

Ulpian, Natural Law and Stoic Influence

Is the role of natural law as a source of Roman law to be taken seriously? Does its recognition point to philosophical, in particular Stoic, influence? For Ulpian, at least, the answer to these questions should be a qualified Yes.¹

The first text of Justinian's sixth century *Digest* records that Ulpian, the leading lawyer from Syria and counsellor to successive emperors of the Severan age (AD 193-235), related the term 'law' to four elements: art, religion, ethics and philosophy.² Law is the art of the good and equitable, of which lawyers can well be called priests. They cultivate justice and the knowledge of right and wrong, and aim, unless Ulpian is mistaken, at the true philosophy.³ He goes on to say that private law is collected from three sources: natural law,⁴ the law common to all communities (*ius gentium*) and the law specific to each community (civil law).⁵ Gaius, a generation earlier, listed two sources: the civil law of each community and the *ius gentium*.⁶ He recognized, however, the existence of natural law which, so far as performing a 'natural obligation' is concerned, cannot be changed by civil law.⁷ At times he identifies natural law with *ius gentium*.⁸

Ulpian lists natural law as a third source of law. It is, he says, what nature has taught all animals, not only humans. He attributes to the law common to animals 'the union of male and female which we call marriage, the procreation of children and their education. For we see that other animals, including wild animals, are taken to have experience of this law'.⁹ 'Nature' is here treated not just as a description of the physical features of the world but as including ends implanted in living things. For living things the end is the survival of the individual, the species or, on a modern view, their genes. Sex, procreation and education are taken as means to this survival.¹⁰ The *ius gentium* on the other hand is confined to human

¹ I have touched on this theme in 'Les droits de l'homme chez Ulpian': *Le Monde Antique et les Droits de l'Homme* (ed. H.Jones,1998) 235-253.

² T.Honoré, *Ulpian. Pioneer of Human Rights*² (2002) 76-93.

³ D. 1.1.1 pr.-1 (Ulp. 1 inst: ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet: iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separatnes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, verum nisi fallor philosophiam, non simulatam affectantes.).

⁴ *Ius naturale* or *naturalia iura*; but *ius naturae* is used as equivalent.

⁵ D. 1.1.1.2-3 (Ulp. 1 inst.: privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut civilibus...Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humanae generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est...).f. Just. Inst. 1.1.4; 1.2.pr..

⁶ Gaius, *Institutes* 1.1: omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium iure utuntur: nam quod quisque populus ipse sibi constituit, id ipsius proprium est vocaturque ius civile, quasi ius proprium civitatis: quod vero naturalis ratio inter omnes homine constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.

⁷ Gaius, *Institutes* II.65,73; D 4.5.8 (4 ed. prov: eas obligationes, quae naturalem praestationem habere intelleguntur, palam est capitis deminutione non perire: quia civilis ratio corrumpere naturalia iura non potest.); 43.18.2 (24 ed. prov.)

⁸ Inst. 1.1; D. 41.1.1 pr.; 41.1.9.3 (Gai. 2 rer. cott.).

⁹ D 1.1.1.2 (Ulp. 1 inst: hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam, istius iuris peritia censi)

¹⁰ 'hinc descendit'.

beings. The distinction is legally salient, for in another text Ulpian is cited as saying that the owners of animals are liable for the damage they do only when they act contrary to nature.¹¹

Is this genuine Ulpian or is it a later addition to his text? What understanding of ‘nature’ would make it part of human law? ‘The saying has no juristic content at all’, says Berger.¹² According to Nicholas ‘the philosophical natural law is no more than an ornament, carrying no suggestion that an inconsistent man-made law might be invalid. Only in the case of slavery did Gaius remark that according to natural law all men were born free, but by the *ius gentium* they might be slaves.’¹³ Ulpian seems to have given natural law a different meaning. For he equates it with the instincts which humans share with animals. The prominent position of this text in Justinian’s *Institutes* and *Digest* gave it an undeserved influence in later thought’.¹⁴

But Ulpian’s view that the law of nature is a source of private law cannot be dismissed in this summary way. The argument that it is a merely ornamental or a later insertion in the text¹⁵ is not convincing. Why begin an ambitious legal compilation with a decorative remark? Neither Justinian (Christian) nor Tribonian (neo-Platonic) were given to frivolity and neither was an adherent of Stoic philosophy. As to later interpolation, the Latin conforms to Ulpian’s style. The substance is at first sight surprising but agrees with accounts of Stoic beliefs by Cicero and Diogenes Laertius.

