

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

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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 continentur, 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

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

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

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

<sup>84</sup> Gai. III 154.

<sup>85</sup> 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

<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 guidem 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 *iuris 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>

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

<sup>120</sup> 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.

<sup>121</sup> He consequently is not liable *iure naturali*: Lic. Rufin. D. 44.7.58.

<sup>122</sup> D. 5.1.12.2.

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

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

<sup>125</sup> 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 habere. 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. 1.8.2 (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 haec: 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

<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 Haywood (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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<sup>160</sup> *Lectures on Jurisprudence*, 5th ed. (1885) 154 ff, 175 ff, 567 ff.

<sup>161</sup> *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.