that the judge ought to be a true judge, i.e., he ought to complete in himself the idea of judge. The ideal concept becomes a norm. So declares the Athenian in Plato's Laws: "When there has been a contest for power, those who gain the upper hand so entirely monopolize the government as to refuse all share to the defeated party and their descendants. . . . Now, according to our view, such governments are not politeis at all, nor are laws right which are passed for the good of particular classes and not for the good of the whole state. States which have such laws are not politeis but parties, and their notions of justice are simply unmeaning." The law should be a true law: one that benefits the common weal. Therein its idea achieves its completion. Thus Plato contrasts the true and proper law with the positive law, and he makes the former the measure and criterion of justice for the latter.

This true law, this true right, abides in the realm of the ideas and remains forever the same. On the other hand, the positive laws change, and they may claim legal force only because and so far as they partake of the idea of law. Indeed they are but a reflection of true law. The lawmaker must look up into the realm of the ideas, where dwells the real essence of the immutable, eternally valid law. However, philosophers and philosopher-kings, freed through disciplined thinking from the blinding illusions of the senses, can alone do this. Moreover, this world of ideas, whereof the world of sense appears only as an imperfect copy, is kairos, or order; it is not akhaimin, or disorder. But this order of the ideas is the pattern for the fashioning of moral and legal conduct in the present world. The being of the ideas is oneness for man who shapes things in accordance with contemplative knowledge, whether

S. Laws, IV, 75 (Jowett's translation).
he forms himself or a community unto goodness. Underlying all this, of course, is the conception of a human nature with impaired powers of contemplation. Only the man of disciplined mind, not the great mass of men, can see intellectually. This doctrine is the opposite of the optimism of the Sophists. If Plato, then, scarcely ever makes use of the Sophists' antithesis of physi and omen, he by no means identifies the natural law, which he recognizes, with the positive law.

The difference between Plato and the Sophists lies elsewhere. The Sophists started from the freedom of the individual, who had to be liberated from traditional religious and political-legal bonds. For the polis, the state, is not something eternal, nor is its law. It is mankind that is eternal: the cives maxima of free and equal men. In the eyes of Plato, however, the polis and its law were the indispensable means for realizing the idea of humanity, which reaches completion in citizenship, in the ethical ideal of the citizen, of the law-shaping and just man. The state is the great pedagogue of mankind. Its function is to bring men to morality and justice, to happiness in and through the moral virtues. Hence Plato's thought revolves continually around the idea of the best state or government. But this is also why he recognizes a natural law as ideal law, as a norm for the lawmaker and the citizen, as a measure for the positive laws. His metaphysics and the ethical system which he built thereon made a natural law possible and furnished the foundation.

Aristotle passed for centuries as the “father of natural law.” St. Thomas, in that section of his Summa theologica which deals with law, repeatedly appeals to him as the Philosopher par excellence. Aristotle, however, as should now be clear, was not the father of the natural law. Nevertheless his theory of knowledge and his metaphysics have provided ethics, and consequently the doctrine of natural law, with so excellent a foundation that the honorific title, “father of natural law,” is readily understandable.

Plato had totally separated the world of sense perception from the world of pure ideas, the objects of scientific, necessary, and true knowledge (universalia ante rem). Aristotle transferred the idea as the form which determines the formless matter into the individual (universalia in re). This "becomes" through the union of the form (or the essence or the true whiteness) with the matter (or the potency or the possibility) and thus gives actuality to the individual. The archetype for Aristotle was human artistic activity: the architect who constructs a house according to the plan in his mind; the sculptor who molds a statue in accordance with his artistic conception; even organic nature which causes the plant to grow from the actualizing essential form that exists in the seed in an incorporeal manner. Aristotle wished to comprehend motion, development, becoming. To him, therefore, the essence, and the perfect expression of it in the individual, is also the telos, or end. The form is thus the efficient and the final cause at one and the same time. Applied to the domain of ethics, however, this means that pure being or the pure essential form is likewise the goal of becoming for the man who is to be fashioned by education into a good citizen. From the essential being results an ouchness for the individual man. In this way, from the content of the primary norm, "strive after the good," arises the norm, "realize what is humanly good," as it appears in the essential form of man. The supreme norm of morality is accordingly this: Realize your essential form, your nature. The natural is the ethical, and the essence is unchangeable.

