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Cicero's De Legibus: Law and Talking Justly Toward a Just Community

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In *De Legibus*, Marcus, as the principal speaker and stand-in for Cicero, describes law as right reason, as the selection of justice within a community. Most modern readers have concluded that this description is based on the belief that there is an immutable human nature and a transcendent order in the universe that dictates right reason and thus determines specific rules of law. And since this belief is said to rest on

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psychological and theological assumptions that are rejected in modern thought, the dialogue, Cicero’s principal work on the nature of law, is not considered to be of much current interest. But the text of *De Legibus* does not support this reading of Cicero’s legal views. Indeed, the standard interpretation depends upon lifting parts of the speeches made in this dialogue and in *De Republica* out of context and treating them as abstract statements of Cicero’s legal theory. Ironically, *De Legibus*

Litman, “Cicero’s Doctrine of Nature and Man” (Ph.D. diss., Columbia University, 1930): 25-27 includes the closest reading of *De Legibus* I have found, but he finally follows a conventional reading. The only dissension I have discovered is Leo Strauss, *Natural Right and History* (Chicago, 1953), 153-156, who notes that Cicero raises doubts about the truth of Stoic ontological natural law doctrine in *De Legibus*. There has been some debate whether the views thus attributed to Cicero are closer to the formulation of Panetius, a second century Stoic, or the reinterpretation of Stoicism developed by the neo-Platonic Antiochus. This debate is summarized in Elizabeth Rawson, “The Interpretation of Cicero’s ‘De Legibus’,” Aufstieg und Niedergang der römischen Welt, I,4 (1973): 340-42, where she observes that many scholars have shelved the debate, concluding that Cicero generally did not draw from only one source. Max Pohlenz, *Die Stoa* II (1949; reprint, Gottingen, 1972), 126 similarly concludes that Cicero does not use the formulations of any one particular philosopher but rather draws upon the ordinary version of Stoic thought well-known in Rome at the time. This view is consistent with my reading of Cicero, although I cannot claim expertise on Stoic philosophy.

2. The discounting of Cicero as a legal thinker was no doubt encouraged by the sweeping attacks on Cicero’s political works during the nineteenth century, most notably by Karl Marx, who attacked Cicero as an enemy of popular rule, and by Théodor Mommsen, who criticized Cicero as a reactionary opponent of the enlightened leadership of Julius Caesar. The rejection of Cicero in the nineteenth century is in sharp contrast to the great admiration and influence given to his work by eighteenth century political thinkers, especially John Locke, Thomas Jefferson, and many others among the American founders. See Wood, I-11 for a good discussion of Cicero’s prestige as a political thinker and citations to other discussions. See also Richard McKeon, “Introduction to the Philosophy of Cicero,” in Cicero, *Brutus, On the Nature of the Gods, On Duties*, trans. Hubert Poteat (Chicago, 1950), 1-9 (discussing Cicero’s “persistent, widespread, and ambivalent” influence on Western thought and the fact that he is “little read or admired today”). For a collection of essays exhibiting and arguing for the continuing study of Cicero in a variety of fields, see T.A. Dorey, ed. *Cicero* (New York, 1965).

3. These writers most frequently quote *De Republica* 3.22.33 as a direct statement of Cicero’s conception of law and then cite *De Legibus* 1.6.19; 2.4.8; 2.6.14 as restatements of this conception. See, e.g., Bodenheimer, 13-15; Cairns, 137-38; Friedrict, 29-30. And see A.P. d’Entreves, *Natural Law* (London, 1951), 20-21 remarking on the frequent citation of this passage. *De Republica* 3.22.33 reads as follows:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not law its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.

*De Republica, De Legibus*, trans. Clinton W. Keyes, Loeb Classical Library (1928; reprint, 1970). All references to *De Republica* will be to this translation.

Three circumstances, at least, suggest caution in concluding that this passage states Cicero’s views in any direct way. Most importantly, this is not said by Scipio, the principal speaker whose views are presented as closest to Cicero’s, but by Laelius, well-known to be a devoted student of Stoicism. Scipio apparently responds to Laelius, and to the earlier arguments presented by Philo, but this part of the dialogue is lost. Second, this fragment is not contained in the major manuscripts, but was preserved by the Christian writer Lactantius. See editorial note, *De Republica*, 210; Lactantius, *The
itself, in its opening passage, anticipates and refutes this reading. The
dialogue specifically denies any claim to objective truth, and its concep-
tion of law does not depend upon any notion of the essential character of
human beings or a divine order in the universe. Instead, the dialogue
argues for a view of law as public discourse about justice, and it presents
this view as a rhetorical construct, valuable for the purpose of ethical and
political action.\(^4\)

In the following pages, I offer a reading of *De Legibus* that focuses on
its treatment of law as a "discoursive" practice and takes seriously its
self-presentation as a rhetorical construct. My hope is that this reading
will make Cicero's rhetorical view of law more available to modern read-
ers. At the end of the essay, I suggest some ways this view may contrib-
ute to current jurisprudential discussion.

The beginning of *De Legibus* challenges the reader to look at the dia-
logue as a rhetorical construct. Walking with Quintus among the groves
on Marcus's land in Arpinum, Atticus is reminded of the "oak tree of
Arpinum" in Marcus's poem "Marius." Atticus remarks that if that tree
were still alive, it would be quite old. That oak will live forever, Quintus
replies, because it was planted by the intellect: "As long as Latin litera-
ture shall live, there will not fail to be an oak tree on this spot . . . And in
the same way many other objects in many different places live in human
thought for a longer time than nature could have kept them in exist-
ence."\(^5\) Atticus then asks Marcus, the poet himself, whether the events

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\(^1\) *Divine Institutes*, trans. Mary Frances McDonald (Washington, 1964), 6.8.6-9. Without doubting
the accuracy of this fragment, still its select preservation may have resulted from a particular reading
of Cicero's views. Cf. d'Entreves, *Natural Law*, 20: "It is significant that Cicero's definition should
have been preserved for us by a Christian writer, Lactantius." Third, Cicero clearly criticizes the
abstract doctrines of Stoicism, both in *De Legibus* itself (3.6.14) and in other works. Cf. Colish,
chap. 2.

Part of the problem with the standard reading is that it expects to find some grand theoretical
system similar to that attempted by post-Enlightenment theorists, and it assumes that such a system
must be the primary goal of any social philosophy. Indeed, some of those who read Cicero in this
way then criticize him harshly for failing to articulate a systematic theory of law or for being incon-
sistent in his statements about Stoic natural law, see, e.g., Colish, 98-104. Yet Cicero, with his
rhetorical orientation, resists such abstract system-building. Cf. Wood, 62 (frankly admitting that
there may be some distortion of Cicero's work involved in Wood's attempt to present it as a system-
atic political theory). The problem in reading Cicero is very similar to that in reading Lon Fuller;
see Peter Teachout, "The Soul of the Fugue: An Essay on Reading Fuller," *Minnesota Law Review*
70 (1986): 1082-92 (discussing the failure of "theory-seeking" readings of Lon Fuller). Cicero and
Fuller are similar in their resistance to theoretical system-building and in their resulting vulnerability
to attack by those who see the commitment to openness and complexity as a sign of laziness and
fuzzymindness.

4. I use the word rhetoric, here and elsewhere, to refer to the classical art of rhetoric, and
particularly to its philosophic dimensions. I use the word ethics as derived from *ethos* or character,
to mean having to do with human character. And I use the word politics as derived from *polis* or
community, to mean having to do with human community.

Library (1928; reprint, 1970). References throughout the essay will be to this text. The translations
used in this article are all based on Keyes's, although I have made some changes, as noted. In this
quotation, I have changed Keyes's translation of *commemoratione*. There is some controversy over
the Heinsianus manuscript, one of the three manuscripts relied upon in the Loeb edition, see Clinton

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described in the poem actually occurred. Marcus answers by recalling the legends of Romulus, who is said to have spoken, after his death, to Proculus Julius, and of Aquilo, the north wind, who is said to have carried off and raped Orithyia: surely these things could not have actually occurred, and Atticus should resist "inquiring too critically into traditions which are handed down in that way" (1.1.1-2).