As Cicero puts it, ‘They [Stoics] think it important to understand that nature creates in parents love for their children; and from this source we derive the general sociability of the human race.... Even among animals nature’s power can be observed; when we see the effort that they spend on giving birth and rearing their young, we seem to be listening to the voice of nature itself...Hence it follows that mutual attraction among humans is also something natural. The mere fact of their common humanity requires one man not to regard another as alien.’¹⁶ This is close to Ulpian’s account of the natural law common to humans and other animals.

Diogenes’ account of Stoicism is said to be reliable,¹⁷ though his personal philosophy may be Epicurean. According to him ‘They [Stoics] say that an animal’s first impulse is to preserve itself, because it is at home (*οἰκεῖον*)¹⁸ with itself by nature from the start, as Chrysippus says in his first book ‘On Ends’. He says that the first thing that each animal is at home with is its own constitution and its awareness of it. ..Nature, they say, makes no distinction between plants and animals since, besides animals, it directs plants without impulse and sensation.

¹¹ D. 9.1.1.7 (Ulp. 18 ed: et generaliter haec actio locum habet, quotiens contra naturam fera mota pauperiem dedit). There are, according to this text, proper and improper ways for a horse to behave.

¹² A. Berger, *Encyclopedic Dictionary of Roman Law* (1953, 1968) 530-531.

¹³ He is not recorded as saying this, but a generation later Ulpian, Florentinus and Tryphoninus do: nn.22,25,27 below.

¹⁴ B. Nicholas in *Oxford Classical Dictionary*³ (1996) 835.

¹⁵ Both, according to P.A. Vander Waerdt, ‘Philosophical influence on Roman jurisprudence?’ in *Aufstieg und Niedergang der Römischen Welt* 36.7 (1994) 4851-4900.

¹⁶ Cicero, *On Ends* 3.62, 63: Pertinere autem ad rem arbitrantur [Stoici] intellegi natura fieri ut liberi a parentibus amentur; a quo initio profectam communem humani generis societatem persequimur....Atque etiam in bestiis vis naturae perspici potest; quarum in fetu et educatione laborem cum cernimus, naturae ipsius vocem videmur audire.....Ex hoc nascitur et etiam communis hominum inter homines naturalis sit commendatio, ut oporteat hominem ab homine ob id ipsum quod homo sit non alienum videri.

¹⁷ *Oxford Classical Dictionary*³ (2003) 475.

¹⁸ To the Stoics *οἰκεῖωσις* (roughly being at home with or akin to someone or something) is the basis by which people come to recognize that they belong to a universal human community. Below nn. 52-56. .

Even in us humans there are some vegetative processes. But since animals have the additional faculty of impulse, by which they seek out what they are drawn to, then what accords with nature is regulated by what accords with impulse. And since rational animals are for more perfect guidance given reason, what accords with nature for them becomes to live rightly according to reason. For reason comes in as the craftsman of impulse.’¹⁹ Seneca speaks of a ‘controlled and balanced impulse’.²⁰

These, though non-Stoics, present a plausible view of Stoic teaching. Stoicism was unusual in the ancient world in discerning common elements in different types of living creature. In this it was closer than other schools of thought to the understanding we derive from modern genetics. An influence of Stoic thought on what Ulpian says about the law common to humans and other animals cannot, therefore, be ruled out. From what other source would he have derived his bold thesis? Though Stoics did not all have the same opinions, the texts cited present a consistent view. Nature governs the behaviour of living things. It directs plants, animals and humans to survive and rear young, but in ways that vary with the make-up and capacity of each. An implicit allusion to that view perhaps struck Ulpian as a way of filling out his statement earlier in the same text that law is the true philosophy. He is concerned to show, like his contemporary Galen,²¹ a concern with the theoretical basis of applied disciplines such as medicine and law. An appeal to some aspect of the school of philosophy embraced by Galen’s patient, Marcus Aurelius, the emperor most admired by lawyers of the Severan age, would not be out of place.