But a criterion of actions is thereby established. Some actions correspond to nature, and hence are naturally good; others are repugnant to nature, and hence are naturally bad. This settled, Aristotle advances to the distinction between what is naturally just and what is legally just. Both are objects of justice. Justice, however, taken in the narrower sense (for in the wider sense the virtuous man is the just man purely and simply) and distinguished from morality, is directed to the other, to the fellow man, whether as equal (commutative justice) or as fellow member of the comprehensive polis-community (distributive and, in the behavior of the member with regard to the whole, legal justice). It finds expression in the natural law and in the positive law. The latter originates in the will of the lawmaker or in an act of an assembly; the natural law has its source in the essence of the just, in nature. That which is naturally right is therefore unalterable. It has everywhere the same force, quite apart from any positive law that may embody it. Statue or positive law varies with every people and at different times.
Yet the natural law does not dwell in a region beyond the positive law. The natural law has to be realized in the positive law since the latter is the application of the universal idea of justice to the myriad manifold of life. The immutable idea of right dwells in the changing positive law. All positive law is the more or less successful attempt to realize the natural law. For this reason the natural law, however imperfect may be its realization in the positive law, always retains its binding force. Natural law, i.e., the idea and purpose of law as such, has to be realized in every legal system. The natural law is thus the meaning of the positive law, its purpose and its ethically grounded norm.

Recognition of the fact that no system of positive law is altogether perfect brought Aristotle to the principle of equity. The law is a general norm, but the actual matters which it has to regulate issue from the diversity of practical life. Of necessity the positive law exhibits imperfections; it does not fit all cases. Equity thereupon requires that the individual case get its right, i.e., that the imperfection of the formal law be overcome by means of material justice, through the content of the natural law. Thus Aristotle already viewed the judge's function of filling up gaps in the law as an attempt to apply the natural law—if indeed the positive law is rightly to bear the name of law at all. The gaps are consequently the gateways through which the natural law continually comes into play. In such cases the judge has to decide in accordance with the norm which the true legislator would himself apply if he were present; the true legislator of course is always assumed to will what is just. This is a celebrated formula which in these very words or in the form, "which he [the judge] would lay down as lawmaker," still found its way into the great codifications of civil law undertaken in the nineteenth and twentieth centuries (e.g., the Austrian and Swiss Civil Codes).

Concerning the content of the natural law Aristotle had as little to say as Plato. This was in sharp contrast to the Sophists, who because of their political and socio-critical bias had admitted many reform proposals and demands into their natural law. The silence of Plato and Aristotle finds its explanation in their idea of the natural law: they set out from the conservative conviction that the positive law wishes to realize the natural law. Added to this was their strong belief in the excellence of the existing laws of the polis as well as in the conformity of such laws to the natural law. The city-state, its general welfare, and its happiness occupied so prominent a place in the ethical thinking of Plato and Aristotle—for whom indeed the idea of man achieves ultimate perfection in the good citizen—that they looked upon the existing laws as something holy. In contrast to the individualistic attack launched by the Sophists against them, the natural law of Plato and Aristotle served precisely to justify the existing laws and not merely as a basis for criticizing them, although the function of criticism was regarded as included in the idea of natural law. Furthermore, for Aristotle as for Plato the polis or city-state was the great pedagogue, against which, strictly speaking, no natural, subjective right of the citizen could be admitted. They acknowledged no goal of man that transcends the ideal polis. They remained state socialists. Their doctrine of natural law was from the political standpoint conservative, but it was based on metaphysics. With the effective discovery, through Christianity, of human personality and with the recognition of God's intellect and will as the source of the natural moral law, rational thought would thenceforth be in a position to work its way through to the true natural law.

In the public squares of Athens and on the steps of its public buildings the worthy Sophists had once taught their rationalistic philosophy, their revolutionary natural-law doctrine. In the same places Socrates, the "lover of wisdom," and Plato and Aristotle, following him, had risen up against the skepticism that was already making its appearance among the Sophists, a skepticism evoked by the doctrine of man as the measure of all things and by the resultant subjectivism in epistemology and ethics. This trio of thinkers had anchored anew in philosophy the natural law which at the hands of the Sophists had been threatening to decline into a mere rationalization of political interests.

With the disappearance of these intellectual giants from the scene, however, the Skeptics, the positivists of their day, began at once to hold forth in the same halls and gardens of the Academy at Athens.