Atticus then suggests that the poem is different from these myths, because it is set in recent time: "People ask, concerning many parts of the 'Marius,' whether they are fiction or fact; and certain persons, since you are dealing with recent events and a native of Arpinum, demand that you stick to the truth" (1.1.4). Marcus responds that he doesn't want to be thought a liar, but the concern with truth is inappropriate in this context:

Those "certain persons" whom you mention display their ignorance by demanding in such a matter the kind of truthfulness expected of a witness in court rather than of a poet. . . . For in history the standard by which everything is judged is the truth, while in poetry it is generally the pleasure [delectatio] one gives; however, in the works of Herodotus, the father of history, and in those of Theopompus, one finds innumerable fabulous tales. (1.1.4-5)

In this way, Cicero emphasizes that different standards apply in different kinds of discourse and that the classification and determination of these matters may be complex.6

Immediately, readers must wonder about the character of this dialogue

6. This introduction echoes the beginning of Plato's Phaedrus, both in its reference to the Orithyia story and in its focus on rhetoric. Phaedrus asks Socrates if he believes the tale of Orithyia's abduction; Socrates responds that it is beside the point to inquire into the truth of such myths, for their value lies in giving us narratives with which to learn about ourselves, Phaedrus 229-30. See also De Legibus 2.3.6, referring to Phaedrus 230 in Atticus's description of the river Fibrenus. Rawson notes this parallel, "Interpretation," 339 (citing Hirzel, Der Dialog (Leipzig, 1895), 471), but she does not pursue its implications; similarly, Litman notes that the opening discussion of the poem "Marius" directs the reader's attention to the issue of truth, but he does not develop the rhetorical significance of this (26).

Cicero recalls this point towards the beginning of Book II: Marcus says he will present a justification for each of his legal proposals, following the practice of Plato, Zaleucus, and Charondas; Quintus asks if Marcus thinks that Zaleucus actually existed; Marcus responds that the truth of the tale makes no difference to his point (2.6.15).
itself. We do not want to display ignorance in our demands on the text. Should we expect truth of this dialogue? Is this text more like history or poetry or some other form? Cicero quickly addresses one part of this concern. Immediately following the discussion of "Marius," Marcus refuses Atticus's request that he compose a history for Rome, claiming that he does not have time for such a project. Clearly this dialogue will not be a historical account.

Wondering then if Marcus might have more time available in his old age, the three friends discuss whether Marcus ought to retire to the traditional role of legal counsellor, advising clients on the civil law. This idea suggests a subject for the day's conversation: Atticus urges Marcus to expound on the civil law "going into it more deeply than your predecessors" (1.4.13). Marcus responds positively, observing that it would bring them pleasure (delectatio) to discuss one question after another; but then he is surprised that Atticus wants to hear Marcus's opinions (sentias) about the civil law: "My opinions? . . . What subject is it, then, that you are asking me to expound? To what task are you urging me?" (1.4.14). Since Marcus has already written on the best commonwealth, Atticus answers, he should do the same for the law, just as Plato did. Satisfied with this plan, Marcus agrees to discuss the character of the best law while walking and resting in the manner of the characters in Plato's Laws.

With this, we know we are not in the realm of history and probably not of pure poetry. We are not to expect truth, in a historical sense, nor are we to focus merely on the aesthetic pleasure created by the text. What, then, is being offered in this dialogue? As the conversation progresses, Marcus emphasizes that the purpose for this discussion of the best law is not to discover historical truth or aesthetic pleasure, but rather to engender purposive action. Marcus says this explicitly after Atticus accuses him of being overly meticulous in his conversation, trying too hard to comply with the judgment of others. Marcus responds:

But you see the direction this conversation is to take: our whole discourse is directed towards the strengthening of the commonwealth, the stabilizing of cities, and the healing of peoples. For that reason I am fearful of laying down foundations that have not been wisely considered and thoroughly investigated. Not, for all that, that they will be accepted by everyone (for that is not possible).

The character of this discourse, then, is rhetorical: it is designed to facili-
tate action, and its success depends upon its persuasiveness.\textsuperscript{10}

But still we are unsure what kind of rhetorical construct Marcus contemplates. What is it that will promote the firm foundation of the community and the well-being of its members? Even after listening to a far-reaching discussion on the origin of justice in Book I, Quintus expects Marcus to lay out specific laws, absolute and universal in scope (1.22.57-58), and Marcus eventually does propose a set of laws regarding religion and one concerning government officials.\textsuperscript{11} Many readers, following Quintus, have taken these to be the dialogue’s central focus. They have assumed that the proposals represent Cicero’s views of the ideal constitution, his statement of the substantive content of natural law.\textsuperscript{12} Yet this interpretation ignores much of the conversation in Books II and III. Throughout this discussion, Cicero emphasizes that Marcus’s proposals are tentative, clearly open to debate and modification, and contingent, dependent upon historical circumstance.

Before Marcus makes the specific proposals, Quintus asks him if these laws are meant to be universal and absolute, “the kind that will never be repealed.” Marcus responds with a paradox: “Certainly, provided that they are accepted by both of you” (2.6.14). This answer must catch the reader’s attention: how can it be that nature as right reason dictates laws of universal applicability, yet the status of these laws depends on the approval of their audience?

The tentativeness of the proposals is emphasized as the discussion progresses. Quintus and Atticus both disagree with important parts of the laws, and Marcus seems willing to leave the controversies unresolved. He light-heartedly recites the call for a vote in the popular assembly,\textsuperscript{13} and at one point in Book III, after Quintus and Atticus have expressed

\textsuperscript{10} Cicero emphasizes the rhetorical character of this discourse in numerous places, by directly denying any claim of truth and by using a language of construction. For example, in describing the various philosophical schools that are among his potential audience, Marcus says: “So far, however, as [the Epicurians] are concerned, let them, even if they are right (for there is no reason to quarrel with them here), bid them carry on their discussions in their own gardens” (1.13.39). It does not matter if the Epicurians are right in thinking that the gods don’t care about humanity; such theological claims are simply irrelevant to Marcus’s project. Similarly, Marcus says of the skeptics: “Let us implore the Academy . . . to be silent, since it contributes nothing but confusion to all these problems; for if it should attack what we think we have constructed and arranged quite skillfully, it would produce great ruins” (1.13.39). See also 1.6.20; 1.12.34; 2.4.8-9; 2.7.15-16.

\textsuperscript{11} The surviving manuscripts of \textit{De Legibus} include only substantial parts of Books I, II, and III and a fragment from Book V. There is some debate over whether additional books were written and what the content of these might have been. Cicero refers to a discussion of education and perhaps one on the courts (3.13.29-30; 3.20.47). See Rawson, “Interpretation,” 338-39; Keyes, “Introduction,” 291; Clinton W. Keyes, “Did Cicero Complete the \textit{De Legibus}?” \textit{American Journal of Philology} 58 (1937): 403.

\textsuperscript{12} See, e.g., Clinton W. Keyes, “Original Elements in Cicero’s Ideal Constitution,” \textit{American Journal of Philology} 42 (1921): 309-10 (describing the dialogue as the first instance of a written constitution in the modern sense); Wood, 67 (“The purpose of the Laws is to set forth and explain the basic statutes of the ideal state of the \textit{Republic}”).

\textsuperscript{13} “The law has been read: ‘disperse, and I will order the ballots to be distributed’ ” (3.4.12).
their disagreement with the proposed law on the plebeian tribunal, Marcus jokes about the disagreement:

You are aware, my dear brother, that it is customary in dialogues of this kind, to say “Quite right,” or “That is certainly true,” in order to introduce a transition to a new subject.

Quintus responds somewhat curtly, but the conversation moves on:

Quintus As a matter of fact I do not agree with you, but for all that I should like you to go on to the next topic.
Marcus You are persistent then, and hold to your previous opinion?
Atticus Neither am I at variance with Quintus, I assure you; but let us hear what remains to be said. (3.11.26)

Marcus concedes that his proposals are potentially controversial and therefore, by his own description, may not be universal or absolute. Similarly, many of the proposals, particularly those on religion, are expressly contingent, dependent upon the specific customs and context of Roman tradition. Several specify customs that are binding merely by virtue of their continuous observance, and Marcus frankly admits that his proposals are drafted “out of consideration for human faults and the resources of human life in our time.”

The disagreement generated by Marcus’s proposals is left unresolved, and readers of the dialogue are not asked to reach a final judgment on them. Instead we are drawn into a detailed discussion of the justification for each specific proposal in terms of its contribution to community life. For each provision, Marcus offers some rationale that explains how the law will promote the welfare and harmony of the community and its individual members. Some proposals are defended because they provide for a balanced form of government (e.g. 3.7.15-17; 3.12.27-28; 3.20.46-47). Others are said to reduce unhappiness or to encourage harmony between the classes (e.g. 2.16.40-41; 2.24.60; 3.10.23-25). Still others are supported because they will promote activities that tend to develop social virtues or to educate people about these (e.g. 2.10.25; 2.11.28; 2.12.30; 3.13.28-13.29). For some proposals the justification offered seems strong, while for others it does not. Quintus and Atticus at times argue with Marcus about the rationale offered, claiming that it is mistaken, incomplete, or the like. Reading through these arguments, we become engaged in the evaluation of specific passages, learning to understand and anticipate the kinds of arguments made on each side.