Ulpian is writing in the light of the *Constitutio Antoniniana*, which in 212 AD extended Roman citizenship and so Roman law to all free peoples in the empire. This made the *ius gentium* a matter of historical rather than contemporary input into law. So it was pertinent to point to another source of those aspects of Roman civil law that continued to mitigate its original rigour. ‘Nature’ had long played an informal role of this sort, a justification for interpretations of the law that might otherwise appear audacious.

Roman lawyers had for more than a century appealed to nature to justify rules and institutions of Roman law that were not confined to Roman citizens. For example, the natural freedom of all men, which Ulpian endorses as part of natural law,²² features as the legal principle that favours liberty.²³ In the introductory Digest title he states that by natural law all humans are born free. Slavery made its way in through the *ius gentium*. The benefit of being freed followed.²⁴ Roman slaves have the great benefit that, if freed, they become Roman citizens.²⁵ ‘It is well known that many decisions are reached against the rigour of the law and in favour

¹⁹ Diogenes Laertius 7.85-6; Seneca, *Letters* 76.9; Epictetus, *Discourses* 1.6.12-22; Origen, *On Principles* 3.1.2-3; A.A. Long and D.N.Sedley, *The Hellenistic Philosophers* (Cambridge 1987), 53A, 57A.

²⁰ Seneca, *Letters* 89.14: primum enim est, ut quanti quidquid sit iudices; secundum ut impetum ad illa capias ordinatum temperatumque.

²¹ Galen, *The Best Doctor a Philosopher* (ed. Kühn 1821) 1. 53-63; G.Lannata, *Legislazione e natura nelle novelle Giustineane* (1984) 214-219. Galen was not a Stoic.

²² Below n.24.

²³ *Favor libertatis*.

²⁴ D. 1.1.1.4 (Ulp. 1 inst.: quae res <manumissio> a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita; sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis).

²⁵ D. 38.2.1 pr (Ulp. 4 ed: tam grande beneficium, quod in liberos confertur, cum ex servitute ad civitatem Romanam perducantur).

of freedom.²⁶ This natural freedom can be invoked when the law admits of more than one interpretation.

Florentinus takes a similar view. Slavery is a provision of the *ius gentium*, by which one person is subject to another's power contrary to nature.²⁷ For Marcianus, a younger contemporary and probably pupil of Ulpian,²⁸ a freed slave granted the privilege of being treated as born free is restored to the condition in which all men were originally, though in fact he was born a slave.²⁹ Seneca, a Stoic, argues that freemen should treat slaves as they would wish slaves to treat freemen if their positions were reversed; indeed as friends.³⁰

Elsewhere in the *Digest* Ulpian says that by the law of nature, as opposed to civil law, all human beings are equal. So slaves, though they do not count in civil law, are not nullities by the law of nature.³¹ There is an informal sense in which a slave owes and is owed debts, and account of this is taken in actions by or against the slave's owner. As the Severan lawyer Tryphoninus³² remarks, though a slave cannot sue his owner for payment of a so-called debt, if he is freed and the owner pays him what he supposes is owed, even in the mistaken belief that the debt is legally due, the owner cannot reclaim the payment. It was 'naturally' owing. For just as natural law confers freedom and the ownership of slaves was introduced by the *ius gentium*, so in regard to repayment what is owing or not owing must be understood in a natural sense.³³ The 'natural' status of a slave is recognised by law in a set of remedies relating to property which in practice, if not in strict law, forms a slave's private holding.³⁴ This status is important in commerce, for it allows slaves to do business and helps to regulate their financial relations with their owners.

A slave, like anyone else, can be subject to a natural obligation.³⁵ As Ulpian expresses it 'slaves are bound by civil wrongs [torts] and, if freed, they remain bound. They are not civilly bound by contracts, but by nature they bind and are bound'.³⁶ Children under age can

²⁶ D. 40.5.24.10 (Ulp. 5 fid: nec enim ignotum est, quod multa contra iuris rigorem pro libertate sint constituta).

