CHAPTER IV

CICERO

Cicero was a very wise man; he wrote more than all the Philosophers and read all the Grecian books through. . . . I hope God will be merciful to him.

Luther

CHRYSIPPUS opened his book On Law with the definition: "Law is the ruler of all things divine and human, the settled arbiter of good and evil, the guide to justice and injustice, the sovereign and lord of all who are by nature social animals. It directs what must be done and forbids the opposite." ² When those words were written perhaps not more than a hundred years had passed since the death of Aristotle. However, they may be taken as establishing the bridgehead on this side the gulf between ancient and modern legal thought, as summing up a social philosophy which henceforth was to be dominant in Western thinking.

Alexander, at a dramatic moment in his career in the early summer of 325 B.C., revealed a policy which subsequently became the basis of the Hellenistic philosophies. At Opis in that fateful summer he announced, after the mutiny of his troops had subsided, that the Macedonians and the Persians were both his kinsmen and he prayed especially for harmony (ὀμόνοια) and fellowship in the empire between the two peoples.² Napoleon has noted the conspicuous skill with which Alexander appealed to the imagination of men. Aristotle had maintained the basic inequality of human beings; the idea of the State as a whole of which man is a part; the distinction between Greek and barbarian with its corollary that the Greek race, through the mechanism of an Hellenic city-state, was the one best fitted to rule. The Hellenic philosophies, or some of

¹ S von Arnim, Stoicorum Veterum Fragmenta (1908) 77, no. 314.
them, stimulated by the Macedonian Persian policy asserted the equality of human beings; a theory of individualism; and the doctrine of a world state, a cosmopolis, in which Greek and barbarian, Jew and Gentile should all be equal. For the ideal city-state of Plato and Aristotle, the device through which the good life could be realized, there was substituted the perfect wise man of Zeno and Epicurus, the sage who alone knew the way to right living.

Those doctrines had their antecedents in earlier Greek philosophy, and in that sense the belief that the systems of Plato and Aristotle were splendid digressions from the main line of ancient speculation rather than stages in its regular development has some justification. Zeno appears to have returned to Heraclitus for his doctrine that men should live according to a single, harmonious principle in accordance with universal law; and slavery was held by some sophists to be an unnatural institution. Plato himself recognized forms of individualism in the theory that laws are made by men to protect their own selfish interests, thus doing violence to the natural badness of human nature; and in the idea that law, the despot of mankind, often constrains us against nature. In the latter aspect individualism, as an expression of goodness, is led by law to unnatural deeds. Whatever may be the philosophical antecedents of the Hellenistic philosophies their humanistic tendencies were fully worked out when Cicero came to study them. Iambulus had sketched his great Utopia of the Islands and Children of the Sun in which humanitarian principles are developed to their ultimate political significance. Christianity extended further the notion of equality as in the emphasis on the cardinal virtue of unlimited openhandedness; and the French Revolution, which enthusiastic French critics trace to third century stoicism, gave new impetus to the Hellenistic ideas for the modern world; but the significant break in the

\[8\] Diog. Laert. VI, 2, 63.  \[8\] 337C-D.
\[4\] Rep. 359A.  \[4\] Diod. II, 55-60.
\[7\] 2 Denis, Histoire des théories et des idées morales dans l'antiquité (1856) 191; 1 Janet, Histoire de la science politique (n. d.) 249-250.
metaphysical foundations of ancient and modern legal thought lies in the Hellenistic period with its development on the ethical side to fuller dimensions of the idea of the "inhabited world" or οἰκουμένη. ⁸

Cicero was the inheritor of this complex tradition. In philosophy he followed the teaching of Carneades and denied the certainty of knowledge; he held that the differences between opinions were differences merely of probability. ⁹ However, in the theory of law Cicero renounced agnosticism and followed the views of Antiochus who declared knowledge to be possible. Cicero was the statesman who was also the intellectual, one of the first since the classical days of Greece and the most influential of his type in the history of the West. No doubt he is open to the accusation, which has been brought against his great successor Burke, of approaching his philosophical problems with something of a sinister interest in solving them in one way rather than another. That weakness of the man of affairs turned philosopher is evidently a customary one. At the same time Cicero's speculations have all the strength of being brought to a focus upon the concrete. He was a Utopian, but he was also the statesman who had learned the value of testing ideas by reference to the actual affairs of men. How soundly his political and legal philosophies were conceived is made apparent by the fact that they served as the basis of the Augustan policy of restoration fifteen years after his death. The triumph of his humanism was even greater. It was perpetuated by the Fathers of the Church, and at the Renaissance his works became the touchstone of enlightened inquiry, thus extending the humanity of Stoicism to the present day.

⁸ The first professed study of the Alexandrian revolution is Tarn, Alexander the Great and the Unity of Mankind, Proceedings of the British Academy (1933) 123. For a later view see Ehrenberg, Aspects of the Ancient World (1946) 175, where it is maintained that Alexander's idea was to build an empire which would unite the peoples of the earth without forcing any of them into slavery. Professor Ehrenberg believes it may be doubted that Alexander subscribed to the doctrine of the unity of mankind.

⁹ ad Att. XII, 52.
Cicero in writing to Atticus took a modest view of his accomplishments: "You will say, 'What is your method in compositions of this kind?' They are merely copies, and cost me comparatively little labor. I supply only the words, of which I have a copious flow." Elsewhere, however, he placed a different value on his compositions: "As is my custom, I shall at my own option and discretion draw from the Stoics in such measure and in such manner as shall suit my purpose." 10 “For our part we do not play the rôle of a mere translator, but, while preserving the doctrines of our chosen authorities, add thereto our own criticism and our own arrangement.” 11

In the setting down of his legal philosophy he clearly had Plato’s *Laws* open before him as he wrote and occasionally the writings of some of the Stoics. Nevertheless, his fusion of Greek and Hellenistic legal speculation is of a notable order and warrants study on its own account. Moreover, as we shall see, there is an original element in his legal philosophy. That originality is small in extent and is clearly suggested by his experiences as an advocate. It sounds a new note, however, in juristic thought and cannot be matched by anything in the writings that preceded him.

Cicero was the first to raise the question: Why is jurisprudence worth studying? Though he was the leading practicing lawyer of his day he had no use for the contemporary Diceys who held their noses when the subject was mentioned. It is not likely that the question would ever have occurred to a Greek of the Fourth Century B.C. since there was no body of positive law, maintained by a highly skilled class of advocates, from which jurisprudence could be rigidly separated. Cicero recognized the field of positive law as a domain for separate study; but he refused to write treatises on the law of eaves and house-walls, on contract and court procedure. Those subjects had been carefully treated by many writers

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10 *de off.* I, 6.  
11 *de fin.* I, 6.
and were of a humbler character, he believed, than what was expected of him. There were many eminent men in Rome whose business it was to interpret the civil law to the people and answer questions in regard to it. Those men, though they have made great claims, have spent their time on unimportant details. What subject indeed is so vast as the law of the state, but what is so trivial as the task of those who give legal advice? However, it is a necessary social function. The professional lawyers are not altogether ignorant of the principles of jurisprudence; but they have carried their studies of the civil law, from this point of view, only far enough to accomplish their purpose of being useful to their clients. From the standpoint of knowledge all this amounts to little, though for practical purposes it is indispensable.\(^\text{12}\) In maintaining this position Cicero is perhaps insisting upon the Platonic thesis that knowledge is an ultimate value, important on its own account and not as a means to other things.\(^\text{13}\) He saw that it was a mistake to defend jurisprudence on the ground of its usefulness to positive law, a lesson which modern jurists have even yet not learned. If the sole justification of jurisprudence is its usefulness to positive law then it will never achieve the status of an independent science inasmuch as a science of means is always controlled by the ends. It was clear to Cicero that jurisprudence was something more than a dependent science.