The senses, they taught, do not convey true knowledge but only illusion; even reason does not guarantee the truth and certitude of knowledge; certainly, then, truth cannot arise from the illusions of both the senses and reason. All laws, whether of art, speech, morality, or rights, are arbitrary. They have their origin in mere agreement, and they vary with the change of the free will which establishes them. As no assertion is of more value than its opposite, so, too, no law is worth any more than its opposite. Likewise, since we cannot perceive the essence or nature of things and of man, a natural law is impossible.

Skepticism attained its highest point in the teaching of Carneades (cir. 215-125 B.C.), who for a long time was scholarch at Athens. About 155 B.C., in Rome, he directed his attacks against the natural-law doctrine of the Stoics, a contest which he had made the principal mission of his life. There he won fame through his pro-and-con method of demonstration, whereby he strove to heap ridicule upon the notion of justice. One of his most celebrated arguments was drawn from the borderline case known as "the plank of Carneades." At a time of shipwreck two persons swim to a plank and grasp it simultaneously. But the plank can hold up and save only one of the two. In the light of this case what is right, and who has the right to the plank? Both and neither, he answered, in such a case of dire necessity and self-preservation. (Seventeen centuries later Suarez furnished the correct solution: the order of justice here terminates, and the order of charity governs the case.) Positivism in ethics and law reached its climax with Carneades, again in connection with the repudiation of objective knowledge of reality and essences and with the denial of metaphysics.

Stoicism prepared the way for the Christian natural law. It was founded in Greece as a school of philosophy by Zeno, who lived from about 340 to 265 B.C. It came to its full flowering in Rome in the imperial age. The great figures of Seneca and the emancipated slave Epictetus as well as the appealing personality of Emperor Marcus Aurelius adorned the Stoic school. Cicero, however, was its great popularizer, and the wealth of Stoic thought was handed down to the medieval world mainly in his writings. Stoicism, moreover, greatly influenced the various schools of Roman jurisprudence. The passages of Roman law which touch the natural law have their source mostly in Stoic philosophical literature.

Stoicism thus reached its height at a time when the society of the ancient world was definitively splitting into two classes. On the one side stood the plebeian proletariat, kept tractable by largesses of food and other articles and by shows; on the other side stood the new aristocracy and bourgeoisie, largely given over to unrestrained pleasure-seeking and vice. Over both classes, deified and sometimes crazed Caesars eventually established a despotic rule. This environment conditioned the ecclesiasticism of the Stoa, that circle of the few from all ranks and provinces of the world empire who placed the idea of a virtuous life and of attaining happiness of mind through the true, the good, and the beautiful above base sensuality, pursuit of wealth, and pride of life. The Stoics were individualists but, unlike the Sophists, they were not militantly opposed to the polis; indeed, the city-state no longer existed, only the world empire. Therefore they extolled, besides the individual, the social impulses and feelings. They drew upon and assimilated the intellectual goods of Heraclitus, Socrates, Plato, and Aristotle.

The core of Stoic teaching is ethics with its Socratic and, in final analysis, general Greek stamp of intellectualism, according to which correct knowledge is the basis of ethics, and the unity of knowledge and conduct forms the ideal of the sage. This last and most striking representative of the spirit of the declining civilization of antiquity comes closest to the grander representative of Christianity, the saint.

The sage is the man who carries his happiness within himself, who in inner self-sufficiency remains undisturbed by external events. Knowledge and conduct are not dependent on the irregular influences of the world: the sage is calm, unmoved by passion. It is owing to the passions and their excesses that clearness of perception and judgment becomes impossible. For this reason man does not attain to a clear knowledge and judgment of what is truly worth striving for. This consists essentially in conformableness to the rational nature of the sage. Virtue consists in the positive determination of conduct through will power in accordance with rational insight into man’s essential nature. Virtue is right reason. Nature and reason are one. Right reason and the universal law of nature, which holds undisputed sway throughout the universe, are
Injustice which are distinguished by Nature, but also and without exception things which are honourable and dishonourable. For since an intelligence common to us all makes things known to us and formulates them in our minds, honourable actions are ascribed by us to virtue, and dishonourable actions to vice; and only a madman would conclude that these judgments are matters of opinion, and not fixed by Nature.

Time and again the gifted rhetorician contrasts in this manner the law of nature, as the measure and inner source of validity, with the positive law, which to him is a shadow and reflected image of the true law.