²⁷ D. 1.5.4 (Florent. 9 inst: Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur). Florentinus is a writer of the late second or early third century: D.Liebs in *Handbuch der lateinischen Literatur* 4 (1997) 206-207.

²⁸ D.Liebs, *Handbuch der Lateinischen Literatur der Antike* 4 (1997) 201-205.

²⁹ D. 40.11.2 (Marcian. 1 inst: illis enim utique natalibus restituitur, in quibus initio omnes homines fuerunt, non in quibus ipse nascitur, cum servus natus esset).

³⁰ Seneca, *epist.* 47.10-11,13: Vis tu cogitare istum quem servum tuum vocas ex isdem seminibus ortum eodem frui caelo, aequae spirare, aequae vivere, aequae mori! Tam tu illum videre ingenuum potes quam ille te servum...Haec tamen praecepti mei summa est: sic cum inferiore vivas quemadmodum tecum superiorem velis vivere. ...Vive cum servo clementer, comiter quoque, et in sermonem illum admitte et in consilium et in convictum. .

³¹ D. 50.17.32 (Ulp. 43 Sab: Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt).

³² A member of the imperial council under Septimius Severus: D.Liebs, *Handbuch der Lateinischer Literatur* 4 (1997) 125.

³³ D 12.6.64 (Tryph. 7 disp.: Si quod dominus servo debuit, manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale agnovit debitum: ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti in conditione naturaliter intellegenda est.

³⁴ *Peculium*. These are the so-called *actiones adiectitiae qualitatis*.

³⁵ Gaius, *Inst.* III.119a; D. 15.1.50 2 (Pap. 9 qu: ...quia naturalis obligatio, quam etiam servus suscipere videtur, in litem translata non est).

³⁶ D. 44.7.14 (Ulp. 7 disp: servi ex delictis quidem obligantur et, si manumittantur, obligati remanent: ex contractibus autem civiliter quidem non obligantur, sed naturaliter et obligantur et obligant. Denique si servo, quo mihi mutuum pecuniam dederat, manumisso solvam, liberor).

also incur natural obligations. Such debts are ‘equitable by nature’.³⁷ In short the complex law of natural obligations rests on the view that nature, though not directly making informal obligations enforceable, recognizes them indirectly. There are circumstances, such as the enforcement of security and claims for repayment, in which formal status can be disregarded and the equality of humans recognized.³⁸ It is true that, until the text of Tryphoninus cited above, natural obligations are not expressly related by legal writers to the law of nature, but this merely shows that the theory of sources can lag behind the law in practice.

What is natural to humans in the eyes of the Roman lawyers of the second and third centuries, and especially to the Severans, are those inbuilt and hence informal features of life that can be rationally justified apart from civil law and social convention. This is what distinguishes natural law from *ius gentium*, which rests on accepted conventions, whether or not informed by reason. So beside natural obligations we find appeals to natural reason (*naturalis ratio*), much favoured by Gaius.³⁹ It is treated by the Severan Paul as a sort of tacit legislation.⁴⁰ Other arguments appeal to natural equity (*naturalis aequitas*) to justify legal rules or principles.⁴¹

This status of natural institutions is repeatedly stressed in the years before in the Severan age natural law is expressly recognized as a source of law. ‘Nature’ not merely rules out an obligation to perform what is by nature impossible⁴² but gives reasons for or against rules and institutions. It provides the right of self-defence.⁴³ It endorses certain modes of acquiring property.⁴⁴ Blood relationship is natural. Along with decency, nature condemns incest.⁴⁵ It eschews speculation about another’s misfortune.⁴⁶ It supports the repayment of payments made that were not in fact owed.⁴⁷ It allows us consciously to improve the position of others, but not to make it worse.⁴⁸ It imposes losses on those who profit from the thing in question.⁴⁹ It provides that no one should be enriched by a wrong to another.⁵⁰ Some ways of behaving are naturally wrong.⁵¹ The law of nature is always equitable and good.⁵²

³⁷ D. 15.1.11.2 (Ulp. 29 ed: est autem natura aequum liberari filium vel servum obligatione eo quo indebitum videtur egisse).