As we are drawn into this discussion, we come to understand Marcus’s

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14. De Legibus 2.18.45. I have changed Keyes’s translation of vel hominum vitiis vel subsidiiis.
earlier paradoxical response to Quintus: the laws dictated by right reason depend on the acceptance of their audience because for Cicero right reason is discovered through and within persuasive discourse. The point of the proposals is not that they represent the final dictates of natural law, but rather that the practice of selection itself requires a certain kind of purposive evaluation that can be conducted only through persuasive discourse. The discovery of justice in a particular situation requires consideration of the available arguments of rightness, evaluated in terms of their persuasiveness to an audience concerned with justice for the community.

Cicero thus demonstrates two crucial elements of legal practice in this part of the dialogue: first, the conversation shows that these proposals are contingent and controversial; second, the discussion details the kinds of arguments that may justify specific laws. The prominence of these two elements direct the reader beyond Quintus's desire for a static set of statutes. The reader is led to focus instead on the activity of legal debate itself, on the practice of justification of which this conversation is a part.

The reader is led, in addition, to a new concern for the purpose of this dialogue. Does Cicero's claim that just law is right reason and right reason is discovered within persuasive discourse mean that justice is no more than the approval or vote of the populace? Does this mean that anything a majority wants is by definition just? Again the text anticipates this concern: Marcus specifically rejects the equation of justice and popular will in Book I: "... if the Athenians without exception were delighted by the tyrants' laws, that would not entitle such laws to be regarded as just, would it?" (1.15.42). The crucial differences between a rhetorical discovery of justice and majority will are generated by the practice of legal discourse, as displayed in Books II and III. First, the practice requires justification in terms of rightness—one cannot argue, for example, that a law is just because it allows one part of the community to exploit or oppress another. Second, the practice of legal discourse, unlike the mere assertion of majority will, forms and is formed by a certain kind of ethos—in order to participate in the practice, one must be open to the discourse.

The purpose of this dialogue, then, is not to set out one person's opinions about law; that is why Marcus was surprised when Atticus first asked him to give his opinions on the law. Instead, the dialogue is designed to define and defend the activity illustrated in Books II and III and to prepare its audience to participate in this discoursive practice of law.

17. See De Legibus 1.4.14 and text accompanying note 8 supra.
This effort is important precisely because the practice of equating law and justice, of requiring that law be justified in terms of the creation or maintenance of the community, is not inevitable. People could simply stop doing it. Or rather, over time, people could come to think that it was not a worthwhile practice. It is possible for people to view law as nothing more than commands backed up with physical force and to deny all value except utility and individual pleasure.\textsuperscript{18} The practice of talking justly, as I will call it, is not compelled by some immutable human nature or some other objective reality in the world. Cicero argues that this discoursive practice should be cultivated not because it is cosmically required, but rather because it offers possibilities of significant ethical and political value. This is the complex subject of Marcus's discussion in Book I.

Marcus begins his description of the practice of talking justly by identifying it with an existing practice—the way those who are most learned look at justice:

The most learned scholars have determined to begin [the investigation of justice] with law, and it would seem that they are right, if, according to their definition, law is the highest reason, implanted by nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is law. And so they believe that law is practical wisdom, whose natural function it is to command right conduct and forbid wrongdoing. They think that this quality has derived its name in Greek from the idea of granting to every one his own, and in our language I believe it has been named from the idea of choosing. . . . Now if this is correct, as I think it to be in general, then the origin of justice is to be found in law, for law is a natural force; it is the mind and reason of the practically wise person, the standard by which justice and injustice are measured.\textsuperscript{19}

Marcus later explains that this equating of law with justice and reason means that law depends upon a practice of justification:

For every law that deserves that name is truly praiseworthy, as they

\textsuperscript{18} Of course inasmuch as the practice of valuing justice is deeply embedded in our traditions, educational practices, and the like, we cannot simply will ourselves to forget it. On the other hand our practices do change, often as a result of reinterpretations or reassessments of their purposes and value. Arguments regarding the value of a practice are finally arguments about its maintenance and development. For different ways of thinking about this general point, see Stanley Fish, \textit{Doing What Comes Naturally} (Durham, 1989); Alasdair MacIntyre, \textit{Whose Justice, Which Rationality?} (Notre Dame, 1988).

\textsuperscript{19} \textit{De Legibus} 1.6.18-19. I have changed Keyes's translation of "prudentiam" and "prudentis." The notion of practical wisdom or practical reasoning conveys the sense of "practical" as directed to action, or \textit{praxis}, not the more narrow popular sense of practical as plain, affordable, not extravagant, and so on. I have also changed Keyes's translation of \textit{doctissimis viris}. Although this phrase, unlike most other references to people in the dialogue, does suggest men as distinguished from women I have chosen a gender neutral translation which I think does not distort the text.
prove with certain arguments: that the laws were structured towards the well-being of the citizens, towards the preservation of states, or towards a quiet and happy human life, and that those who first enacted decrees of this sort showed the people that they would write and enact such provisions as, once adopted and respected, make possible for them an honorable and happy life.20

In order to be called law, a command must be argued for, justified, both in terms of its actual correspondence with the well-being of the community and in terms of the purposes of those who enacted it (which are in turn evaluated rhetorically, according to what the lawgivers “showed the people”). The very essence of law thus involves a practice of justification.21

By referring to the practice of learned scholars, Cicero emphasizes that the practice of linking law and justice already exists, that the dialogue does not purport to fabricate a new way of thinking.22 Further, although the narrow reference could encompass other schools, it is likely that contemporary readers of Cicero would see this as a direct reference to the Stoic philosophers, because this apparently was the most widely known and accepted understanding of the nature of law.23 By this reference,
Marcus signals that he will draw upon the Stoic language of natural law, presumably because it was so widely known and because it contained elements attractive to Cicero. Stoic natural law insisted that there is a correspondence between law and an essential order or reason in the universe; thus it provided a link between law and rightness or justice. It emphasized the interdependence of humanity and the universal value of friendship and society, and it condemned both slavery and sexual inequality.24 These elements and others apparently were attractive to Cicero as well as to many educated Romans.

Yet underlying these notions in Stoic natural law was a much less attractive, highly abstracted cosmology in which a divine logos directs all aspects of the universe and human life. Cicero repeatedly criticized the abstractness and rigidity in this Stoic cosmology,25 and he was careful to separate Marcus's arguments in De Legibus from the cosmology of Stoic natural law. Immediately after the reference to Stoic scholars, Marcus suggests that the language of natural law is not limited to the Stoic teachings and thus that he will not be bound by their formulations. Although the Stoic philosophers would locate the origins of law in the Greek word for distribution, giving to each his own, Marcus would tie it to the Latin word lex, which comes from lege, meaning choice or selection. As he later explains, the Latin term for law itself reflects "the idea and principle of choosing what is just and true. . . . the distinction between things just and unjust" (2.6.12-13). For Marcus the practice of linking law and justice is deeply rooted in the Roman commitment to human choice in the determination of justice, and he is careful to show that this is deeply rooted in Roman culture, independent of Stoicism.

In sum, the "learned scholars" passage sets the stage for Cicero's development of a non-ontological view of law as right reason. He will use some of the language of Stoic natural law, but he will reorient it from abstract theory to practical rhetoric, and finally he will ground this view of law in the rhetorical practices of Roman culture.

The practice of talking justly assumes that justice is valuable for its own sake, not merely as a means to some other end. The practice assumes that it is possible to make meaningful distinctions between justice and injustice, between right and wrong, on some basis other than

24. See Colish, 21-60. As Colish emphasizes, these generalizations cannot possibly be accurate for the long and complex history of Stoicism:

The brief outline given above illustrates the problems in dealing with Stoic philosophy in summary form: the doctrine grew, changed and was channelled in certain directions, widening or shrinking in scope at the hands of its different exponents across a span of six centuries.(21)

25. For Cicero's criticisms or at least doubts about Stoicism, see especially De Oratore, De Finibus, and De Natura Deorum. For discussion of Cicero's philosophical works and their treatment of Stoicism, see H.A.K. Hunt, The Humanism of Cicero (Melbourne, 1954).
mere utility. This is perhaps the most difficult part of the dialogue for readers familiar with modern legal discourse. Although we think of the common law as a product of judicial efforts to establish a just system of rules, we tend to view justice as a matter of individual preference, largely beyond the reach of reasoned argument. This conflict undermines our understanding of modern legal practice: what is the purpose of legal argument if the rules of law finally depend upon the arbitrarily developed preferences of judges and other officials?26

De Legibus suggests an alternative understanding of justice that avoids this conflict. In this text, clarity about justice begins with an acceptance of its contextual particularity. Following Aristotle, Cicero does not attempt to define justice with formulaic precision or apart from particular events and situations.27 And even more thoroughly than Aristotle, Cicero treats the question of justice as rhetorical: justice can be perceived only from arguments discovered in a particular situation,28 addressed to a specific issue in dispute.29 Any determination is limited by its situation,

26. This conflict helps to explain the appeal of a simple form of positivism to many modern lawyers. In its popular version, positivism sees law as the commands of the legislature and other authorities empowered by delegation of the populace, and it views justice as the even enforcement of these commands. Normal legal argument is directed to justice in this procedural sense, but it does not address the content of the commands. A judge may impose her subjective sense of justice, then, only in the very rare and unfortunate case where the legislature and officials have failed to issue a directive on an unescapable legal problem. When these "gaps" occur, lawyers and others may offer suggestions, but discourse is largely irrelevant to the final exercise of discretion. Yet as Ronald Dworkin emphasizes, this view simply does not correspond to our legal practice. Judges and lawyers do in fact routinely engage in debate and deliberation about the content of law. See Ronald Dworkin, Law's Empire (Cambridge, Mass., 1986), chap. 1.