In fact, he expressly took an opposite position. His theory of law was to possess complete generality, in particular to be so general that the \textit{ius civile} would be merely a special case easily subsumed under a wider principle.\(^\text{14}\) Like Plato he had already written a treatise on the constitution of the ideal state, and he now proposed to write one on its laws. He stated with care the method which would lead him to those laws. Cicero neither believed, as our present day realists and the majority of his fellow workers believed, that the science of law

\(^{12}\) \textit{de leg.} 1, 14. Unfortunately Cicero's treatise \textit{De iure Civili in Artem Redigendo}, mentioned by Aulus Gellius, I. xxii. 7, is lost.

\(^{13}\) \textit{Rep.} 475 et seq.

\(^{14}\) \textit{de leg.} 1, 17.
could be derived from the praetor's edict, nor did he believe, as the Austinians and his own immediate predecessors believed, that the science of law could be drawn from the Twelve Tables. A science of law must be based on the fundamental principles of philosophy. It must be borne in mind in such an inquiry, Cicero points out, that we are not learning how to protect ourselves legally, or how to advise clients. Those in truth are important tasks. But the present discussion is along wider lines than that called for by the practice of the courts. Cicero's declared subject is the whole range of universal law and enactments. In order to do this the nature of law must be explained, and it must be sought for in the nature of man; then the laws by which all states ought to be governed must be considered; and finally the iura civilia already formulated for particular countries, including Rome, will be studied. No other kind of discussion can reveal so clearly how much has been bestowed upon man by nature, what a wealth of endowments have been implanted in the human mind, why we have been born and placed in the world, what it is that united men, and what natural fellowship there is among them. For it is only after all these things have been made clear that the origin of law and justice can be discovered.

THE NATURE OF LAW

Cicero knew many kinds of law but his legal theory, under the influence of a commonplace Stoic idea, was dominated by the conception of a "true law" (vera lex). He knew lex as the written law, and ius not only as denoting what is right and fair, but as law in the most general sense of the word and also as referring to a particular system of law. In its plural form iura were the ordinances, rules, rules of law, decisions on points of law; iura were also the separate provisions, lex the whole enactment containing them. He knew also the divine law (fas). One of Cicero's contributions to philosophy was the invention of a Latin philosophical vocabulary which reappeared
in modern European languages. Thus we find him using as importations from Aristotle \textit{ius} or \textit{lex naturae} (\dikaion kata\phi\ion) in the sense of an ideal law which may or may not have an existence in universal practice, but which ought to have. Similarly, the \textit{ius civile}, the law governing citizens, has its Aristotelian counterpart in the \dikaion v\omion. As a corollary to the \textit{ius naturae} Cicero employed the phrase \textit{ius gentium}, which he stated had been used by his predecessors; by the phrase he apparently meant, when he wanted to distinguish it from the \textit{ius naturae}, legal usage actually existing everywhere as distinguished from the ideal law (\textit{ius naturae}) which might not exist. \textit{Ius gentium} was a world common law, the principles applicable to cases in which the parties were not both Roman citizens and in which, therefore, no appeal could be made to the \textit{ius civile}. He used the phrase \textit{ius communis} to mean the law which he and the person whom he is addressing acknowledge. He thought of customary law (\textit{consuetudo}) as that which has been approved by common consent of long standing and which may not have been ratified by statute. He drew a sharp distinction between public law and private law. He had many more phrases and combinations of phrases to denote further kinds of law.\footnote{Nettleship, \textit{Contributions to Latin Lexicography} (1889) 497 et seq. 1 Costa, 
\textit{Cicerone Giureconsulito} (1927) 13 et seq.} Plainly, we are in the presence of a man to whom legal distinctions were important and who was fortunate enough to have before him a body of material which would permit the making of distinctions.

As a professed philosopher it was Cicero’s business to systematize this miscellaneous collection of the kinds of law. He states expressly that he is following the method of the philosophers—not those of former times, but the modern ones who have built workshops, so to speak, for the production of wisdom.\footnote{\textit{de leg.} 1, 36. Cicero is here following Plato who insisted upon the trained philosophic intellect as the supreme authority in law. \textit{Laws} 714A. Cf. \textit{de leg.} 1, 17-18. Dialectics, in Cicero’s opinion, was the instrument that would transform jurisprudence into an art and would make possible the systematic study of law. \textit{Brut.} XLI. 152-3.} Formerly, problems were argued loosely and at
great length; Cicero thought they were now examined systematically and point by point. For that reason Cicero wanted to be especially careful not to lay down first principles that had not been wisely considered and thoroughly investigated. He does not expect to demonstrate his doctrine to the satisfaction of everyone for that is impossible; but he does look for the approval of all who believe that everything which is right and honorable is to be desired for its own sake, and that nothing whatever is to be accounted a good unless it is intrinsically praiseworthy, or at least that nothing should be considered a great good unless it can rightly be praised for its own sake. Of all such, therefore, Cicero expected the approval, whether they have remained in the Old Academy with Speusippus, Xenocrates, and Polemon; or have followed Aristotle and Theophrastus who differ slightly from the Old Academy in mode of presentation; or, in agreement with Zeno, have changed the terminology without altering the ideas; or even if they have followed the strict and severe sect of Aristo, now broken up and refuted, and believe everything except virtue and vice to be on an absolute equality. So far, however, as those philosophers (the Epicureans) are concerned who practice self-indulgence, are slaves to their own bodies, and test the desirability or undesirability of everything on the basis of pleasure and pain, Cicero bids them, even if they are right (for he feels no need to quarrel with them here) to carry on their discussions in their own gardens, and even requests them to abstain for a while from taking any part in matters affecting the state, which they neither understand nor have ever wished to understand. He implores the New Academy formed by Arcesilaus and Carneades to be silent, since it contributes nothing but confusion to all these problems; for if it should attack what Cicero thinks he has constructed and arranged so beautifully, it would do great mischief. At the same time he would like to pacify this school, and so does not dare to banish it from the discussion.

Two points stand out in this discourse. There is a clear
conception of system, but it is rudimentary. As stated it means a strict and distinct enumeration of points. In practice, however, as will appear, it also includes the idea of classification and its corollary, subsumption. Nowhere do the notions of fact, hypothesis, verification, systematic doubt, axiomatization, simplicity, theory, abstraction, explanation, appear explicitly though the elements of some of them are evident in the subsequent analysis. Cicero's attempt to systematize the kinds of law, therefore, is self-conscious, and slightly more explicitly sophisticated than that of Plato and Aristotle. His practice does not go beyond theirs but what they take for granted he particularizes and states as a principle of all scientific systematization. Aristotle's method of aporetic analysis is an instance of Cicero's principle but the converse would not be true. From the discourse it is also clear that there will be an identification of the legal and the moral. Until modern times there has been no effort in natural law thinking to separate the law that is from the law that ought to be; although Cicero, as we shall see, was aware of the distinction in the field of positive law, he assumed, as have most jurists who have employed the natural law approach, that it was a necessary implication of the natural law doctrine that law and morals were to be identified.

Cicero perceived three kinds of law operating in the world and this classification apparently embraced all the forms with which he was familiar. There is first the heavenly law (lex caelestis). He observes it has been the opinion of the wisest men that law is not a product of human thought, nor is it any enactment of peoples, but something eternal which rules the whole universe by its wisdom in command and prohibition.