Epictetus (citr. A.D. 60—110) likewise called attention to the diversity of the laws that prevail at various times and among different peoples. He taught that the test of whether or not a law accords with nature consists in its agreement or non-agreement with reason. The laws that upheld slavery he called laws of the dead, an abysmal crime. Seneca (d. A.D. 65), in the teeth of the prevailing institution of slavery, gladiatorial combats, and shows featuring the throwing of human beings to beasts, voiced this magnificent sentiment apropos of human dignity: *homo sacra res humani.*

What were originally Sophist doctrines were gaining fresh currency: the dignity of the human being and the natural-law basis of freedom and equality. Slaves, too, are men, blood relations and brethren. Like freemen, they are God's own children, members of a great commune.

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11. The following is another celebrated passage of Cicero on the same subject: "True law is right reason in agreement with nature: it is of universal application, unchanging and everlasting; it summons to duty by its commands, and avers from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abate it entirely. We cannot be freed from its obligations by renunciation, or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchanging law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment." (*The Republic, III, xii,* trans. C. W. Keyes, in the Loeb Classical Library).

The Legacy of Greece and Rome

had held regarding the natural law—all that they had taught touching the lex aeterna, recta ratio, lex naturalis, ius naturale, as well as concerning the connections of these with positive law and their evaluating force in relation to it. It thus preserved the "seeds of the Logos," and it found the literary forms or word vessels into which the Christian spirit was to pour its own ideas, which eventually matured into a new, yet related, doctrine of natural law.

Under the influence of Stoic philosophy the doctrine of the natural law passed into Roman law. The great jurists of the golden age of Roman law were for the most part also philosophers. Through the medium of eclectic Stoicism they were acquainted with Aristotle's teaching on justice and with Zeno's work On the Law; especially, however, they were familiar with the writings of Cicero, the popular philosopher of Stoicism. Besides, the forensic orators were interested in philosophy in their pleadings at the bar. Among these Cicero held first place, but there were also Q. Mucius Scaevola, Calpurnius, and Rutillus, as Cicero himself informs us. This philosophical bent is likewise evidenced by the frequency with which the jurists cite the philosophers. Gaius, for example, quotes Aristotle and Xenophen; Ulpian and Celsus quote Cicero; Paulus mentions Gracch in general. The peculiar function of the jurists, "responding," i.e., imparting legal information and counsel to the judges and litigants alike, involved for the jurists this deeper kind of intellectual labor. Thus Stoic philosophy may with considerable justice be called the mother of Roman jurisprudence. The latter, to keep up the metaphor, sucked in the doctrine of the ius naturale with its mother's milk.

Down to the time of Cicero neither science nor the natural-law doctrine had exercised any practical influence on Roman law. Then, however, theory broke in along a broad front. For Gaius, Paulus, and Marcian the ius naturale is a norm which from the very beginning lies forever imbedded in the nature of things; since it also reveals itself in

15. Meditations, VI, 44.
things, it can be discovered in them. The Stoic idea of an eternal law of the order of the universe was present to their minds. This law emanates from the logos, which in turn is itself the law of things. The logos, moreover, expresses itself conceptually in the nature of things, and it destined them for harmony with the universe. Hence wherever two beings, whether man and thing or two men, find themselves related to each other, a rule covering what is naturally and essentially conformable to this relationship is present in the law of the logos—and is at the same time expressed a priori in the very nature of the correlates. A law rules as an ordering force in the natura rerum, in the world of both irrational and rational creatures.

This became of practical importance as a norm for positive legislation and for the deciding of cases for which the positive law contained no norm. But the natural law especially became the magic formula whereby the jurists in their responsum replaced the ancient law, which had by then become inadequate, with new law introduced under the concepts of lex naturae and aequitas. This they accomplished by means of the edict of the magistrates who were under their influence as well as through the imperial constitutions. In addition, the new law had in its favor the splendor of inherent truth or reason, the charm of simple conformity with nature, and the grandeur of transcending peoples and ages. But to the jurists aequitas was the echo of the lex naturae, the command of an inner voice through which speaks the ratio of the natura rerum immanent in things. Aequitas is the legal conscience which speaks even when a positive norm is at hand, for it is the “meaning” of the positive law. Adjudication, or applying the law, is not a logical and automatic process of subsuming under a general norm: it is interpretation in the light of aequitas.