A second response to this conflict is to view talk about justice as mere folly or facade. If justice does not exist in any meaningful way, then judges and lawyers are either foolish or deceitful when they talk about justice. Judges and other people with power always impose their personal preferences, without any constraint except other powerful people, and so the only significant question in law is who has the greatest power in a particular situation. Legal argument then is always either misguided or deceitful. The ethical risk to a lawyer in this view is essentially that of losing one's language. See generally Lon Fuller, The Law in Quest of Itself (Chicago, 1940), 1-16, 120-20-28.

It was this dilemma that motivated Chaim Perelman to undertake the search for a language of value that eventually led him to a recovery of ancient rhetoric. See Perelman, 57; Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation, trans. John Wilkerson and Purcell Weaver (Notre Dame, 1969), 3.


28. For Aristotle as well as for Cicero, rhetoric is the art of reasoning appropriate to matters, like justice, that cannot be established by demonstrative proof — things that, in Aristotle's terms "are such as seem to present us with alternative possibilities," Aristotle Rhetoric, trans. W. Rhys Roberts (Modern Library, 1984): 1.2.1357a.5-10. These include "most of the things about which we make decisions, and into which therefore we inquire," 1.2.1357a.20-25. Yet in many ways Aristotle sought to narrow the range of rhetorical investigation, hoping to limit the influence of the rhetoricians, while Cicero embraced rhetoric and strove rather to fortify its philosophical integrity. Thus while Aristotle takes deliberative speech as the paradigm for rhetoric and his detailed discussion of justice in Book V of the Nicomachean Ethics refers to the significance of rhetoric only indirectly, Cicero consistently uses forensic speech as the central model for rhetoric, see e.g. De Inventione 1.8.10; De Oratore 1.31.138-34.159, and his works on rhetoric reveal a sustained concern with the rhetorical conception of justice.

29. Cicero calls the issue in controversy alternatively status or constitutio, or occasionally
controversy, and deliberative character. Thus every determination is contingent and potentially controversial.

Yet this particularity does not mean that we cannot deliberate with others about justice and reach a shared determination within a particular situation. Indeed, one version of the classical art of rhetoric focuses on how one can talk and think about controversial issues in an effective way and this is a central concern of Cicero’s rhetorical works. And a part of that art involves arguing from commonplaces, including statements of principle or value that currently are generally accepted within a community. What is significant to this aspect of De Legibus, however, is that

quaestio. See e.g. De Inventione 1.7.10, Tusculan Disputations 3.33.79; De Oratore 1.31.137-41. Status is a translation of the Greek word stasis which refers to a wrestler’s stance before taking hold of the opponent or to an army’s maneuver before battle. The doctrine of stasis is often attributed to Hermagoras, although it is certain that Cicero extended it considerably. See George Kennedy, The Art of Persuasion in Greece (Princeton, 1963), 304-313; George Kennedy, The Art of Rhetoric in the Roman World (Princeton, 1972), 117. See also A.E. Douglas, “The Intellectual Background of Cicero’s Rhetoric: A Study in Method,” Aufstieg und Niedergang der römischen Welt 13, (1973): 95-138.

30. Within the Aristotelian tradition, a principal focus is on the discovery or invention of available means of persuasion by use of topics, or topoi: literally places at which or from which arguments can be developed. See Richard McKeon, “The Methods of Rhetoric and Philosophy: Invention and Judgment,” in The Classical Tradition, ed. Luitpold Wallach (Ithaca, 1966), 365-373, reprinted in Richard McKeon, Rhetoric: Essays in Invention and Discovery, ed. Mark Backman (Woodbridge, 1987), 56-65; Friedrich Solmsen, “The Aristotelian Tradition in Ancient Rhetoric,” American Journal of Philology 62 (1941): 35-50, 169-90, reprinted in Aristotle: The Classical Heritage of Rhetoric, ed. Keith Erickson (Metuchen, N.J., 1974): 278-309. Cicero draws heavily upon Aristotle’s views, emphasizing inventio and topoi (or loci) in his rhetorical studies. The topics include both general ideas applicable to any subject (e.g. more and less, consistency) and special topics that are generated by a particular field of discourse.

It is essential of course for a rhetor to know the topics frequently recognized, and many books are devoted to organization and explanation of topics. Cicero suggests such an explication of the topics commonly recognized in legal discourse in De Oratore 1.42.187-191, and he may have written such a text in the lost work De Ture Civili in Artes Redigendo, mentioned by Aulus Gellius Noctium Atticarum 1.22.7. See also De Oratore 2.19.47, (criticizing the jurists for failing to generalize in their legal summaries); De Legibus 2.19.47 (on the value of discovering a single principle underlying a law); Orator 13.45-49 (on the use of generalizations as topics for argument). Some have misread these passages to call for a static code of rules, see, e.g., Fritz Schulz, History of Roman Legal Science (Oxford, 1946), 69 (“Cicero’s conception of the task was immature and inadequate. What he aimed at was a short, hard-and-fast system, built up of elementary distinctions, definitions, and principles”).


31. Thus argument about justice often will involve statements of general principles and standards. Yet this does not mean that justice exists in abstraction. Some modern theorists argue that the existence of uncontroverted statements of principle or value is proof that there exists a universal and unalterable “minimal content” of justice. Yet in a rhetorical view of law, the fact that certain principles are at certain times and places uncontested is not at all surprising, and it does not in itself establish any claim about the nature of justice.
determinations of justice in a particular situation are not "merely subjective" because they are reached through discourse. They are public or "objective" in the sense that they are discovered in and expressed by persuasive argument. A determination reached in this way may not be persuasive to everyone, or even to all participants in the debate. But still it is possible to reach a decision that is in this way not merely personal whim or preference.

Discourse thus is crucial to the practice of discovering and pursuing justice in law. The conclusions reached through discourse are temporary, for new situations will give rise to new ways of understanding the central questions of community and human life. This is why Quintus will always be disappointed in his hope of finding a set of laws that will be just for all time and in all places. Justice is a human pursuit, and thus it is dependent upon the specific ways human life is understood and experienced.

As a final step in this initial description of the practice of talking justly, Cicero emphasizes its public character. As Marcus observes, "our whole discussion has to do with the reasoning of the populace" (1.6.19). This is so because in a surprising way the "product" of legal discourse is the possibility for shared deliberation and thus it is the possibility for community itself. In De Republica, Scipio insists that "community is not any collection of human beings brought together in any sort of way, but an assemblage of people in large numbers associated in an agreement with respect to justice and a partnership for the common good." De Legibus responds to this idea: by cultivating a notion of justice, albeit contingent and controversial, by making talk about justice available to the populace, and by providing occasions for discussion and concerted action, law offers the possibility of community.

In Alasdair MacIntyre's terms, each of us is formed by the various practices in which we engage. Yet most of our practices have local

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32. De Republica 1.25.39. I have changed Keyes's translation of populus.
33. With this image of the unifying potential of persuasive discourse, cf. De Inventione 1.2.2-3; De Oratore 1.8.33-34; De Republica, 1.26.41.
34. See generally Alasdair Maclntyre, After Virtue, 2d ed. (Notre Dame, 1984), chap. 14. MacIntyre defines a "practice" as Any coherent and complex form of socially established cooperative activity though which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended. Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry, and biology, and so is the work of the historian, and so are painting and music. In the ancient and medieval worlds, the creation and sustaining of human communities—of households, cities, nations—is generally taken to be a practice in the sense in which I have defined it. Thus the range of practices is wide: arts, sciences, games, politics in the Aristotelian sense, the making and sustaining of family life, all fall under the concept. (187-188)
contexts, in friendship, family, work, or the like. Law constitutes a whole in which these diverse practices may co-exist. Marcus makes this same point in describing the primacy of his Roman citizenship over that of his home village, Arpinum: “All natives of Italian towns have two fatherlands, one by birth and the other by citizenship . . . one fatherland which was the place of his birth and one by law; . . . But that fatherland must stand first in our affection in which the name of republic [rei publica] signifies the common citizenship of all of us” (2.2.5).

