Phi 213 Sp16: some ideas of natural law

The following are quotations representing views of the nature of law in ancient and medieval thinkers. The comments appearing among them are designed to provide some context and to suggest things to look for in the selections. In most cases, the you can find the works from which the quotations are drawn in the text browser on the course Canvas site.

Aristotle (384-322 B.C.E.)

Think about Aristotle's distinction between "natural" and "legal" justice; you will find it echoed in a distinction between "natural" and "positive" law in many other things you will read. ("Positive" law is law that acquires its validity by being "posited" or, as Aristotle says, "laid down.") The distinction between the natural and conventional was common in Greek thought in Aristotle's time and the century before. His characterization of the conventional as something that is indifferent except for being laid down is analogous to recent ideas of what it is for something to be a matter of convention: something is conventional when its content is less important than is the general agreement to it. Aristotle's example of units of measurement is a common one; a more contemporary legal example is whether we drive on the right or left side of the road.

1 Political justice is partly natural and partly conventional.

The part which is natural is that which has the same authority everywhere, and is independent of opinion; that which is conventional is such that it does not matter in the first instance whether it takes one form or another, it only matters when it has been laid down, e.g. that the ransom of a prisoner should be a mina.…

Within the sphere of the contingent it is easy to see what kind of thing it is that is natural, and what kind that is not natural but legal and conventional, both kinds being similarly variable.…

Such rules of justice as depend on convention and convenience may be compared to standard measures; for the measures of wine and corn are not everywhere equal, but are larger where people buy and smaller where they sell. Similarly, such rules of justice as exist not by nature, but by the will of Man, are not everywhere the same, as polities themselves are not everywhere the same, although there is everywhere only one naturally perfect polity. [*The Nichomachean Ethics of Aristotle*, J.E.C. Welldon (tr.), 1134^{b}-1135^{a}.]

Cicero (106-43 B.C.E.)

Cicero's *Republic* survives only in fragments, and the immediate context of this passage is not known, but it is probably spoken by a character in the dialogue who expresses Stoic views (to which Cicero was sympathetic). Stoicism grew up in the period following Aristotle and was influential in Roman thought in the time of Cicero and for a couple of centuries thereafter. The Stoics took the distinction between the natural and conventional and made it a cosmological principle: their God suffused the universe, so they thought its the very substance embodied rational laws.

2 True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself, and does violence to the very nature of man. And by so doing he will endure the severest penalties even if he avoid the other evils which are usually accounted punishments. [*On the Commonwealth,* C. D. Yonge, ed. and tr., bk. 3, ch. 22 (sect. 33)]

Ulpian (d. 228 C.E.)

The selections up to those from Aquinas are from the *Corpus Juris Civilis*, the collection of legal materials commissioned by the emperor Justinian that was assembled under the direction of Tribonian (c. 485-547 C.E.). One of its components was the *Pandects* or *Digest*, a topical arrangement of quotations from ealier Roman jurists. The selections below from Ulpian, Julius Paulus, and Hermogenian appear in it.

3 When a man means to give his attention to law (*jus*), he ought first to know whence the term *jus* is derived. Now *jus* is so called from *justitia*; in fact, according to the nice definition of Celsus, *jus* is the art of what is good and fair.… Public law is that which regards the constitution of the Roman state, private law looks at the interest of individuals.… Private law has a threefold division, it is deduced partly from the rules of natural law, partly from those of the *jus gentium*, partly from those of the civil law. 3. Natural law is that which all animals have been taught by nature.… 4. *Jus gentium* is the law used by the various tribes of mankind, and there is no difficulty in seeing that it falls short of natural law, as the latter is common to all animated beings, whereas the former is only common to human beings in respect of their mutual relations. [The *Digest* of Justinian, C. H. Munro (tr.), book I, title 1, article 1.]

4 Manumissions … are comprised in the *jus gentium*. Manumission is … the giving of liberty.… All this had its origin in the *jus gentium*,

seeing that by natural law all were born free, and manumission was not known, because slavery itself was unknown; but when slavery came in through the *jus gentium*, there followed the relief given by manumission. [*Ibid.,* article 4.]