³⁸ References in *VIR* 4(1) 26.36-41 esp. 41.1.16.4 (Iul. 53 dig.); D 46.1.6.2, 8.3 (Ulp. 47 Sab.); 46.1.21.2,3 (Afr. 7 qu.); 46.2.1 pr. (Ulp. 46 Sab.).

³⁹ Gaius, Institutes I.1, 89, 189; II. 66, 69, 79; III.154; D. 3.5.38 (3 verb. obl.); 7.5.2.1 (7 ed. prov.); 8.2.8 (ed. prov.); 9.2.4 pr. (7 ed. prov.); 13.6.18.2 (9 ed. prov.); 41.1.1 pr. (2 rer. cott.); cf. D. 5.3.36.5 (Paul 20 ed.); 17.2.83 (Paul 1 manual.); 48.20.7 pr. (Paul 1 port.lib. damn.); 50.17.85.2 (Paul 6 qu.); 25.3.5.16 (Ulp. 2 off. cons).

⁴⁰ D 48.20.7 pr (Paul 1 port. lib. damn: quasi lex quaedam tacita).

⁴¹ D. 50.17.66 (Marcellus ad Iul. 60 dig.); 38.8.2 (Gai. 16 ed. prov.); 41.1.9.3 (Gai. 2 rer. cott.); 4.4.1 pr. (Ulp. 11 ed.); 12.4.3.7 (Ulp. 26 ed.); 13.5.1 pr. (Ulp. 27 ed.); 37.5.1 pr. (Ulp. 40 d.); 38.16.1.3 (Ulp. 1 Sab.); 43.26.2.2 (Ulp. 71 ed.); 47.4.1.1 (Ulp. 38 ed.); 44.4.1.1 (Paul 71 ed.); 49.15.19 pr. (Paul 16 Sab.).

⁴² D. 44.7.1.9 (Gai. 2 rer. cott.).

⁴³ D. 9.2.4 pr. (Gai. 7 ed. prov: adversus periculum naturalis ratio permittit se defendere.); 43.16.1.27 (Ulp. 69 ed.).

⁴⁴ D. 1.8.2 ((Marcian. 3 inst.); 8.2.8 (Gai. 7 ed. prov.); 17.2.83 (Paul 1 manual.); 43.18.2 (Gai 25 ed. prov.).

⁴⁵ D. 23.2.14.2 (Paul 35 ed.).

⁴⁶ D. 45.1.83.5 (Paul 72 ed.).

⁴⁷ D. 1.6.15 pr. (Paul 10 Sab.).

⁴⁸ D. 3.5.38 (Gai. 3 verb. obl.)

⁴⁹ D. 50.17.10 (Paul 3 Sab.).

⁵⁰ D. 12.6.14 (Pomp. 21 Sab.); 50.17.206 (Pomp. 1 var. lect.).

⁵¹ D. 50.16.42 (Ulp. 57 ed.).

⁵² D. 1.1.11 (Paul 14 Sab: Ius plurimis modis dicitur: uno modo, cum id quod semper aequum et bonum est ius dicitur, ut est ius naturale.)

If one accepts that principles can explain legal rules and serve to decide contested legal issues, not always conclusively, then natural law was part of Roman law. What view of nature underlies this way of thinking? Stoic elements seem prominent. This would not be surprising given the intellectual standing of Seneca and Marcus Aurelius in the first centuries of the empire. Moreover Ulpian's close colleague Aelius Marcianus is recorded in the *Digest* as citing Chrysippus, 'the philosopher of the highest Stoic wisdom', to the effect that law is the king of things divine and human. It should preside over the good and bad as ruler and guide and set the standard of the just and unjust for creatures who by nature live together, prescribing what they should do and forbidding what they should not do.⁵³