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17 Cicero also proposed a plan for the systematization of positive law (de or. 1, 190) which was influential in the sixteenth century revival of juristic studies. See Hotman, *Dialecticae Institutionis Libri III* (1573) 117. Holland thought that Cicero's plan was "the clearest possible description of an analytical science of law." *Elements of Jurisprudence* (10th ed. 1906). 6n.1. However, it is now argued that the professional jurists had a better grasp of the nature of jurisprudence than Cicero. Schulz, *History of Roman Legal Science* (1946) 69.

18 *de leg.* 2, 8.
Thus they have been accustomed to say that law is the primal and ultimate mind of God, whose reason directs all things either by compulsion or restraint. Therefore, that law which the gods have given to the human race has been justly praised; for it is the reason and mind of a wise lawgiver applied to command and prohibition.

Plato’s playful account of the origin of law may have been in the back of Cicero’s mind as he set forth this idea, although as he develops its main foundations, it is obviously Stoic. In the old days Plato pointed out Cronos ruled us through his daemons (δαιμονες). Today there is in man a divine part—his mind—and this divine element must do as Cronos did and appoint subordinate ministers for our government. These ministers we may call not δαιμονες but νοῦ διανομάς, “the arrangements” or “appointments made by the intellect” and to which we give the name of “laws.” Elsewhere Cicero refers to the contention that nothing is more divine than reason and quotes Chrysippus as identifying Jupiter with the mighty law, everlasting and eternal, which is our guide of life and instructress in duty, and which he entitles Necessity or Fate, and the Everlasting Truth of future events. That he has in mind a kind of law distinct from natural law is clear from his discussion of wrongful gains as being contrary to the law of nature (in this case ius gentium), the statutes of particular communities, and the “Reason which is in Nature, which is the law of gods and men” (ipsa naturae ratio, quae est lex divina et humana).

At the point in the dialogue of De Legibus at which Cicero first develops the idea of law as the ultimate mind of God his brother Quintus interrupts him and demands a fuller explanation. He remarks that Cicero has, on more than one

19 Laws 714A. Cf. 715C, 762E. 1 England, Laws of Plato (1921) 441. England suggests that when Cicero connects νοῦ with νοῦν, as being so called “a suum cuique tribuendo,” he is very possibly thinking of Plato’s association here of διανομή with νοῦς, but he leaves Plato’s τοῦ νοῦ out of sight. See also Laws 624A, 835C; Minos 333.

20 de n. d. 1. 37; 1. 40.

21 de off. 3. 23.
occasion, already touched on this topic. But before Cicero comes to treat of the laws of peoples, Quintus would be grateful if he would make the character of this heavenly law clear to him, so that the waves of habit may not carry him away and sweep him into the common mode of speech on such subjects.

Cicero agrees that there should be a true understanding of the matter. He quotes a rule from the Twelve Tables and observes that it, together with other rules of the same kind, is called “law.” These commands and prohibitions of nations have the power to summon to rectitude and away from wrongdoing. However, this power is not merely older than the existence of nations and states, it is coeval with that God who guards and rules heaven and earth. For the divine mind cannot exist in a state devoid of reason; and divine reason must necessarily have this power to establish right and wrong. Prior to written law reason existed, derived from the nature of the universe, urging men to right conduct and diverting them from wrongdoing; and this reason did not first become law when it was written down, but when it first came into existence; and it came into existence simultaneously with the divine mind. Therefore, the true and supreme law, whose commands and prohibitions are equally authoritative, is the right reason of the Sovereign Jupiter.

Lactantius has preserved for us an eloquent passage by Cicero describing the *lex caelestis* at greater length: There is in fact a true law, right reason, agreeing with nature, diffused among all men, unchanging and eternal; it summons to duty by its commands, and deters from wrong by its prohibitions. Its commands and prohibitions are not laid upon good men in vain, but are without effect on the bad. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and to annul it wholly is impossible. We cannot be

**Inst. Div.** VI, 8. 6-9. Cicero, *de rep.* 3. 33. This passage is customarily quoted as an illustration of natural law. From the context in Lactantius it is clear, however, that the *lex caelestis* is meant.
freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. It will not lay down one rule at Rome and another at Athens, or different laws now and in the future; but there will be one law, eternal and unchangeable, binding at all times upon all peoples. There will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and in denying the true nature of a man, will thereby suffer the severest of penalties, although he has escaped all the other consequences which men call punishment.

That is a clear statement of the Stoic doctrine of the Logos carried over explicitly into jurisprudence. Heraclitus had laid it down that "all things happen in accordance with the Word" and that men must "hold fast to that which is common to all, as a city holds fast to its law, and much more strongly still; for all human laws are nourished by the one divine law." Assertions such as these were transformed by the Stoics into the doctrine of a κοινὸς λόγος which ruled the universe. An early work by Zeno, the Republic, was an attempt to answer the argument of Plato’s Republic and to show that the perfect state must include the entire world. A man would not say "I am an Athenian," but would follow Socrates and regard himself as a native and citizen of the world. At the basis of this speculation was the belief, taken over from physics, that the universe is governed by law, which essentially is the law of reason. Morality as an expression of reason represents the commands and prohibitions of the divine law. "Act according to nature" summed up the general ethical teaching. In its legal sense the Logos becomes the Platonic rule of Right Reason (ὁρθὸς λόγος, vera ratio) which pervades all things and which commands what ought to be done and forbids the opposite. Cicero could never understand how Zeno convinced

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23 Fr. 2. 24 Fr. 91. 25 Diog. Laert. VII, 88; Cicero, de leg. I, 18.
himself that this law was alive.\textsuperscript{26} Eventually the conception took its place in the Digest in Chrysippus' definition of law as the Queen of all things, human and divine, a paraphrase of Pindar.\textsuperscript{27}

Although the Roman jurists were able to work the Logos out in practice by means of the doctrine of the law of nature, the imagination of the Stoics was too idealistic to foresee the possibility of its use in positive law. Zeno wanted to abolish law courts altogether.\textsuperscript{28} He also argued that the practice of permitting both sides to be heard in an action at law ended in a dilemma. If the plaintiff has plainly proved his case, there is no need to hear the defendant, for the question is at an end; if he has not proved it, it is the same case as if the plaintiff had not appeared to prosecute his cause when the case was called, or had appeared and offered no evidence; so that, whether the plaintiff has proved or not proved his case, the defendant should not be heard. To this Plutarch \textsuperscript{29} replied that Plato had either proved or not proved those things which he set forth in the \textit{Republic}; but in neither case was it necessary for Zeno to write against him.

Cicero as a practical lawyer attempted to give concrete meaning to the idea of a \textit{lex caelestis}. As an instance he cited the case of Cocles who took his stand on a bridge alone, against the full force of the enemy, and ordered the bridge broken down behind him. He was obeying the "law of bravery," an illustration of the positive or command aspect of the \textit{lex caelestis}. For its negative or prohibitory side Cicero cites the case of Sextus Tarquinius who broke the "eternal law" against rape by violating Lucretia.\textsuperscript{30} It is a weakness of Cicero that in his efforts at concreteness he is not able to rise above the level of the wall motto in his moral precepts. Cocles' conduct was a noble act of bravery. But should the law command

\textsuperscript{26} \textit{de n. d.} I, 36.
\textsuperscript{27} D. I. 3. 2. Plato, \textit{Gorg.} 484B.
\textsuperscript{28} Diog. Laert. VII, 33.
\textsuperscript{29} Sto. rep. 8, 1.
\textsuperscript{30} \textit{de leg.} 2, 10. See also Phill. Xi, Xii, 28; \textit{pro Milo}, 10.
such conduct in all similar circumstances with penalties for disobedience? As a legal ideal the bare proscription of rape is too indeterminate to be a standard of much use. In English law a man may be guilty of rape upon a prostitute, but he cannot be guilty of rape upon his wife; a husband has no need to ask his wife’s consent to sexual intercourse, whatever new circumstances may have arisen since the marriage, not even if he is knowingly suffering at the time from a venereal disease.  