Despite our diverse commitments, we are connected as a community in so far as we have law and a shared desire for justice. And according to Cicero, to have law means to participate in legal discourse. Legal discourse must be in some way available to all members of the community. It must be, in Marcus’s phrase, directed to the “reasoning of the populace.” In De Republica, Scipio emphasizes that all classes must be given some deliberative authority (1.27.43-32.49; 1.65.69). Again De Legibus responds to this concern by trying to prepare, to educate, a citizenry for participation in this discursive activity.

Cicero invites us to compare this aspect of De Legibus with Plato’s Laws. Throughout De Legibus, and especially in Books II and III, Marcus and the others refer to the Laws as a model for their conversation (1.5.15), yet they repeatedly emphasize the differences between Marcus’s views and those of Plato (e.g. 2.7.16-18; 2.15.38). The difference in the treatment of legal discourse is most striking. In the Laws, the Athenian Stranger talks about specific laws concerning religion and government officers, but there the discussion is directed to the education of Kleinias and Megillus as future lawgivers for the new city. Kleinias has already been selected as one of ten men appointed to establish laws for the new city, and Megillus eventually agrees to help in the founding.35 Quintus and Atticus, in contrast, are mere citizens of the republic, of a privileged class to be sure, but with no special office or authority. Marcus seeks to prepare them for the practice of discourse about law and justice, not as lawgivers but merely as citizens who will participate along with many others in the community.

In addition, De Legibus offers a vision of open and habitual discussion of law and justice throughout the republic. Marcus’s description of the mind of a person who has come to know himself and to value justice for its own sake emphasizes this vision:

And when it [the mind] realizes that it is born to take part in the life of society, it will think that it must use not merely the simple method of debate, but also the more broad, continuous style of speaking, considering, for example, how to rule nations, how to establish laws, how to punish the wicked, how to protect the good,

how to honor those who excel, how to give advice to fellow citizens on their well-being and honor, in a way designed to win their acceptance, how to arouse them to honorable actions, recall them from wrongdoing, console the afflicted, and hand down to everlasting memory the deeds and counsels of the brave and the wise, and the infamy of the wicked. 36

Marcus's proposals on government officials also reflect this vision. In the senate and in the peoples' assemblies there will be open discussion and debate (3.18.40-42). Government officers at every level will be required to report and explain their activities (3.20.47).

This vision of pervasive public discourse is very different from the city described by the Athenian Stranger in Plato's Laws. There discourse about the law is centered in the secret "Nocturnal Council," empaneled to converse with prisoners convicted of impiety, to receive reports of respected travellers on the laws of foreign cities, to protect the city from influence of foreign poets and educators, and to consider changes in the laws (10.909a; 12.964c; 12.968c). This critical yet carefully circumscribed place of discussion and deliberation is a striking contrast to the profusion of public discussion of law suggested in De Legibus.

This is the conception of law offered in the dialogue. Marcus seeks to persuade his friends and readers that they should think of law as the selection of the just, as discovered through on-going public discourse. For this conception, although rooted in long-standing practice, is not commonly held. Marcus acknowledges that many people define law as any written command, which "decrees whatever it wishes" (1.6.19), and that others think of law as "derived from the praetor's edict" (1.5.17), consisting of whatever the judge orders. Rather than directly dispute these ideas, Marcus shows the superiority of the alternative practice of linking law and justice.

Marcus's persuasive effort is complex, because the task is so difficult. Consider the problem: Marcus wants to convince his friends and readers that they should change their common understanding of law and participate in discussion of law with a new orientation. But how do you convince someone that she should engage in life in a particular way or that she should think of herself and her community according to a particular view? The difficulty of the task depends on the extent to which the listener already accepts the central values of the suggested way of life. Consider how you might convince a rebellious young person to stay in school or how you might persuade a sedentary person to exercise. You would probably argue that these activities will improve the other person's life, perhaps pointing out specific ways that the person will be more capa-

ble or healthy. These arguments appear forceful to many because most of us do see education and physical fitness as goods and we expect that others do too. But these arguments will be persuasive to the particular person addressed only if that person also values these things. If she does not, then persuasion may not be possible.

Marcus recognizes this difficulty. After describing his project, Marcus acknowledges that he cannot expect universal approval and indeed that he can anticipate agreement only by those who already accept the central tenet of this mode of thinking:

Not, for all that, that they will be accepted by everyone (for that is not possible), but it is possible that they will be approved by those people who consider 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 praiseworthy in itself, or at least that nothing should be considered a great good unless it can rightly be praised for its own sake.37

The only people open to persuasion, in other words, are those who already are committed in some way to the central idea of the practice Marcus seeks to promote: that justice, as a good, is valuable for its own sake and not merely for its utility. This is true because finally the practice, like education and physical fitness, is justifiable only within its own terms, for the internal goods, the way of life, it makes available.38 There is no argument sufficient to compel outsiders to participate.

Why, then, is it worthwhile for Marcus to argue for the practice? If he can hope to persuade only those who already value justice for its own sake, then what is the purpose of Marcus's efforts? It is to help those who do share this value to know themselves and to understand the consequences and possibilities of this commitment. The practice of valuing justice itself has a history; it predates any of its contemporary adherents. Growing up as a Roman citizen, one would learn to value justice as a commonplace, as an unexamined part of one's general education. Yet this value, uncritically acquired, becomes a part of one's life and identity as an adult. Modes of thinking, standards of excellence, and rules of conduct are acquired almost by default as one learns the various practices of a community. As MacIntyre suggests,

A practice involves standards of excellence and obedience to rules

37. De Legibus 1.13.37-38. I have changed the first part of Keyes's translation of "nec tamen ut omnibus probentur (nam id fieri non potest), sed ut eis, qui omnia recta atque honesta per se exspectanda duxerunt et aut nihil omnino in bonis numerandum, nisi quod per se ipsum laudabile esset, aut certe nullum habendum magnum bonum, nisi quod vere laudari sua sponte posset." Cf. supra note 9.

38. If you find yourself at this point arguing that liberal education and physical fitness are "universal" goods because they develop the "natural" or "innate" mental and physical health or capacity, please imagine making such arguments to an Amish father who desires that his son remain free from the influence of secular thought or to royalty for whom physical fragility is a sign of great social power and privilege.
as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them. It is to subject my own attitudes, choices, preferences and tastes to the standards which currently and partially define the practice. Practices of course, . . . have a history: . . . Thus the standards are not themselves immune from criticism, but nonetheless we cannot be initiated into a practice without accepting the authority of the best standards realized so far.39

The initial acceptance of the standards and rules of a practice must be largely uncritical, yet in important ways these form the character and activities of participants in the practice. This truth is reflected in our stereotypes: we think of different professions as associated with different types of people. The lawyer, the policeman, the baker, the teacher: our rough stereotypes reflect the complex phenomena in which our adult selves are formed by and within the practices in which we engage. In order to know yourself, then, you must come to see the practices of which you are a member with a more critical eye. To know yourself as a mature adult is to engage in an ongoing exploration of the standards and activities of the practices in which you participate. And to do this is to join in an on-going redefinition of these standards and activities.

Thus the audience for De Legibus consists of those who already have some sense of the value of justice. What Cicero offers is a way for such readers to understand themselves within this practice and to recognize the political and ethical possibilities made available by it. Such understanding is crucial to enable individuals to engage in the practice as responsible agents and to maintain and focus the practice in a way that generates further opportunities.

One of the strongest arguments for this practice is the fact that Marcus himself is a participant in it and has been formed by it. Throughout the dialogue, Marcus presents himself as deeply committed to the conception of law as justice and to the understanding of community and discourse suggested by that conception. Atticus and Quintus express their admiration for Marcus and their desire to share his general commitments (e.g. 1.4.13–5.16; 1.24.63; 2.2.4; 3.6.14). Indeed, Cicero's use of himself as the principal speaker adds the significant weight of Cicero's own highly regarded character to this argument.

The substance of Marcus's discussion focuses on two sorts of arguments: one kind describes the activities and opportunities for coordinated action made possible by the practice of talking justly and a second set defines the ethos of a participant in this practice and thus describes the way of life made possible by it. These two kinds of arguments are closely

related, for consideration of coordinated activity requires some idea of the character of those who participate in it, and consideration of individual ethos necessarily involves some view of the kinds of activities engaged in by that character.