But does Stoic thinking in detail fit this view of nature as a source of law? The view that there is a universal human community⁵⁴ is derived by the Stoics from what is called *οἰκείωσις*,⁵⁵ a difficult term to translate. It is related to *οἶκος* (house) and in my view comes close to 'being at home with' someone or something, either actually or potentially, through being 'drawn to' or 'akin to' that person or thing. It can include a person's relation to their property. Parental love, as Cicero puts it,⁵⁶ is taken as the starting point of human kinship. But how are we to understand the transition from the kinship of parents and children to a universal community? The Stoic Hierocles uses the image of increasingly wide circles. The inmost is drawn round a person's own mind. Then we can proceed to the circles of close relations, more distant relations, local residents, fellow-tribesmen, fellow-citizens, fellow-countrymen. The outermost and largest circle, which includes all the rest, is the whole human race. The well-tempered man draws the outer circles towards the centre.⁵⁷ For the Stoics there was, it has been argued, 'a natural impulse to community and social solidarity',⁵⁸ or as Marcus Aurelius puts it 'community is the good of a reasonable creature'.⁵⁹ But different people made more or less progress in drawing in the wider circles.

Two problems arise. The first is the transition from the existence of certain attributes (e.g. the love of parents for children) to treating the attribute as normative, something to be encouraged. How do we pass from 'feels akin to' to 'ought to treat as kin'? As Hume made clear the passage from 'is' to 'ought' is, without more, illegitimate.⁶⁰ But in this instance it involves nothing more startling than that we should exercise the faculties we possess. We have the ability and disposition to look after our kin, to be sociable and to exercise intelligence and reason. No logical syllogism requires the possessor of these traits to exercise them. But, assuming that life has value, the exercise of innate faculties in living creatures is to be encouraged, since they tend to promote survival. The theory of natural selection

⁵³ D. 1.3.2 (Marcian. 1 inst: sed et philosophus summae stoicae sapientiae Chrysippus sic incipit libro, quem fecit *περὶ νόμου* : ὁ νόμος πάντων ἐστὶ βασιλεὺς θεῶν τε καὶ ἀνθρωπίνων πραγμάτων· δεῖ δὲ αὐτὸν προστάτην τε εἶναι τῶν καλῶν καὶ τῶν αἰσχρῶν καὶ ἄρχοντα καὶ ἡγεμόνα, καὶ κατὰ τοῦτο κανόνα τε εἶναι δικαίων καὶ ἀδικῶν καὶ τῶν κατὰ φύσει πολιτικῶν ζώων, προστατικὸν μὲν ὧν ποιητέον, ἀπαγορευτικὸν δὲ ὧν οὐ ποιητέον.)

⁵⁴ Plutarch, *On the fortune of Alexander* 328A.

⁵⁵ T. Brennan, *The Stoic Life* (2005) ch. 10.

⁵⁶ Above n.16.

⁵⁷ Stobaeus (ed. C.Wachsmuth & O.Hense 1884-1923) 4.671-673; Long & Sedley, *The Hellenistic philosophers* (1987) 57G.

⁵⁸ P.Mitsis 'The Stoic Origin of Natural Rights', in *Topics in Stoic Philosophy* (ed. K.Ierodiakonou 1999, 2001) 155.

⁵⁹ Marcus Aurelius, *Meditations* 5.16: τὸ ἄρα ἀγαθὸν τοῦ λογικοῦ ζώου κοινωνία. ὅτι γὰρ πρὸς κοινωνίαν γεγόναμεν, πάλα δέδεικται.

⁶⁰ D. Hume, *A Treatise of Human Nature* (1740) III, part i, sec. 1.

illustrates this tendency, and the Stoic ideal of living according to nature includes exercising our innate faculties.

It would be odd for living creatures, such as humans, not to treat life as a value, or at least, in Stoic terminology, as a 'preferred indifferent'.⁶¹ This odd term is used because in the Stoic view only virtue is good. All the other things we value are 'indifferent'. Life, health and wealth are however normally to be preferred, not because they are good but because it is natural to choose them.⁶² So they count in the Stoic vocabulary as preferred indifferents which, when in accordance with nature, have value.⁶³ The term is ultimately untenable because what is good need not be good for everyone and in all circumstances. It must be good for most people most of the time. Life is a good because it is a feature of living things, both complex entities like plants animals and humans and simple organisms such as amoebae and bacteria, that they are programmed to survive or reproduce. This feature can be regarded as a built-in end of living creatures. Chrysippus treated it as part of nature's purpose, set by Zeus.⁶⁴ This theological interpretation implies that behind nature lies a rational directing force. It can however be understood more impersonally. If we think of an end as something towards which a thing is oriented owing to its inbuilt nature, then survival and continuity count as ends of life. To continue on similar lines is part of the make-up of living things. Reproduction involves continuity and likeness. So living things are programmed to survive and/or continue along similar lines. Continuity and likeness are in that sense innate and 'natural' ends of life.