For his second kind of law, Cicero turns to the idea of natural law. He observes that the divine mind is the supreme law, and that when reason is perfected in man that also is law; and this perfected reason exists in the mind of the wise man. However, there exist rules which, in varying forms and for the need of the moment, have been formulated for the guidance of nations. They bear the name of law not so much by right as by favor of the people. For every law which really deserves that name is truly praiseworthy. When rules were drawn up and put in force which would make it possible for the people to live an honorable and happy life, it is clear that men called them “laws.” When wicked and unjust statutes were formulated it is clear that something was put into effect that was not “law.” Such statutes no more deserve to be called laws than the rules a band of robbers might pass in their assembly. For if ignorant and unskillful men have prescribed deadly poisons instead of healing drugs, these cannot possibly be called physicians, prescriptions; neither in a nation can a statute of

81 Stephen, in the first edition of his Digest of Criminal Law (1877) 172 thought that under some circumstances a man might be indicted for rape upon his wife; however, in the fourth edition (1887) 194, he withdrew that opinion.  
32 de leg. 2. 11. Pollock points out that lex naturalis or naturae, ius naturale, came in as deliberate translations of the Greek term (φυσικόν δίκαιον) in the last period of the Republic. He thinks they must have been neologisms in Cicero’s time, for in his earliest work, the De Inventione, the idea is found, but is expressed by periphrasis. The law derived from Nature, as there set forth, is identical, as might be expected with the morality of a high minded Roman gentleman. The History of the Law of Nature (1901) 1 Col. L. Rev. 11. “Natural law is that which has not had its origin in the opinions of men, but has been implanted by some innate force, like religion, affection, gratitude, retaliation, respect, truth.” de inv. 2. 53. Cf. Tusc. 1, 30. The inclusion of “retaliation” in this group may seem strange, but is merely a further illustration of the variability of moral judgments.
any sort be called a law, even though the nation, in spite of its being a ruinous regulation, has accepted it. Therefore, Cicero says, law is the distinction between things just and unjust, made in agreement with that primal and most ancient of all things, nature; and in conformity to nature's standard are framed those human laws which inflict punishment upon the wicked but protect the good. This is his formal definition of natural law (lex naturae).

Plato had argued that law is a good and that what is not beneficial to the state is not a good, and hence a bad law is no law. Cicero's analysis reproduces this argument, but adds the idea of nature as the standard by which to test the goodness or badness of a law. However, it is far from clear what Cicero meant by "nature." Chrysippus had defined the highest good "as life in accordance with nature, or, in other words, in accordance with our own human nature as well as that of the universe." Apparently there was an order of nature which was rational throughout and man was to conform to it. Animals were able to preserve their lives because nature had given them impulse. In their case nature's rule was to follow the direction of impulse. To man nature had added reason, and for him life according to reason rightly becomes the natural life. By "reason" Cicero understood that which teaches and explains what should be done and what should be left undone. Cicero regarded a life in accordance with nature as the highest good. That meant the enjoyment of a life of due measure based upon virtue, or, in other words, following nature and living according to her law; that is to say, to spare no effort, so far as in us lies, to accomplish what nature demands, among those demands being her wish that we live by virtue as our law.

For his third kind of law, Cicero turns to the naked idea of law as that which decrees in written form whatever it

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83 Hipp. Maj. 284B-E; Minos 314E; Laws 715B.
85 Diog. Laert. VII, 86.
86 de off. 1, 101.
87 de leg. 1, 56.
wishes, either by command or prohibition.\textsuperscript{38} Such, he observes with contempt, is the crowd's definition of law. With those words he dismisses the subject. Nevertheless, the idea was a necessary one in order to make his system philosophically complete. For one thing, it would serve as a catch-all for the specimens of law which could not be fitted into the categories of the \textit{lex caelestis} or the \textit{ius naturae}. It could contain even those bad laws which were no laws at all.

What is extraordinary in this analysis of the nature of law is that Cicero, although the most learned lawyer of his time, does not reason from legal materials. His \textit{lex caelestis} is pure Stoicism; his \textit{ius naturae} appears to be a Greek importation. Only the \textit{lex vulgus} refers directly to positive law. In this respect Cicero is much closer to Plato than to Aristotle, although his idea of law is completely different from either of theirs. Plato, in working out his theory that law seeks to be the discovery of reality, paid no more attention to legal materials than did Cicero. Aristotle, however, in putting forward his numerous ideas on the nature of law plainly kept positive law and legal procedure before him. Cicero's conceptions, nevertheless, were to be as influential as those of his illustrious predecessor and are even today the basis of a revival in juristic thought.

There was no inclination on Cicero's part to underestimate law even in its opprobrious sense. In his hands the theory of the state assumes a legalistic form unknown to the Greeks. He maintains that nothing can be nobler than the law of a state.\textsuperscript{39} It was originally made for the security of the people, for the preservation of the state, for the peace and happiness of human life.\textsuperscript{40} Law is the bond of civil society, and the state may be defined as an association or partnership in law.\textsuperscript{41} If a state has no law, it cannot be considered a state at all.\textsuperscript{42} Law is even superior to philosophy. An art, even if unused, can

\textsuperscript{38} \textit{de leg.} 1, 19; cf. 3, 44.
\textsuperscript{39} \textit{de leg.} 1, 14.
\textsuperscript{40} \textit{de leg.} 2, 11.
\textsuperscript{41} \textit{de rep.} 1, 32; 1, 25.
\textsuperscript{42} \textit{de leg.} 2, 12.
still be retained in the form of theoretical knowledge, but virtue depends entirely upon its use; and its noblest use is the government of the state, and the realization in fact, not in words, of those deeds which philosophers rehearse in their secluded retreats. For, even when philosophers express just and sincere sentiments about these matters, they merely state in words what has been actually realized and put into effect by those statesmen who have given states their laws. From whom comes our sense of moral obligation and our reverence towards the gods? From whom do we derive that law which is common to all peoples (ius gentium), or that to which we apply the term civil (ius civile)? Whence justice, honor, fair-dealing? Whence decency, self-restraint, fear of disgrace, eagerness for praise and honor? Whence comes endurance, toils and dangers? Assuredly, from those statesmen who have developed these qualities by education and have embedded some of them in customs and have enforced others by statutes. Xenocrates, one of the most distinguished of philosophers, was once asked, so the story goes, what his pupils gained from his instructions. He replied that of their own free will they would perform the duties they would be enforced to do by the laws. A statesman, therefore, who by his authority and by the punishments which his laws impose obliges all men to adopt that course which only a mere handful can be persuaded to adopt by the arguments of philosophers, should be held in even greater esteem than the teachers who make these virtues the subject of their discussions. For what speech of theirs is excellent enough to be preferred to a state well provided with law and custom? 

**Justice**

We know Cicero believed that justice was the supreme virtue and perhaps included all the others. Why he thought so we do not know, since he stated the arguments of his opponents so fairly that he was unable to refute them. That, at any rate,

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43 de rep. 1, 2.  
44 de fin. 5, 65.
is the assertion of Lactantius, who was not a prejudiced witness, and to whom we owe much of the statement of the argument.

Justice is defined by Cicero as that sentiment which assigns to each his own and maintains with generosity and equity human solidarity and alliance. It has its source in nature and as a matter of fact, "we are born for justice." The most foolish notion of all is the belief that everything is just which is found in the laws of nations. A law to the effect that a dictator might put to death with impunity any citizen he wished, even without a trial, is obviously not a just law. Justice is one; it binds all human society, and is based on one law, which is right reason applied to command and prohibition. Whoever does not know this law, whether it has been recorded in writing anywhere or not, is without justice.