5 The civil law is something which on the one hand is not altogether independent of natural law or *jus gentium*, and on the other is not in every respect subordinate to it; so that when we make addition to or deduction from universal law (*jus commune*), we establish a law of our own, that is, civil law. 1. Now this law of ours is either ascertained by writing or with out writing. [*Ibid.,* article 6.]

6 Justice is a constant, unfailing disposition to give every one his legal due. 1. The principles of law are these: Live uprightly, injure no man, give every man his due. 2. To be learned in the law (*jurisprudentia*) is to be acquainted with divine and human things, to know what is just and what is unjust. [*Ibid.,* article 10.]

Julius Paulus (fl. c. 200 C.E.)

7 The word *jus* is used in a number of different senses: in the first place, in that in which the name is applied to that which is under all circumstances fair and right, as in the case of natural law; secondly, where the word signifies that which is available for the benefit of all or most persons in any particular state, as in the case of the expression civil law. [*Ibid.,* article 11.]

Hermogenian (fl. c. 300 C.E.)

8 It was by … *jus gentium* that war was introduced, nations were distinguished, kingdoms were established, rights of ownership were ascertained, boundaries were set to domains, buildings were erected, mutual traffic, purchase and sale, letting and hiring and obligations in general were set on foot, with the exception of a few of these last which were introduced by the civil law. [*Ibid.,* article 5.]

Tribonian *et al*, 533 C. E.

Another component of the *Corpus Juris Civilis* was the *Institutes*, a manual designed for legal education. Since it draws on the material in the *Pandects*, and you may notice echoes of some of the quotations above.

9 Justice is the set and constant purpose which gives to every man his due. Jurisprudence is the knowledge of things divine and human, the science of the just and the unjust. [The *Institutes* of Justinian, J. B. Moyle (tr.), title 1, section 1.]

10 The precepts of the law are these: to live honestly, to injure no one,

and to give every man his due. [*Ibid.,* section 3.]

11 The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence the procreation and rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offers. Civil law takes its name from the state wherein it binds.… But the law of nations is common to the whole human race; for nations have settled certain things for themselves as occasion and the necessities of human life required. For instance, wars arose, and then followed captivity and slavery, which are contrary to the law of nature; for by the law of nature all men from the beginning were born free. The law of nations again is the source of almost all contracts; for instance, sale, hire, partnership, deposit, loan for consumption, and very many others. [*Ibid.,* title 2, sections 1-2.]

12 Our law is partly written, partly unwritten, as among the Greeks. The written law consists of statutes, plebiscites, senatusconsults, enactments of the Emperors, edicts of the magistrates, and answers of those learned in the law.… The unwritten law is that which usage has approved: for ancient customs, when approved by consent of those who follow them, are like statute. And this division of the civil law into two kinds seems not inappropriate, for it appears to have originated in the institutions of two states, namely Athens and Lacedaemon; it having been usual in the latter to commit to memory what was observed as law, while the Athenians observed only what they had made permanent in written statutes.

But the laws of nature, which are observed by all nations alike, are established, as it were, by divine providence, and remain ever fixed and immutable: but the municipal laws of each individual state are subject to frequent change, either by the tacit consent of the people, or by the subsequent enactment of another statute. [*Ibid.,* sections 3,

9-11.]

Thomas Aquinas (1225-1274)

Aquinas wrote not long after the full range of Aristotle's works again became available in Western Europe, and he was strongly influenced them. In his incorporation of the law into his general theology, he was also influenced by the Justinian *Corpus* and, by way of it, by the Roman Jurists. Notice, especially, selections 18-21, where he incorporates distinctions like Aristotle's distinciton between natural and legal justice and the Roman jurists' distinctions among natural law, the law of nations, and civil law. The last of these and the selections following point to some further issues we will encounter over the course of the semester: the relation between natural law and international law (the modern successor to the law of nations), the relation between the idea of natural law and a moral duty to obey positive law, and the relation between written (or explicitly stated) law to particular legal decisions and to unwritten custom.

13 [Law] is nothing else than an ordinance of reason for the common good, made by him who has care of the community, and promulgated. [*Summa Theologiae*, I-II, q. 90, a. 4.]

14 The light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light. It is therefore evident that the natural law is nothing else than the rational creature's participation of the eternal law. [*Ibid.,* q. 91, a. 2.]