Marcus does not make purely instrumental arguments. Yet claims of this sort, treating justice as a means to some other good, are fairly common in contemporary discussions: people argue that law should be just to encourage voluntary obedience, to reduce dissatisfaction of minorities and the disadvantaged, or to enhance the reputation of the nation. Why, then, doesn't Marcus make arguments of this kind?

Perhaps for Marcus the risk of corruption entailed in this kind of argument is too great. Take MacIntyre's example of the offer of candy to a child to entice him to learn chess. If the child plays chess for no other reason than to get candy, still he is learning the game (so long as cheating is prevented), and it is possible that he will come to appreciate its internal goods. But some activities require more; some require not only action but a certain kind of motive. A "kindness" done for profit is not what we call kindness (1.18.48-49). Similarly, justice must be done for its own sake, for "the very height of injustice is to seek pay for justice" (1.18.50). One can't be called just if one's only purpose is to enhance wealth or reputation. Thus Marcus resists using the lure of external goods to entice his audience into the practice of justice.

What Marcus does do, however, is to make some arguments appear instrumental, as an initial appeal to those who may see justice as a means to some other good (including those who already value justice but do not understand the significance of this commitment). But having begun an argument in this way, Marcus invariably converts it into one based upon the internal values of the practice. Consider, for example, the following:

If justice is conformity to written laws and national customs, and if, as the same persons claim, everything is to be tested by the standard

40. Also, arguments of this sort would cast doubt on Marcus's own commitment and thus would undermine his ethical authority.
41. MacIntyre, After Virtue, 188.
42. Compare De Officiis 2.11.38-12.43, where Cicero argues to his son that while the external goods of admiration and glory may be given to a just man, one cannot seek these directly; one must rather merely seek to be just: "as Socrates used to express it so admirably, 'the nearest way to glory — a short-cut, as it were — is to strive to be what you wish to be thought to be.' " De Officiis, trans. Walter Miller (Loeb Classical Library, 1913; reprint, 1928), 2.12.43.

This insight into the motive for justice does not deny that people always act out of "self-interest" in some broad sense. Cicero certainly would agree that action and indeed thought itself is always connected with desire, as formed or focused by emotion, see, e.g., Cicero, De Oratore, Books I, II, trans. E.W. Sutton and H. Rackham (Loeb Classical Library, 1942; reprint, 1976), 2.42.178: "Men decide far more problems by hate, or love, or lust, or rage, or sorrow, or joy, or hope, or fear, or illusion, or some other inward emotion, than by reality, or authority, or any legal standard, or judicial precedent, or statute." The point is rather one can desire to act justly for the sake of justice itself, because it is a good. Once the existence and complexity of such desires is recognized, the language of "self-interest" simply does not provide any useful conception or distinction.
of utility, then anyone who thinks it will be profitable to him will, if he is able, disregard and violate the laws. (1.15.42)

This sounds like a familiar instrumental argument for justice: if there is no justice, then people will not voluntarily obey the laws; therefore, if we want obedience, then we ought to value justice as a means to that end. Yet this is not the course followed by Marcus, for he concludes:

It follows that justice does not exist at all if it does not exist in nature, and if that form of it which is based on utility can be overthrown by that very utility. (1.15.42-43)

In other words, we ought to value justice as an independent good, not because that will facilitate law enforcement, but rather because that will promote the realization of justice itself. Yet to seek the realization of justice is to treat justice as a good in itself, and thus to operate within the practice Marcus advocates. This argument, which appears instrumental, actually seeks to justify the practice from within, by appealing to the internal values of the practice.

The argument is circular, of course, since it amounts to saying that justice should be valued because it is valuable. The purpose of this argument and the others, however, is not to establish a logical demonstration of the value of justice but rather to bring to light the consequences and opportunities attendant on that commitment. The audience for this argument is those people who already accept the central values of talking justly. Thus the circularity of this argument and others is inevitable, but irrelevant.

Marcus makes several arguments describing the internal goods made possible by the practice of valuing justice. First, the practice generates a language of justice. In recognizing justice as a good, we speak of a distinction between the just and the unjust. This distinction then is used by us in everyday life, in determining our own actions and in evaluating those of others. And this language is pervasive: even wrongdoers are troubled by the thought that they have done wrong and will try to excuse their conduct in the language of justice: “in fact there has never been a villain so brazen as not to deny that he had committed a crime, or else invent some story of just anger to excuse its commission, and to seek in some such way a defense of his crime in natural justice.”

The language of justice is in fact used and valued by us, and we should purposefully maintain it: “if even the wicked dare to mention these claims, then how eagerly should they be cultivated by the good!”

But, as Marcus urges, the language of justice itself depends on the

43. De Legibus 1.14.40. I have changed Keyes’s translation of “defensionemque facinoris a naturae iure aliquo quaerere.”

44. De Legibus 1.13.40. I have changed Keyes’s translation of “quae si appellare audent impii, quo tandem studia colentur a bonis?”
commitment to justice. To say that someone or something is just is to say that there is some measure of value other than utility, for “those of us who are not influenced by virtue itself to be good people, but by some consideration of utility and profit, are merely shrewd, not good.”45 So too, if the only reason not to do wrong is to avoid punishment, then “no one can be called unjust, and the wicked ought rather to be regarded as imprudent.”46 Because we value justice for its own sake, we are able to generate a language of justice and to perceive the kinds of distinctions formed in that language.

In addition, the practice of talking justly makes community itself possible. Marcus’s argument here is complex. The heart of his claim is this:

If nature is not to be considered the foundation of justice, that will mean the destruction [of the virtues on which human society depends]. For where then will there be a place for generosity, or love of country, or loyalty, or the inclination to be of service to others or to show gratitude for favors received? For these virtues originate in our natural inclination to care about others, and this is the foundation of justice.47

How can it be that a certain conception of justice is necessary for virtue to exist? And why is it that virtue is necessary for community to exist? The first interpretive difficulty is to establish a perspective from which to read the passage. Should this passage be viewed from inside or outside the practice Marcus is urging? From outside—from a position that is not committed to the conception of justice as right reason—the argument appears to be one of logic: if justice (as independent of written law and custom) is based upon a natural inclination to care about other people, then a denial that justice exists is a denial of such natural inclination; yet if this natural inclination does not exist, then virtue cannot exist because virtue, too, is based on a natural inclination of concern for others; therefore if one denies that justice exists, then one must also deny that the other virtues exist.

Although initially plausible, this argument clearly is flawed if treated as a matter of logic alone. One may consistently maintain that there is a natural inclination of concern that gives rise to generosity, gratitude, patriotism, loyalty, and service to others but that it does not give rise to justice. In addition of course, one could logically contest this origin of the virtues in a number of ways.

To give substance to this argument one must view it, instead, from

45. De Legibus 1.14.41. I have changed Keyes's translation of boni viri.
47. De Legibus 1.15.43. I have changed Keyes's translation of ad diligendos homines. The bracketed phrase does not appear in the three major manuscripts of De Legibus, but only in minor manuscripts. Keyes concludes that this is probably only a conjecture but that it accurately completes the sense of the passage, Keyes, "Introduction," 334, n:3).
inside the practice, from the point of view of someone who accepts, at least tentatively, the interdependence of justice, the virtues, and an inclination of concern for others. From this perspective, the argument appears quite different. What it now says is that the practice of valuing justice for its own sake makes it possible for human beings to develop the virtues of generosity, gratitude, loyalty, and the like, and that these virtues in turn make possible a genuine community. In order for individual men and women to learn these virtues, they must live among others who possess them, and they must have opportunities to develop the habits of thought and behavior that constitute these virtues.\(^{48}\) In order for such people to exist and such opportunities to occur, justice must be valued. The conclusion, then, that these virtues and this kind of community would not exist if justice was not valued for its own sake does not operate as a logical deduction but rather as a description of the constitutive connection between virtue, community, and the practice of talking justly.

A final good made possible by the practice of talking justly is an institutionalized set of opportunities for discourse about justice and related matters. Cicero focuses on this element of the practice in Books II and III, when Marcus and the others discuss proposals for specific legal rules. The imagery of this part is engaging. In Book I, the three friends have been walking and resting along the bank of the Liris.\(^{49}\) The opening of Book II has Atticus suggesting that since they are about to begin a new part of the discussion, focusing specifically on the civil law, the group should move to the island in the Fibrenus. Marcus agrees, saying that the island is a “favorite haunt of mine for meditation, writing and reading” (2.1.1). The name of the river is itself suggestive—indicating a fiber or structural bond, but Atticus’s description of the course and quality of the river is even more provocative for the conversation on law:

Here we are on the island; surely nothing could be more lovely. It cuts the Fibrenus like the beak of a ship, and the stream, divided into two equal parts, bathes these banks, flows swiftly past, and then comes quickly together again, leaving only enough space for a palaestra of moderate size. Then after accomplishing this, as if its only duty and function were to provide us with a seat for our discussion, it immediately plunges into the Liris, and as if it had entered a patrician family, loses it less famous name, and makes the water of the Liris much colder.\(^{50}\)

The Fibrenus provides a voyaging place for debate and deliberation and

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\(^{48}\) Cicero discusses the virtues at length in *De Officiis*.  
\(^{49}\) The conversation begins, of course, in the grove which contains the “Marian Oak” (1.1.1), but the threesome soon walks to the Liris for the main conversation (1.4.14).  
\(^{50}\) *De Legibus* 2.3.6. The word *palaestra* refers to a Greek gymnasium or school for wrestling. The term was often used by both Greek and Latin rhetoricians to mean a school of rhetoric or a place for debate.
then flows into the Liris, losing its separate identity yet significantly affecting the first river by its contribution. This is a rich image for the ways in which law provides opportunities for meaningful discourse about justice.