These are lofty sentiments, but Cicero knew well enough that they were not self-evident principles. Unless justified philosophically, they were no more than pious platitudes which awakened an echo in the minds of the morally inclined but which the cynical could pass by with a smile. In the Republic he assigns to Philus, who was regarded as an almost incomparable example of old-fashioned probity and honor, the task of stating Carneades' arguments in support of the conventional nature of justice and the equivalence of true justice and folly. Philus believed that to state the case against a position was the easiest means of reaching the truth.

He first set forth the general propositions to be established. Men enacted laws for themselves with a view to their own advantage. These laws differed according to their characters and in the case of the same persons often changed according to the times. There was no natural law; both men and animals were directed by the guidance of nature to their own advan-

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45 de fin. 5, 65. See also de inv. 2, 160; de n. 3, 38. de off. 1, 42.
46 de fin. 2, 59.
47 de leg. 1, 28.
48 de leg. 1, 42.
49 de rep. 3, 8 et seq. For Cicero's views on self-evident principles see de off. 3, 38; de inv. 1, 65.
tage; therefore, there was no justice, or if any did exist, it was the greatest folly, because it injured itself by promoting the interests of others.

In support of these propositions, Philus turns to the argument from relativity. If the justice he is investigating is a product of nature, then, like heat and cold, or bitter and sweet, justice and injustice would be the same thing to all men. In actual fact, it is not. In Egypt animals are worshipped as divine; in Greece and Rome the sacred statues have a human form, a custom which the Persians considered wicked; many peoples believe in human sacrifice; the Cretans and the Aetolians considered piracy and brigandage honorable; the Gauls think it disgraceful to grow grain by manual labor, and consequently they go forth armed and reap other men's fields. Indeed, the Romans themselves, the most just of men, forbid the races beyond the Alps to plant the olive or the vine, so that their own olive groves and vineyards may be the more valuable. This is regarded as prudent, but not just, conduct. Not only are there differences among nations, but there have been a thousand changes in a single city, even in Rome, in regard to these things. Before the passage of the Voconian law the rights of women with respect to inheritance were different. That law itself is full of injustice to women. Why should a woman not have money of her own? Why may a Vestal Virgin have an heir, while her mother may not?

In short, if the supreme God had provided laws for us, then all men would obey the same laws, and the same men would not have different laws at different times. If it is the duty of a just and good man to obey the laws, what laws is he to obey? All the different laws that exist? But virtue does not allow inconsistency, nor does nature permit variation. Laws are imposed upon us by fear of punishment, not by our sense of justice. Therefore, there is no such thing as natural justice, and from this it follows that neither are men just by nature. Or will they tell us that, though laws vary, good men naturally follow what is truly just, not what is thought to be so?
they say, it is the duty of a good and just man to give everyone that which is his due. Well then, first of all, what is it, if anything, that we are to grant to dumb animals as their due? For it is not men of mediocre talents, but those who are eminent and learned, such as Pythagoras and Empedocles, who declare that inevitable penalties threaten those who injure an animal.

At this point leaves of the manuscript are missing, but from other sources, it appears that the argument continued as follows. The difference between codes of law can be accounted for by utility, which varies from place to place. But there is a wide divergence between justice and utility. Prudence demands that we have a care to self-interest, justice to the interests of others. But to follow justice is the height of folly, inasmuch as it leads us to injure ourselves to the advantage of others. Roman history itself is the best proof of this. Rome has won her empire by injustice both to gods and men; a policy of justice would make her again what she was originally, a miserable poverty-stricken village, inasmuch as it would require her to restore all that was not her own. What is commonly called justice in states is nothing but an agreement for mutual self-restraint, which is a result of weakness, and is based on nothing whatever but utility.

Wisdom urges us to increase our resources, to multiply our wealth, to extend our boundaries; for what is the meaning of those words of praise inscribed on the monuments of our greatest generals “He extended the boundaries of the empire” except that an addition was made out of the territory of others? Wisdom urges us also to rule over as many subjects as possible, to enjoy pleasures, to become rich, to be rulers and masters; justice on the other hand, instructs us to spare all men, to consider the interests of the whole human race, to give everyone his due, and not to touch sacred or public

\[66\text{Lactantius, Inst. Div. V, 16, 2-4; VI, 9, 2-4; VI, 6, 19 and 23; Tertullian, Apolog. 25 (p. 164 Oehl, p. 90 Mayor).}\]

\[61\text{de rep. 3, 24.}\]
property, or that which belongs to others. What then is the result if you obey wisdom? Wealth, power, riches, public office, military commands, and royal authority, whether we are speaking of individuals or nations.

To such arguments as these it is replied by the Epicureans who are open and frank and do not themselves use crafty and rascally tricks of arguments, that a wise man is not good because goodness and justice in themselves give him pleasure, but because the life of a good man is free from fear, anxiety, worry, and danger, while on the other hand the minds of the wicked are always troubled by one thing or another, and trial and punishment always stand before their eyes. No advantage or reward won by injustice is great enough to offset constant fear, or the everpresent thought that some punishment is near or is threatening.\(^{52}\)

However, I put the question to you: Let us suppose there are two men, one a pattern of virtue, fairness, justice and honor, and the other an example of extreme wickedness and audacity; and suppose a nation is so mistaken as to believe the good man a wicked, treacherous criminal, and the wicked man on the other hand a model of probity and honor. Then let us imagine that, in accordance with this opinion, held by all his fellow-citizens, the good man is harassed, attacked, and arrested; blinded, sentenced, bound, branded, and reduced to beggary, and finally is also most justly deemed by all men to be most miserable. Then let the wicked man, on the contrary, be praised, courted, and universally loved; let him receive all sorts of public offices, military commands, wealth and riches from every source; and finally, let him have the universal reputation of being the best man in the world and most worthy of all the favors of fortune. Now I ask you, who could be so insane as to doubt which of the two he would prefer to be? The same thing is true of states as of persons. No people would be so foolish as not to prefer to be unjust masters rather than just slaves.

\(^{52}\) At this point a page of the manuscript is lost. With the following paragraph cf. Plato, *Rep.* 861-862.
Philus' defense of injustice from here on is lost, but from Lactantius we learn that he returned to the antagonism between prudence and justice. Let us suppose, he said, that a good man possesses a runaway slave or an infected house, and that he alone is aware of these defects. If on this account, he offers the slave or the house for sale, will he declare that he is putting on the market a runaway slave or an unhealthful house, or will he conceal these defects from a purchaser? If he admits them, he will be considered honest, but he will also be regarded as a fool, for he will either sell at a low price or he will not sell at all. If he conceals the defects, he will be prudent in that he considers his own interest, but he will be dishonest in that he deceives. Again let us suppose that a man finds a dealer who thinks he is selling copper, though it is really gold, or who thinks he is selling lead when it is really silver. Will an honorable man keep silence in order to buy at a low price, or will he disclose the truth and pay a higher price? Only a fool, it appears, would choose the latter course. Consider also the cases in which a man cannot be just without endangering his life. Certainly justice requires us not to kill human beings and not in any way to touch another's property. What then, will the just man do if he is in a shipwreck and someone weaker than himself has found a plank on which to keep afloat? Will he not push the weaker man off the plank, that he may get on it himself and thus make his escape, especially when there is no one in the middle of the sea to bear witness against him? If he is prudent he will do this, for he will inevitably lose his own life if he does not. If however, he would rather die than raise his hand against another man, he is indeed just but he is a fool, because in sparing another's life he fails to spare his own. Similarly, when the army in which he is fighting has been routed, and the enemy begin pursuit, if a man finds a wounded soldier mounted on a horse, will he spare the wounded man and be killed himself, or will he throw the other from the horse in order that he may himself escape the enemy? If he follows the latter course, he is prudent, but
also wicked; if he takes the former course, it necessarily follows that, though just, he is a fool.