As material contents of the law of nature the jurists designated such things as the rules touching kinship (marriage—family), good faith, adjustment or weighing of interests (summ cœisque), the real meaning of the actual will of the legal subject as opposed to the formalism of the law governing expression of will. To these may be added the original freedom and equality of all men, and the right of self-defense (eum vi repellere).

Furthermore, the jurists, e.g., Paulus, Ulpian, and Marcial, regarded the ius civilis as possessing special force. Yet even according to them the ius naturae must prevail in case of conflict: what the ius naturae forbids, the ius civilis may not allow; nor may the ius civilis repeal such prohibition (compare the scholastic teaching: the negative precepts of the natural law are forever immutable). To be sure, this question occasioned no real trouble, since the responsum of the jurists possessed, so to speak, legislative force. Thus their doctrine of the ius naturae forthwith gained a footing, along with the finding and the judgment, in the responsum. It also took on positive form in the lex cases, in accordance with which the magistrates were thereafter to proceed in similar cases. In like manner, too, the royal judge in Anglo-Saxon lands, bearing the law, i.e., the natural law, “in the shrine of his breast,” in the very act of handing down a decision conferred positive character upon the natural law in the rule of the case.

The Roman world empire, with its toleration of the legal institutions of subject peoples, placed in the hands of the jurists still another important source of knowledge. This was the unwritten ius gentium, which arose out of actual practice and was substantially “found” by the jurists and magistrates. The ius naturale, derived from metaphysical and ethical reflection, appeared identical with the universal element in the legal systems of individual peoples. As the idea of law thus issued from ethical speculation as a teleological apriorism for the positive law, so it emerged as concept of law in the positive law through abstract treatment of the legal systems of particular peoples. This led to the ius gentium. Consequently the results which philosophical thinking arrived at by way of deduction from logos, ratio, and rerum natura turned out to be identical with the idea of law in the systems of positive law. These in turn are products of the universal, law-creating societas humana and of reason that governs in it.

The equating of ius naturale and ius gentium that is met with even in Gaius has here its origin. Ulpian, on the contrary, defined ius naturale as “that which nature teaches to all animals” (quod natura omnio animantibus docebit); but this is the ordo rerum. The ius gentium thereupon becomes
that part of the *ius naturale* which has force for mankind. This, however, is a product of the will of universal reason, not of the will of some particular historical lawyer.

The Roman jurists still lacked a clear distinction between law and morality. Even the norm “worship must be paid to God” pertained to law, and so did “live honorably.” To the jurists, indeed, jurisprudence was “a knowledge of things divine and human, the science of what is just and unjust.”

But the greatest intellectual gain stemmed directly from Stoic ethics. The Greeks, except for a few revolutionary Sophists, had regarded the citizens of the polis as the sole subjects of law. For the Roman jurists, on the other hand, it was not merely the Roman citizen who was in the true sense a subject of law, but every member of human society (the *civitas maxima* of the Stoics). Therefore they held that man as such is possessed of natural rights, which he continues to retain even in a state of slavery. Slavery was thereby, in contrast to Aristotle’s doctrine, a positive-law institution which could and should be displaced in keeping with being and oughtness.

Even after the revival of imperial sovereignty in the later Roman Empire (under Justinian, A.D. 527–65), the natural law remained the first, supreme, and true legal norm: the basic law of human relations, the model and ideal set before the eyes of the lawmaker for realization. But it was no longer such for the judge, who was henceforth dependent upon the law, or for the citizen. For these the positive law alone had force. Nevertheless the idea of *ius naturale* had so strong a hold that, in contrast with modern absolutism, as, for instance, in the doctrine of Hobbes, the lawmaker remained subject to the natural law not merely as an empty form, but as a system of content-laden norms.

It remains an eloquent proof of the eternal truth of the doctrine of natural law that Roman law, the finest legal system yet developed in the West, enveloped the natural law in its deepest thinking and taught it in its noblest terms.

20. Anglo-Saxons will be disposed to demur. But this is not the place to attempt to weigh the claims of the English system of common law, in which the natural law has also played an important role, to equal or superior excellence. In a general way, cf. W. W. Buckland and A. D. McNair, Roman Law and Common Law. A Comparison in Outline (Cambridge: The University Press, 1956).