15 Just as, in the speculative reason, from naturally known indemonstrable principles, we draw the conclusions of the various sciences, the knowledge of which is not imparted to us by nature, but acquired by the efforts of reason, so too it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other essential conditions of law be observed. [*Ibid.,* a. 3.]

16 Man has a natural participation of the eternal law, according to certain general principles, but not as regards the particular determinations of individual cases, which are, however, contained in the eternal law. Hence the need for human reason to proceed further to sanction them by law. [*Ibid., ad* 1.]

17 The natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail. [*Ibid.,* q. 94, a. 4.]

18 Nothing hinders the natural law from being changed [by way of addition]: since many things for the benefit of human life have been added over and above the natural law, both by the Divine law and by human laws.

[By way of subtraction] the natural law is altogether unchangeable in its first principles: but in its secondary principles, which … are certain detailed proximate conclusions drawn from the first principles, the natural law … may be changed in some particular cases of rare occurrence. [*Ibid.,* a. 5.]

19 A thing is said to belong to the natural law in two ways. First, because nature inclines thereto: *e.g.* that one should not do harm to another. Secondly, because nature did not bring in the contrary: thus we might say that for man to be naked is of the natural law, because nature did not give him clothes, but art invented them. In this sense, the possession of all things in common and universal freedom are said to be of the natural law, because, to wit, the distinction of possessions and slavery were not brought in by nature, but devised by human reason for the benefit of human life. Accordingly the law of nature was not changed in this respect, except by addition. [*Ibid., ad* 3.]

20 As Augustine says … *that which is not just seems to be no law at all:* wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above …. Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.

But it must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by way of determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby, in the arts, general forms are particularized as to details: thus the craftsman needs to determine the general form of a house to some particular shape. Some things are therefore derived from the general principles of the natural law, by way of conclusions; *e.g.* that *one must not kill* may be derived as a conclusion from the principle that *one should do harm to no man:* while some are derived therefrom by way of determination; *e.g.* the law of nature has it that the evil-doer should be punished; but that he be punished in this or that way, is a determination of the law of nature.

Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law. [*Ibid.,* q. 95, a. 2.]

21 Positive law is divided into the *law of nations* and *civil law*, according to the two ways in which something may be derived from the law of nature …. Because, to the law of nations belong those things which are derived from the law of nature, as conclusions from premises, *e.g.* just buyings and sellings, and the like, without which men cannot live together, which is a point of the law of nature, since man is by nature a social animal…. But those things which are derived from the law of nature by way of particular determination, belong to the civil law, according as each state decides on what is best for itself. [*Ibid.,* a. 4.]

22 Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience….

On the other hand laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above—either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory—or in respect of the author, as when a man makes a law that goes beyond the power committed to him—or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws; because, as Augustine says…, *a law that is not just, seems to be no law at all*. Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right.…

Secondly, laws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed.… [*Ibid.,* q. 96, a. 4.]

23 Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.…

Nevertheless it must be noted, that if the observance of the law according to the letter does not involve any sudden risk needing instant remedy, it is not competent for everyone to expound what is useful and what is not useful to the state: those alone can do this who are in authority, and who, on account of such like cases, have the power to dispense from the laws. If, however, the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law. [*Ibid.,* a. 6.]

24 Now just as human reason and will, in practical matters, may be made manifest by speech, so may they be made known by deeds: since seemingly a man chooses as good that which he carries into execution. But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of human reason. Wherefore by actions also, especially if they be repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of a law, abolishes law, and is the interpreter of law. [*Ibid.,* q. 97, a. 3.]

25 The people among whom a custom is introduced may be of two conditions. For if they are free, and able to make their own laws, the consent of the whole people expressed by a custom counts far more in favor of a particular observance, that does the authority of the sovereign, who has not the power to frame laws, except as representing the people. Wherefore although each individual cannot make laws, yet the whole people can. If however the people have not the free power to make their own laws, or to abolish a law made by a higher authority; nevertheless with such a people a prevailing custom obtains force of law, in so far as it is tolerated by those to whom it belongs to make laws for that people: because by the very fact that they tolerate it they seem to approve of that which is introduced by custom. [*Ibid., ad* 3.]