Accordingly, Lactantius goes on, after political and natural justice had been distinguished, Philus overthrew both, for political justice is in fact prudence and not justice, while natural justice, though it is really justice, is not prudence. “Clearly,” he adds, “these arguments are subtle and ensnaring; indeed, Cicero could not refute them. For though he makes Laelius answer Philus and present the case for justice, Cicero left all these objections unrefuted, as if they were mere traps. The result is that Laelius appears as the defender not of natural justice, which had been subjected to the charge of being mere stupidity, but rather of political justice, which Philus had admitted to be prudent, though it was not just.” Lactantius himself attempts to answer the argument by showing that a truly just man would not take a sea voyage. For why should he take a voyage when his own land is sufficient for him? However, he admits it is possible that a man may be compelled even against his will to make a voyage. In that case it is impossible that the just man should be unprotected by the guardianship of Heaven. Finally, he grants that the case Cicero puts is possible. In those circumstances, the just man will die because of his innocence; he abstains from all fault, because he cannot do otherwise, although he has the knowledge of right and wrong. He is the wisest man who prefers to perish rather than to commit an injury, that he may preserve that sense of duty by which he is distinguished from the dumb animals.

It may well be that Cicero’s answer was the doctrine of the lex caelestis. That doctrine expressly denies that there will be different laws at Rome and at Athens, or different laws now and in the future, but asserts one eternal and unchangeable law valid for all nations and all times. He may have shown the identity of the lex caelestis and iustitia. Elsewhere, Cicero states the same and similar cases as representative of the dis-

53 de off. 3, 50 et seq.
pute between Diogenes of Babylonia who took one side, and his pupil, Antipater who took the other. The cases are given as evidence of the contradiction that seems often to arise between the expedient and the morally right. Cicero remarks that he must give his decision, for he does not propound the cases merely to raise questions, but to offer a solution. He does this by showing that the expedient is really the inexpedient. The man who sells the infected house without disclosing that fact opens himself to the charge of fraud, underhandedness, and slyness. Is it not inexpedient to subject oneself to all these terms of reproach and many more besides? Surely the philosopher Cicero is not speaking here, but rather the successful Roman careerist.

Such is the state of the manuscript Cicero left us, that the argument, although he did not believe it himself, clearly favors the great political tradition of Thucydides, Mandeville, Machiavelli, Hobbes, La Rochefoucauld, and Nietzsche. He himself belonged in the equally great tradition of Plato and Christianity which asserts that the just man, if he possess the ring of Gyges, would nevertheless abstain from injustice. The pure abbess locked in the cell with her lover on the eve of the summons to the guillotine will remain pure. Cicero shares with modern ethics the inability to improve upon Plato’s statement of the dilemma. However, in Cicero’s hands the problem of justice is beginning to assume a definite legal character. Plato is fully aware of the formula *suum cuique tribuere*, but he states it only to repudiate it. It is basic in Cicero’s theory and becomes in time, of course, the classic legal definition. His essential problem, which he never succeeded in solving, was to give the phrase a meaning beyond the legal, in order to avoid an identification of the just and the legal, which would have invalidated his theory of an unjust law.

**The Magistrate**

Cicero’s theory of the magistrate represents a combination of Aristotelianism and natural law doctrine. He set a high
value on the administration of justice which he regarded as including the interpretation of the law.\textsuperscript{54} It is the function of the magistrate to rule and to command what is just and beneficial and in conformity with the law. For as the laws govern the magistrate, so the magistrate governs the people, "and it can truly be said that the magistrate is a speaking law, and the law a silent magistrate." Aristotle\textsuperscript{55} also took the view that the ruler was a "living law." Nothing, Cicero thought, was so completely in accordance with the principles of justice and the demands of nature (by which he says he means law) than authority (\textit{imperium}); for without it neither household, city, nation, the human race, physical nature nor the universe itself could exist. For the universe obeys God; seas and lands obey the universe; and human life is subject to the decrees of supreme law.

\textbf{INTERPRETATION}

In legal theory, interpretation is the name of the methodology employed in the analysis of propositions, generally from the realm of legal discourse, to determine the mode of action to be induced. Law as a means of social control is a technology. Propositions from technological discourse, in the theory of modern logic, have the function of inducing modes of action, as contrasted with propositions from scientific discourse which report a situation or with propositions from aesthetic discourse which present a value. Technological discourse, which embraces medicine, engineering, agriculture, in short, all the technologies, is concerned with imperatives which prevail upon behavior. The propositions of legal discourse are distinguished by such words as "shall," "may," "authorized," "directed," and "shall not." There is today a vigorous effort on the part of logicians to work out a general theory of interpretation which would be comprehensive enough to embrace the results already obtained in logic, theology, law, biology, anthropology, aesthetics, and

\textsuperscript{54} \textit{de re p.} 5, 3.

\textsuperscript{55} \textit{Pol.} 1284\* 13. For the idea in Hellenistic thought see Goodenough, \textit{The Political Philosophy of Hellenistic Kingship} (1928) 1 Yale Classical Studies 55.
the numerous other fields in which interpretation has been studied. It is thought that a theoretical structure simple in outline might unite the now disparate methods into a unified whole. However, that goal is still far to seek.

In the field of legal interpretation the judge, public official, and lawyer have at their disposal a technique formidable in dimension and flexible in content. In spite of a fair amount of analysis, the field remains confused, with its basic theory unsettled, and its rules for the most part, at least from the point of view of rigorous analysis, meaningless and contradictory. In the typical case the judge is free to take down from the shelf the rule which will produce the result he wishes to reach. Thus, to cite a case, the results of which Blackstone did not question, the statute 1 Edw. VI c. 12 enacted that those who are convicted of stealing horses should not have the benefit of clergy. Inasmuch as there is a rule that penal statutes must be construed strictly, the judges conceived that the statute should not extend to the man who stole but one horse. A different result could, of course, have been reached if the judges had applied the rule that the plural number includes the singular. Humanitarian considerations, not even today crystallized into a formal rule, may have moved the judges to their odd conclusion. This factor was plainly present in the second case cited by Blackstone. The statute 14 Geo. II c. 6 made the stealing of sheep, or other cattle, a felony without benefit of clergy. The general words "or other cattle" were looked upon as much too loose to create a capital offense, so the act was held to extend to nothing but mere sheep, a decision which Parliament cured at the next session by amending the statute to include bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name.

In Cicero's hands the theory of interpretation reached a level of development which compares not unfavorably with that which obtains today. Traditionally, interpretation was a branch

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56 1 Bl. Comm. 88. Lord Hale attempted to rationalize the case. 2 Pleas of the Crown 365.
of rhetoric and as such it had been intensively studied by some of the best minds of ancient times. In the *Phaedrus* Plato had conceived of rhetoric as an art based on philosophy. It was concerned with the influence of speech or words upon men's minds. Aristotle, following Plato, regarded it as a branch or counterpart of dialectic and defined it as the power of discovering the possible means of persuasion in reference to any subject whatever. Like dialectic, rhetoric has no special subject matter but can discuss any subject whatever; exact demonstration and necessary conclusions are excluded from it, and no proof, or conclusion, or principle that it employs is more than probable, since belief and not scientific demonstration is the object aimed at; it has no special, appropriate first principles, such as those from which the special sciences are deduced, though it appeals to the ultimate principles common to all reasoning; it argues indifferently the opposite sides of the same question, and concludes the positive or negative of any proposition or problem, unlike science and demonstration, which can only arrive at one conclusion. Where the materials and the method are alike only probable, every question has, or may be made to appear to have, two sides, either of which may be maintained on probable principles. In rhetoric no certainty is attained or attainable.