21. *Philosophia Perennis* (a term seemingly coined by Steichen in 1540, used by Leibniz, and popularized by the Neo-Scholastic movement) denotes a body of basic philosophical truths that is perennial, enduring, abiding, permanent, eternal—philosophy that “is as old and as new as philosophical speculation itself.” It is one whose “validity and truth content is not confined to any particular age or civilization but is absolute and enduring” (K. F. Reinhardt, *A Realistic Philosophy* [Milwaukee: Bruce Publishing Co., 1944], p. 17, cf. also pp. 18 ff.). In other words, *philosophia perennis* is the accumulated fund of sure philosophical truths: “the eternal core of primordial philosophical truths which remains in spite of all evolutions and changes” (*Philosophia Perennis. Aufentellungen zu ihrer Vergangenheit und Gegenwart*, herausgegeben von Fritz-Josef von Rüttel (2 vols., Regensburg: Josef Habbel, 1930), 1, 10; “a stock of fundamental truths which survive the change of time and prevail over and above the difference of systems” (Friedrich Saverio Wieseler, *Die Geschichte der Philosophie als Philosophische Perennität*, ibid., 1, 31). It is in the main identified with the philosophy of Aristotle as purified, synthesized, developed, deepened, and enriched through the genius of St. Thomas Aquinas. Its leading traits are aptly summarized by Jacques Maritain: The “philosophy of Aristotle and St. Thomas is in fact what a modern philosopher has termed the natural philosophy of the human mind, for it develops and brings to perfection what is most deeply and genuinely natural in our intellect alike in its elementary apprehensions and in its native tendency towards truth.

It is also the *evidential* philosophy, based on the double evidence of the data perceived by our senses and our intellectual apprehension of first principles—the philosophy of being, entirely supported by and modelled upon what is, and scrupulously respecting every demand of reality—the philosophy of the intellect, which it trusts as the faculty which attains truth, and forms by a discipline which is an incomparable mental purification. And for this very reason it proves itself the universal philosophy in the sense that it does not reflect a nationality, class, group, temperament, or race, the ambition or medley of an individual or any practical need, but it is the expression and product of reason, which is everywhere the same; and in this sense also, that it is capable of leading the finest intellects to the most sublime knowledge and the most difficult of attainment, yet without once betraying those vital convictions, instinctively acquired by every sane mind, which compose the domain, wide as humanity of common sense. It can therefore claim to be abiding and permanent (*philosophia perennis*) in the sense that before Aristotle and St. Thomas had given it scientific formulation as a systematic philosophy, it existed from the dawn of humanity in germ and in the pre-
But he can achieve this goal only as citizen of the polis and in obedience to its laws. All education and training in virtue consequently become politics, and the latter is ethics. The ancients knew only a political-legal morality. The city-state, in their view, is the ultimate and absolutely supreme pedagogue, the fulfillment of the moral being of man.

The notion of human personality was in its deepest meaning hidden from the ancients, as was also the eternal, superterrestrial goal of the immortal soul. Moreover, they had but a faint idea of a personal God as the supreme lawgiver distinct from the world; nor did they know anything of a Church as the medium of salvation. For them the polis and its divine worship remained the ultimate. Wherever the idea of human rights forced its way through (among the moderate Sophists and in Stoicism), its effect was revolutionary: either it dissolved the city-state or it encouraged dreams of the great society (civitas maxima) of mankind, which of course merely raised the question of its own meaning. Thus the ancients failed to arrive at the distinction between natural law and moral law.

Nevertheless, the main problems connected with the idea of natural law existed already in antiquity. The positivism of the Skeptics, of Epicurus, and of Carneades stood in opposition to the natural law in its two recurring forms: the metaphysical one in Plato and Aristotle, and the individualistic one in the earlier Sophists. Furthermore, the continually recurring definitions of law, which have stirred up and divided philosophico-legal thinking down to the present day, had already been formulated: law is will, law is reason; law is truth, law is authority. The doctrine of an original state of nature, of fundamental importance for individualism but of merely persuasive value for other thinkers, appeared already among the Sophists. It appeared also among the Stoics for a similar reason but with another object in view, namely, to provide the basis for a distinction between a primary and a secondary natural law. This distinction, valuable to the Church Fathers in connection with their doctrine of original sin, served the Scholastics to differentiate the self-evident principles of the natural law from the conclusions obtained through reasoning the content of the natural law is more exactly determined—as well as to solve more or less successfully certain thorny theological problems.