Occasions for debate and deliberation are generated by the practice of treating law and justice as linked. If law is dependent upon justice and right reason, then each legal question must be talked and thought about in these terms. And each legal rule must function rhetorically, to persuade its audience of its significance and value. Finally, adjudication of disputes must be conducted with the same orientation to justice. These occasions, established within the institutions of law, provide opportunities for members of the community to engage in the practice of talking justly.

In the second kind of argument, Marcus defines a character, or ethos, for his audience that is made possible by participation in the practice of talking justly, and which is in turn necessary for continuation of the practice. These ethical arguments take a number of different forms, including unspoken assumption, narrative, empirical evidence, example, and metaphor.

The arguments already mentioned, for example, operate not only as description of internal goods, but as ethical arguments as well. As we have seen, the argument regarding the language of justice, that involving the existence of the virtues and community, and that concerning regular occasions for discussion of justice are effective only if one accepts the central values of the practice Marcus has identified. Yet this condition is not expressed. Instead, the reader is invited to consider Marcus's arguments, and she is thus required to discover for herself a way of rendering justice.

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51. Marcus explicitly adopts Plato's notion "that it was also the function of law to win some measure of approval, and not always compel by threats of force" (2.6.14). See Plato Laws 4.718b-723d.

52. Most scholars assume from 3.20.47 that the missing Books of De Legibus included an extended discussion of the courts, see, e.g., Keyes. "Introduction," 291, and a long passage that apparently included discussion of the proposals regarding trials in 3.3.6-8 is also lost (3.7.17). Even with this gap, the surviving text suggests the importance of open and just adjudication of alleged violations of the magistrates's orders (3.3.6; 3.4.11) and of civil disputes (3.3.8). Cf. 2.21.52-53, criticizing the interpretation of rules regarding the perpetual rites; 2.25.62, on the interpretation of rules regarding graves. See also Rawson, "Interpretation," 355-56, remarking on Marcus's proposal in favor of trials before the people instead of before juries. For two recent studies that reach quite different conclusions about Cicero's view of the political and ethical significance of legal rhetoric, see Richard Enos, The Literate Mode of Cicero's Legal Rhetoric (Carbondale, 1988), 90-3 (concluding that Cicero's published speeches functioned as social criticism); Bruce Frier, The Rise of the Roman Jurists: Studies in Cicero's 'Pro Caecina' (Princeton, 1985) (treating Ciceronian "rhetorical advocacy" as relativistic and unstable in contrast to "autonomous law" associated with the developing profession of Roman jurists). Professor Frier's otherwise interesting study of Pro Caecina and the rise of the jurists is marred by his unproblematic linking of rhetoric and "relativism" and his ungenerous if not deceptive reading of De Oraioe and De Inventione (see, e.g., 130-38).
them sensible. Cicero treats the reader as if she values justice and thus ascribes to her the appropriate ethos.

In addition, Marcus develops a more direct form of ethical argument by using narrative. At the beginning of his discussion of justice, in Book I, Marcus tells a story about the origins of humanity. Through this myth, Marcus defines a character and a situation for his audience. He tells his listeners that they are united with all people and gods, that they are uniquely created for life in community, and thus that they are especially given to valuing justice. The gods scattered the seed of humanity on the earth and gave us the gift of reason. We are united to the gods and to all other human beings through our shared ancestry and our shared faculty of reason. We are, moreover, uniquely endowed to exercise reason and to participate in community: we stand erect; our faces, particularly our eyes, reveal our characters and feelings; and we have the ability to speak (1.7.22-9.28).

The effect of this narrative is to direct the reader’s attention to the ethical significance of alternative views of law. The narrative suggests that what is at stake is who we are and what kinds of lives are available to us. This claim of an anatomical predisposition for justice provides a powerful sense of inevitability to the offered way of life. In addition, this first statement of the narrative is extremely ornate and lofty, inviting the reader to delight in the poetic elevation of the subject.

After Atticus expresses pleasure in the eloquence of this story, Marcus presents a slightly different version of the narrative. Here he claims that empirical evidence reveals the existence of the human character and situation he has suggested. Instead of a myth, this second narrative organizes empirical observation. Marcus signals this shift in his introduction to the second narrative: “Out of all the material of the philosophers’ discussions, surely there comes nothing more valuable than the full realization that we are born for justice and that right is based not upon opinions, but upon nature.” 53 This follows, Marcus explains, from the recognition that people are very much alike: “reason . . . is certainly common to us all, and, though varying in what it learns, at least in the capacity to learn it is invariable” (1.10.30). Moreover, people everywhere are similar both in their virtues and their vices:

Troubles, joys, desires, and fears haunt the minds of all people without distinction, and even if different people have different beliefs, that does not prove, for example, that it is not the same quality of superstition that besets those races which worship dogs and cats as gods, as that which torments other races. But what nation does not love courtesy, kindliness, gratitude, and remembrance of favors

53. De Legibus 1.10.28. I have changed Keyes’s translation of opinione.
bestowed? what people does not hate and despise the haughty, the wicked, the cruel, and the ungrateful? (1.11.32)

To a modern reader, this claim seems very weak: it ignores all of the great differences among cultures and nations and individuals that seem so significant to us and to our understanding of ourselves. Yet of course this is a purposive arrangement. Marcus is not unaware of difference among people, as he takes care to point out. But for the purposes of this discourse, it is productive to look at the similarities, and Marcus gives his audience a way to understand themselves as situated within this deeper unity. Neither unity nor difference is more “true” of humanity, for these characteristics are rhetorical, they are ways of imagining the whole of humanity and can be valuable in so far as they make available certain kinds of action. 54

In Marcus’s conversation, this second narrative operates by selecting and arranging the audience’s empirical perceptions about human beings in such a way as to support the notion of character and situation that Marcus had defined through the opening myth. Marcus here assembles evidence about human behavior and suggests conclusions from this evidence to support the ethos defined in the earlier myth: “When it is understood from these considerations that the whole human race is bound together in unity, the conclusion follows that reasoning together with right living makes humanity better.” Again the value of the practice of talking justly can be established only in a circular way, dependent upon the internal goods made available by the practice. Here the narrative allows us to conceive a whole within which it is possible to see a way of life that improves us all.

Marcus concludes, then, that we are constituted so as “to share the sense of justice with one another and to pass it on to all people.” 56 Were we not misled by unexamined habits and customs, justice would be

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54. Again this argument does not claim that we are all always “free” to choose how we perceive human nature or the whole of humanity or related notions. Such notions are of course embedded in our language and practices in ways over which no one individual has control. The point is rather that Marcus’s narrative does not rest on empirical claims and as Marcus urges at the beginning of the dialogue, the question of truth is just not significant here.

Cicero underscores this point in Book II, when Marcus describes “the opinion of the wisest that law is neither something derived from human nature nor the enactments of peoples” (2.4.8); I have changed Keyes’s translation of “legem neque hominum ingeniis excogitatum nec scitum aliquod esse populorum”). The discussion in Book I makes clear that the notions of right reason and practical discourse are distinct from some empirically perceived “human nature.” Keyes’s translation of “hominum ingeniis” as “human thought” is particularly misleading here.

55. De Legibus 1.11.32. I have changed the last phrase of Keyes’s translation of “quibus ex rebus cum omne genus hominum sociatum inter se esse intellegatur, illud extremum est, quod recte vivendi ration meliores efficit.”

Cicero emphasizes the rhetorical character of the tension between public and private, individual and community. Whether we are unique individuals, or whether we are essentially alike; whether we are narrowly self-interested, as Bentham maintained, fundamentally social, as some communitarians have suggested, or something in between, in Hegelian fashion, is finally a question of narrative.