All his life Cicero was a careful student of rhetorical theory, and he wrote extensively upon it. In a letter he describes one of his rhetorical works as being written "in the Aristotelian manner" and states that it "embraces all the theories of rhetoric held by the ancients, including those of Aristotle and Isocrates." It was Cicero's avowed aim to provide the Romans with a discussion of every phase of philosophy treated by the Greek philosophers. Inasmuch as Aristotle and Theophrastus had joined rhetoric with philosophy it also appeared proper to Cicero to put his rhetorical works in the same category. However, the important consideration is that from

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58 *ad. fam.* 1, 9, 23.
59 *de div.* II, 4.
Cicero’s works it is apparent that the Latin rhetors, following the Greeks, had worked out a complete rhetorical theory of interpretation.

Rhetorical theory was divided into a number of main divisions and it was under the heading *inventio* that interpretation was treated. Invention was defined by Cicero as the devising of reasons either true or credible, which make one’s cause appear probable. It is instructive to examine the history of this idea. In the *Politicus* Plato had concluded that the appearance of the expert who could be trusted in government was so unlikely that we must put up with law which is inflexible and cannot adapt itself equitably to the individual case. In an attempt to correct this theory Aristotle drew a distinction in his *Ethics* and *Rhetoric* between τὸ δικαίωμα or justice and τὸ ἑπικεφαλής or equity and fairness. From this distinction certain rules followed, such as looking to the lawgiver rather than the law in interpreting the latter. That is to say, when the law lays down a general rule, and thereafter a case arises which is not covered by the general rule, then it is right, where the lawgiver’s pronouncement because of its absoluteness is defective and erroneous, to say what the legislator himself would have said had he been present and would have enacted if he had been cognizant of the case in question. Thus, what began as an ethical and political idea with Plato, and was treated both ethically and rhetorically by Aristotle, becomes in Cicero’s theory a purely rhetorical notion altogether divorced from ethics. Interpretation is one branch of the theory of speaking and is exclusively concerned with persuasion. Plato himself had admitted that rhetoric included even the false dialectic which could make the same things seem like and unlike, one and many. But the effort to correct on ethical grounds an admitted deficiency in the rule of law has become transformed into the false dialectic itself.

In English law the Aristotelian doctrine of looking to the legislator rather than the law for help in statutory interpre-

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60 *de inv.* I, 7.  
61 *E. N.* 1137b 20.
tation became the so-called principle of the “equity of the statute” (per l’equite de le statut) which was defined by Coke as follows: “Equity is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms.” Plowden cites Aristotle as authority for the principle, quoting him in the words of the Latin maxim Equitas est correctio legis generatim latae qua parte deficit. Plowden observed “that is not the Words of the Law but the internal Sense of it that makes the Law, and our Law (like all others) consists of two Parts, viz. of Body and Soul, the Letter of the Law is the Body of the Law, and the Sense and Reason of the Law is the Soul of the Law, quia ratio legis est anima legis.” The principle has been now generally abandoned, at least by name. However, it was applied in a comparatively recent case where a murderer was not permitted to take under the will of his victim, although the statutes regulating the making, proof and effect of wills and the devolution of property, if literally construed, gave the property to the murderer. After citing Aristotle the Court asked: “If the lawmakers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?” Although the principle of the equity of the statute is no longer looked upon with favor, a new principle is developing which occupies a portion of the field formerly covered by Aristotle’s rule. The principle is an exception to the casus omissus rule which provides that omissions in a statute cannot, as a general rule, be supplied by construction.

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62 1 Co. Inst. 24b.
63 Plowd. 465. Blackstone cites Cicero. 1 Bl. 61.
64 Equity is the correction of the law in those particulars wherein, by reason of its generality, it is deficient. Aristotle’s words are καὶ ἐστὶν αὕτη ἡ φύσις ἡ τοῦ ἐπισκόπου, ἐπισκόπου νόμον ἡ ἐκλειπεί διὰ τὸ καθόλου. Ε.Ν. 1137b 27.
The new rule holds that, where a statute deals with a genus, and a thing which afterwards comes into existence is a species thereof, the language of the statute should generally be extended to the new species, though it was not known or could not have been known to the legislature when the act was passed, e.g. the genus "railroad" when used in an 1860 statute included the species "steam railroad" and "city street or horse railroad" but in 1907 was extended to the new species "interurban and suburban railroad." Although Aristotle is shoved out the front door, he reappears again by the back entrance.

Cicero classified disputes about the interpretation of written texts into five types. For all cases, following standard rhetorical practice, Cicero obligingly supplies the kinds of arguments which should be used on both sides. *Scriptum* and *voluntas*: When the words of the document and the intention of the writer appear to be at variance. If the orator is speaking for the written law he should ask: Why did the draughtsman write like that if that was not his meaning? It is intolerable that the meaning of the legislator should be explained by anybody rather than by the law. What prevented the writer from inserting the exception which his opponent professes to have followed as though it were actually there? On the other hand one who bases his defense on the meaning and intention of the law will maintain that the force of the law resides in the purpose and intention of the person who drafted it and not in its words and letters. Then he must introduce examples of cases where all equity will be thrown into confusion if the words of the law are followed and not the meaning. Then he must arouse the hatred of the judge against cunning and chicanery of such a kind, with a note of resentful complaint in his voice. *Leges contrariae* or *ἀντινομία*: When two or more laws contradict each other. For this type Cicero supplies an

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66 McCleary v. Babcock, 169 Ind. 228, 82 N. E. 453 (1907).

67 *de inv.* I. 13. 17. 4 Voigt, *Das jus naturale, aequum et bonum und jus gentium* (1875) 350 et seq. collects the instances.

68 *part. or.* 38, 134, 135. *de inv.* II. 35. 130, II. 44. 128, II. 46. 135.
elaborate set of rules. Nothing like them has heretofore appeared in the history of jurisprudence as it is known to us. "It is necessary first," Cicero says, "to compare the laws to determine which is concerned with the more important, that is to say, the more useful, honorable, and necessary matters. It follows that if it is not possible to preserve two or more laws which are contradictory, that one should be preserved which appears to include within its scope the most important matters. Next is the question, which is the most recent law: usually the latest law is the most important. Then, which is the law that commands and that permits; for that which is commanded must necessarily be done, but that which is permissive is optional. Then it is necessary to consider which of the two laws penalizes violations or which has the heavier penalty attached to it; for that law must be preserved which is protected by a more carefully contrived set of penalties. Again, inquire which law commands and which prohibits; for the law which prohibits may turn out to contain amendments to the law which commands. Then it is necessary to discover which is the general and which the particular law; which is applicable to a variety of matters, and which is applicable to a single matter only. The particular law and the special law may be more relevant to the case under consideration and be more helpful in reaching a conclusion. It should also be determined which law prescribes immediate action and which permits some delay and postponement; above all, that law must be first obeyed which brooks no delay. Next, there should be an endeavor to make it appear that the letter of the law is being followed with fidelity; that the opposite position requires a choice of two meanings or of a resort to syllogistic reasoning or definition: a law has more weight and authority if its meaning is clear. Argue also that there is full agreement between the letter and the spirit of the law; if the case allows it, attempt also to give to the opposing law a meaning different from its apparent one, so that the two laws will not seem

69 de inv. II. 49.
contradictory. Thus, if your interpretation is adopted, both laws are preserved, but if your opponent’s interpretation is adopted, one of the laws must be discarded. Also, take into consideration the stock arguments suggested by the theory of rhetoric and those which the case itself furnishes, as well as those which may be drawn from the ample domains of honor and profit. By developing those topics you will be able to show which of the two laws ought to be followed.” Ambiguitas or ἀμφιβολία: When that which has been written signifies two or more things. Ratiocinatio or συλλογισμός: From that which is written, something appears to be discovered which is not written. This is the casus omissus of our law. “It is forbidden to export wool from Tarentum: he exported sheep.” Or, “The man who kills his father shall be sewed up in a sack. He killed his mother.” Definitio legalis or ὁ: When the inquiry is as to the exact meaning of a word which appears in a written document.