More difficult is the argument that, starting from the individual, widening circles and ultimately the whole human species should be treated as kin. This is central to the view that we are all by nature born free and equal and that artificial legal, political, and social distinctions are in a sense unnatural. Why should we come to think of ourselves as citizens of the whole world, of a single cosmopolis?⁶⁵ Not surprisingly the passage from family kinship to universal community was criticised in the ancient world and, though the conclusion is now more widely accepted on other grounds, remains controversial.

The case for it would now rest in part on the genetic similarity of human beings. But their universal kinship cannot be put on the footing that they feel akin to one another. Most feel akin to some (insiders) but may be positively hostile to others (outsiders). Universal kinship must rest on a more limited basis. All of us have to live in a community but we differ in setting the bounds of the community or communities to which we think we belong. All possess some elements of intelligence, reasoning power and affection for others, but the strength of these varies. We are not born with them fully developed, and in the Stoic view they develop over time as we mature.⁶⁶ The sense in which we are by nature born equal is that, apart from the unfortunates who wholly lack these basic capacities, we all possess and can to some extent exercise them.

⁶¹ ἀδιάφορον προηγούμενον. In Stoic theory only virtue is good, so that life, health, wealth and pleasure are 'indifferent', though it is normally rational to prefer them: Diogenes Laetius 7.101-107.

⁶² Seneca, *Letters* 92.11-13.

⁶³ Stobaeus 2.79-80; 83.10.

⁶⁴ Diogenes Laetius 7.88; Cicero, *On the Nature of the Gods* 1.39; A.A. Long and D.N.Sedley, *The Hellenistic Philosophers*, Cambridge 1987, 63c, 54B.

⁶⁵ Cicero, *Laws* 1.23.

⁶⁶ M.Frede, 'On the Stoic Conception of the Good' in *Topics in Stoic Philosophy* (ed. K. Ierodiakonou 1999) 71, 73-74.

But are we bound to exercise them? Does their exercise count as obligatory and so in a broad sense law? It is recommended as a proper or fitting way of living, but is this anything more than moral guidance for those who aspire to virtue? The next paragraph puts the case for holding that the obstruction of basic human capacities is improper in the stronger sense of being forbidden. It is contrary to natural law.

On a Stoic view we are all free in the sense of being able to assent to or dissent from impressions, to accept them as true or reject them as false. But this mental freedom, which is said to exist even in the most dismal circumstances, does not bear on our freedom to act, to exercise our faculties. The sense in which we are by nature born free can be put in an alternative way, which is not shown to be part of Stoic thought but is consistent with it. It would be contrary to nature to obstruct the development and exercise of our innate capacities and those of others. It is part of the nature of humans to live in society. If people avoid acting contrary to nature and respect others they and others are left free to develop their capacities. This serves to explain why natural law is closely related to restraint and respect for others.⁶⁷ People cannot develop their natural ends unless others leave them free from oppression and ill-treatment. Hence it is natural to defend oneself and we should abstain from wrongs to others that prevent the development of their faculties. We are forbidden to prevent others doing what is fitting for them. Several examples of appeal to natural reasoning and equity, drawn from Roman legal texts, were set out earlier.⁶⁸ This helps explain Ulpian's view that the law is, among other things, the art of the good and equitable.

The startling thesis that we are by nature born free and equal then resolves into more modest terms. As living creatures, we are programmed to survive, propagate and educate our young. To do this well we should exercise and develop the gifts of affection, intelligence, reasoning and sociability that are given us. We should not obstruct the exercise and development of these gifts by others who are similarly endowed. We should recognise them, to that extent, as kin. This rules out slavery, oppression and other forms of ill-treatment. To that extent we form part of a universal community.