It may be well to look at an actual application of some of these rules. In what Cicero describes as the famous case of Curiius v Coponius a testator had left his estate to his expected posthumous son, with a gift over to Curiius in the event of such child dying under the age of fourteen, the period at which he emerged from guardianship. In fact no posthumous son was born, and after ten months Curiius claimed the estate but was opposed by M. Coponius the next of kin. It was a clear case of scriptum vs voluntas. Q. Mucius Scaevola argued on the literal terms of the will and contended that Curiius could never inherit unless a posthumous son had in fact been born and died before reaching puberty. How full and precise he was, Cicero says, on testamentary law, on ancient formulas, on the manner in which the will should have been drawn if Curiius were to be recognized as heir even if no son were born;

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70 For the stock arguments see de inv. II. 40, II. 41.
71 The examples are from Quint. VII. 8. 3. For Cicero’s arguments see de inv. II. 50.
72 For the stock arguments see de inv. II. 51.
73 de or. I. 180; II. 140, 221. Brut. 52. 194 et seq.
what a snare was set for plain people if the exact wording of the will were ignored, and if intentions were to be determined by guesswork, and if the written words of simple-minded people were to be perverted by the interpretation of clever lawyers. How much he had to say about the authority of his father, also a great jurist, who had always upheld the doctrine of strict interpretation, and in general how much concerning observance of the civil law as handed down: In saying all this with mastery and knowledge, and again with his characteristic brevity and compactness, not without ornament and with perfect finish, what man of the people would have expected or thought that anything better could be said?

L. Licinius Crassus, who represented Curius, began his rebuttal with the story of a boy’s caprice, who while walking along the shore found a thole-pin, and from that chance became infatuated with the idea of building himself a boat to it. He urged that Scaevola in like manner, seizing upon a thole-pin of fact and captious reason, had upon it made out a case of inheritance imposing enough to come before the centumviral court. He urged that the will, the real intention of the testator, was this: that in the event of no son of his surviving to the age of legal competence—no matter whether such a son was never born, or should die before that time—Curius was to be his heir; that most people wrote their wills in this way and that it was valid procedure and always had been valid. He then passed over to general right and equity; defended observance of the manifest will and intention of the testator; pointed out what snares lay in words, not only in wills but elsewhere, if obvious intentions were ignored; what tyrannical power Scaevola was arrogating to himself if no one hereafter should venture to make a will unless in accordance with his idea. The decision went to Curius.

There is a core of truth at the center of Cicero’s theory of interpretation which sets it over against our own attempts at a “scientific theory of interpretation.” His theory was frankly opportunistic. It was wedded neither to scriptum nor voluntas,
to the intent of the legislature, to the "true meaning" of the words, or to the application of technical rules. At the center of the rhetorical theory of interpretation was the concrete case. In principle it could be solved with the aid of all the techniques which the rhetors had elaborated—or in the face of all of them. This would make for a thoroughly explored system of case law, tough and at the same time sufficiently flexible to meet the surprises of the future. However, the weakness of the rhetorical theory is the fact that its sole object is success, while a legal theory of interpretation demands that it be pointed towards desirable or just results. Cicero's assertion that in judicial argumentation the proper end is equity or some kind of honesty seems a pious afterthought not required by the theory.\textsuperscript{74}

Whether the rhetorical theory of interpretation influenced Roman law is perhaps the most strongly contested point in the history of Roman law today. The jurists were certainly aware of the theories of the rhetors and were no doubt helped on some points by them; but that the theory had a more positive influence is still uncertain.\textsuperscript{75}

**CONCLUSION**

Cicero thought of jurisprudence as the Roman counterpart to Greek philosophy.\textsuperscript{76} He was wonderfully equipped to advance Rome's claim to distinction in that field of knowledge. With the exception of Varro he was probably the most learned Roman of his age. That a man should be well trained in the *artes liberales* which included literature, rhetoric, dialectics, arithmetic, geometry, astronomy, and music, he accepted as a matter of course. But his ideally educated man, his *doctus orator* or philosophic statesman (πολιτικός φιλόσοφος) must be specially at home in literature, rhetoric, history, law, and

\textsuperscript{74} de inv. II. 51.

\textsuperscript{75} The basic study is Stroux, *Summum ius summa iniuria* (1926); Italian translation by Funaioli with preface by Riccobono 12 *Annali Universita di Palermo* (1929) 639. The most complete discussion in English is Schiller, 27 *Vir. L. Rev.* (1941) 733.

\textsuperscript{76} de or. 1. 195.
philosophy. “We are called men,” he writes, “but only those of us are men who have been perfected by the studies proper to culture.” His own legal knowledge is a matter of dispute. That he was a brilliant orator is a commonplace. He prepared his cases with the utmost diligence; and a minute study of four of his orations has led to the assertion that he was a consummate jurisconsult, who combined with the practical a grasp of general principles which culminated in recommendations for legal reforms which were adopted. Still, Cicero himself hedged in the great debate between Crassus and Antonius on the question whether an orator could also be a jurist. Crassus argued that the orator should devote himself to a study of Roman law, but Antonius insisted that the subjects were separate sciences, each demanding a lifetime of study. Cicero sympathized with the idealism of Crassus but he recognized an inevitable distinction between a good advocate and a good lawyer. Like Austin’s, Cicero’s knowledge of the law may have been deficient, but again like Austin, this did not prevent him from devising an influential jurisprudence. His training in the Greek scholastic rhetoric, with its logical subtleties but its emphasis on the practical, here stood him in good stead. For one thing it gave him a sense of system. One of his criticisms of Roman law was that it lacked systematic form.

With Cicero jurisprudence embraced an humanitarian ideal which was to persist in a vital form for many centuries, and which is still influential. At the center of his thinking was the belief that civil law, if it were true law, was not merely the external expression of the desires of a dominant class, but a realization of the rules of justice and reason. The effect of this principle is plainly apparent in his theory of rights. He held that men of high moral character were made kings in order that the people might enjoy justice. When the masses were oppressed by the strong, they appealed for protection to some one man who managed by establishing equitable con-

\(^{77}\) de rep. 1. 28.
\(^{78}\) de or. 1. 166-203, 234-55. For the whole subject see Gwynn, Roman Education (1926) 79 et seq.
ditions to hold the higher and the lower classes in an equality of right. This was also the reason for making constitutional laws. For what people have always sought is equality of rights before the law. For rights that were not open to all alike would be no rights. If the people secured their ends at the hands of one just and good man, they were satisfied with that; but when such was not their good fortune, laws were invented, to speak to all men at all times in one and the same voice.79 Thus, the way was paved for the identification by the Roman jurists of law and morality. At the opening of the Digest was set Celsus’ definition of ius as ars boni et aequi. Not until Hobbes propounded his theory of positive lawmaking was ethics to be dethroned from its position of dominance over law and jurisprudence.

79 de off. 2. 41-42.