The surviving texts do not permit us to be sure that some Stoics reasoned in this way. The questions posed at the beginning of this essay can only be given a qualified 'yes'. But they may well have done so. Moreover the suggested course of reasoning is consistent with Ulpian's view of natural law as a source of private law. This does not mean that he was in a formal sense a Stoic. We know that he had read Cicero, but not what professed Stoics he may have consulted. Some Stoic beliefs, for instance that indifferents such as life, health and wealth are not goods, are untenable.⁶⁹ The so-called preferred indifferents are goods, but are not morally commended to all in all circumstances. The Stoic belief in determinism is also untenable, since the initial conditions, physical and psychological, that that theory presupposes are not ascertainable in advance.⁷⁰ The argument that determinism is incompatible with human responsibility, a favourite criticism of the Stoics in the ancient world, but one which they rejected, need not therefore be discussed. Human law presupposes human responsibility for the conduct of people of normal capacity, because of the faculties

⁶⁷ P.Mitsis, 'Natural law and natural right in post-Aristotelian philosophy. The Stoics and their critics' in *Aufstieg und Niedergang der Römischen Welt* 36.7 (1994) 4812-4850 at 4813; 'The Stoic Origin of Natural Rights', in *Topics in Stoic Philosophy* (ed. K.Ierodiakonou 1999, 2001) ch. 6...

⁶⁸ Above nn. 41-51.

⁶⁹ Above nn.62-63. Half conceded by Chrysippus: Plutarch, *On Stoic Self-contradictions* 1084A.

⁷⁰ T.Brennan, *The Stoic Life. Emotions, Duties and Fate* (2005) ch.15.

that humans possess and an exercise and normally wish to be treated as having. The same need not be true of natural law as it applied inanimates, plants and animals other than humans. They do not have the same nature.

Ulpian need not have embraced untenable Stoic beliefs. As I have pointed out previously, philosophically-minded lawyers are not members of this or that school of philosophy. It is a mistake to attribute to a lawyer a system of philosophy rather than a set of values. The nature of the discipline requires lawyers to be eclectic, to compromise between different aims. They must be faithful to the wording of authoritative texts, take account of the purposes they embody, and try to reach conclusions that are morally acceptable in the particular case.⁷¹ They should act in a befitting way, fulfil their proper function,⁷² ‘reason well in the selection and dissection of things in accordance with nature’.⁷³ This does mean rigidly following settled rules. Law is the art, not the mechanical application, of the good and equitable. Philosophy provides a guideline, not a command. In this respect Roman law was flexible, since settled rules and principles required, as they do in modern legal systems, to be interpreted in the light of equity and of particular circumstances.⁷⁴ Ulpian’s work provides a notable example of this lawyerly approach.⁷⁵

We need not and should not endorse Stoic philosophy as a whole. But the idea that we are programmed by nature to pursue certain ends and provided with means for achieving those ends, some specific to human beings, is not irrational. The recommendation to make use of the available means and not to obstruct their use by others, though not a logical consequence of their existence, is sensible advice for those who live in a community. It is plausible to treat it as an aspect of respect for nature, of which we, along with inanimate plants and animals, are part. We are to respect what nature gives us, and exercise an not obstruct the faculties given to living things. That line of thought does not settle, and is not meant to settle, controverted legal issues but it provides a framework for thinking about them.

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⁷¹ T.Honoré, *Ulpian*² (2002) 80; L.Ackermann, *Cowen on Law. Selected Essays* (ed. S.Cowen 2008) xvi..

⁷² In Stoic terms τὸ καθήκον : ‘proper function’ or ‘what befits’: Cicero, *De Finibus* 3.20-21. Befitting actions do not have to be right in the full sense of being rightly motivated (καθορθώματα).

⁷³ Stobaeus 2.76.

⁷⁴ P.Mitsis, ‘Natural law and natural right in post-Aristotelian philosophy. The Stoics and their critics’ in *ANRW* 36.7 (1994) 4812-4850 at 4848.

⁷⁵ D.Liebs, ‘Mein Ulpian’, in *Altera Ratio. Klassische Philologie zwischen Subjectivität und Wissenschaft. Festschrift für Werner Suerbaum zum 70. Geburtstag* (ed. M.Schauer & G.Thome, 2007, 74-81.