56. De Legibus 1.12.33. I have changed Keyes’s translation of omnes.
observed by all, "For those creatures who have received the gift of reason from nature have also received right reason, and therefore they have also received the gift of law, which is right reason applied to command and prohibition. And if they have received law, they have received justice also. Now all people have received reason; therefore all have received justice." 57

Thus it is possible to conceive of ourselves as sharing a common concern with justice, even though specific beliefs about justice may vary. With lofty eloquence, Marcus offers his audience a possible self:

For one who knows oneself will realize, in the first place, that he has a divine element within him, and will think of his own inner nature as a kind of consecrated image of god; and so he will always act and think in a way worthy of so great a gift of the gods. . . For when the mind, having attained to a knowledge and perception of the virtues, has abandoned its subservience to the body and its indulgence of it . . . and further when it has examined the heavens, the earth, the seas, the nature of the universe, and understands whence all these things came and whither they must return . . . and when it realizes that it is not shut in by [narrow] walls as a resident of some fixed spot, but is a citizen of the whole universe . . . then, in the midst of this universal grandeur, and with such a view and comprehension of nature, ye immortal gods, how well it will know itself. 58

Atticus responds to this flourishing account with some irony: "Your praise of wisdom is indeed impressive and true; but what is its purpose?" (1.24.62). Marcus answers in a straightforward way, recalling the dialogue's practical concerns: "In the first place, Pomponius, it has to do with the subjects of which we are about to treat, which we desire shall assume an equally lofty character; for these matters cannot possess great dignity unless the sources from which they are derived possess it also" (1.24.63). Since the purpose of this discourse is to aid the community and its members by defining and defending the practice of talking justly, we must approach the task in the spirit of high aspiration. In order to engage in the practice of talking justly, we must conceive of ourselves as just. And it is the practice of talking justly, in turn, that enables us to form this view of ourselves. Law is in this way always concerned with ethical education and with the possibility of ethical understanding.

For the reader who brings at least a tentative commitment to justice, this dialogue offers an opening to self-knowledge. It draws the reader into a practice of law as the pursuit of justice through persuasive public discourse, and it enables the reader to recognize the ethical and political opportunities available within that practice. This conception of law pro-

57. De Legibus 1.12.33. I have changed Keyes's translation of omnibus.
58. De Legibus 1.22.59-23.61. I have changed Keyes's translation of nam qui se ipse norit.
vides a way to understand justice as a shared value and a formative part of our community without relying upon empirical proof of some immutable human nature or reducing justice to a matter of personal taste.59 In this conception, justice exists in talk about justice, within a particular situation, not in advance. And this practice of talking about justice constitutes the character of those who participate in it, both as individuals and as members of a community formed by the activity.

In addition, the central connection between law and character in this conception offers a way to enrich our understanding of and aspirations for current legal practice. Recent scholarship has reemphasized the importance of practical reasoning and discourse to our judicial practice, and some of this work has revived the concern with ethos that has been a significant focus within the rhetorical tradition.60 As Aristotle put it, the

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59. *De Legibus* can be seen as a central text within a conception that I tentatively call rhetorical natural law. The standard histories of Western jurisprudence treat *De Legibus* as a classic statement of ontological natural law theory, in which the content of just law is thought to be derived from an immutable human nature or from a divine or otherwise transcendent order. This approach is most closely associated with the Thomist tradition and it has been recently reclaimed by Lloyd Weinreb. See Lloyd Weinreb, *Natural Law and Justice* (Cambridge, Mass., 1987). This approach is sometimes contrasted with deontological natural law theory, in which the content of just law is grounded in a determinable system of morality. See A.P. d'Entreves, "The Case for Natural Law Re-Examined," *Natural Law Forum* 1 (1951): 34. Compare John Wild, *Plato's Modern Enemies and the Theory of Natural Law* (Chicago, 1953), 172 (arguing that all natural law theory must be ontological and pluralistic).

In my reading, *De Legibus* does not fit comfortably within either of these notions. Instead, Cicero’s view of law as persuasive public discourse about justice suggests a third conception of the link between law and justice which focuses on the rhetorical character of justice and on the ethical and political opportunities made available by legal discourse. I claim the term “natural law” in part to embrace the notion of a link between law and justice that is associated with the term in standard Western legal history, but also because I suspect that classical rhetoric has been much more influential within the natural law tradition than the standard histories suggest. My suspicion about this is based first on the importance of rhetoric in *De Legibus* and the undeniable prominence Cicero and the dialogue have been given throughout the natural law tradition. Second, I suspect that the vehement rejection of rhetoric by philosophers and other scholars since the seventeenth century has influenced modern historians and legal theorists to minimize the significance of rhetoric to the natural law tradition.

D'Entreves also distinguishes a “technological” natural law theory that views natural law as "know-how": "the knowledge of the right rule, of the correct solution to a given problem in law, the answer that lies in the 'nature of things,' and which it is only a matter of finding and applying in order to have good laws." D'Entreves identifies this approach with the Roman jurists who authored the *Digest*, but surprisingly not with Cicero, whom he dismisses as committed to “sweeping generalizations” of Stoic ontological natural law. “The Case for Natural Law,” 30. See also d’Entreves, *Natural Law*, 20-23. D’Entreves suggests that Lon Fuller’s notion of “eunomics” is very close to this technological natural law. It is unfortunate that Professor d’Entreves did not reconsider his assessment of Cicero in light of this classification. Although d’Entreves does not develop this category in much detail, I suspect that his notion of technological natural law has much overlap with mine of rhetorical natural law.

word "persuasion" is a term of relationship: something is always persuasive to someone. 61 Similarly, an argument is always made by someone, for some purpose, within some context. These elements are a part of the rhetorical situation and are themselves potential sources of persuasive argument. 62 Thus every rhetorical situation raises issues of character and community, and every successful persuasion is itself a significant ethical and political event.

For students of legal discourse, this means that questions of justice are always also questions of ethics and politics. To define and defend good judicial practice it is necessary not merely to articulate the numerous topics of practical reasoning, but also to explore the ethical significance of legal discourse for individuals speakers and the political significance of this discourse for the community that is both its audience and its product. 63 De Legibus suggests that the quality or value of legal discourse depends as much on the character of the participants and the audience it seeks to create as on the specific topics addressed.

Finally, the rhetorical conception of law offered in this dialogue can enrich discussion of two additional problems in modern jurisprudence. First, on what basis, if at all, are we obligated to obey the law? This question has persisted as a central focus of debate within modern jurisprudence in part because neither legal positivism nor modern deontological natural law has offered an attractive answer. 64 Legal positivism


61. Rhetoric 1.2.11.
62. Rhetoric 1.2.3. See also 1.9.1-14; 2.1.1-17.6.
63. There is a strain of thought in modern jurisprudence that emphasizes the relationship between character and judgment in law, although only indirectly influenced by the rhetorical tradition, see, e.g., Benjamin Cardozo, The Nature of the Judicial Process (New Haven, 1921), 16-17 ("In the long run 'there is no guarantee of justice,' says Ehrlich, 'except the personality of the judge,'") quoting Eugene Ehrlich, The Science of Legal Method, Modern Legal Philosophy Series, 9: 65); Lon Fuller, Anatomy of the Law (1968; reprint, Westport, 1976), 39-40; Edwin W. Patterson, "Logic in the Law," University of Pennsylvania Law Review 90 (1942): 894.
64. Perhaps the recent debate over this problem can be dated from the Hart-Fuller debate in 1958, H.L.A. Hart, "Positivism and the Separation of Law and Morals," Harvard Law Review 71
seems to say that there is no obligation to obey the law, or at least none that is tied to the validity of the law itself. Deontological natural law theory suggests instead that there is an obligation to obey the law only so far as the law is moral, but this depends on the existence of some universal system of morality. Both of these alternatives are troubling.

Cicero's conception of law suggests an alternative way to think about legal obligation. As Marcus emphasizes, the justification for the practice of talking justly finally can be made only in terms of the practice itself. Similarly, the determinations of justice arrived at in this way can be persuasive only to those who accept the central values of this legal discourse. If someone does not value justice, finally that person is not within the rhetorical practice in which talk of an obligation to obey the law makes any sense. Moreover, because justice is always contingent and controversial, there can be no final constituting of authority that is not open to fundamental challenge. What this conception of law suggests is that an obligation to obey the law arises as a consequence of our participation in the practice of valuing justice. Nothing can compel a person to engage in this practice, although most people join as an unexamined consequence of their cultural education. But for those who do, participation entails obligation. Unlike other deontological explanations, the account suggested would not rest on some universal morality, nor would it claim to be absolute or unchangeable.

*De Legibus* also has something to say about openness in legal discourse. Recent calls for the inclusion of diverse voices and perspectives focus on the numerous ways in which some are silenced in law and on the opportunities for change that may be available to judges and others. This work itself opens new ways of thinking about law and judicial prac-


tice and it has rightly generated much discussion and hope. Some of this writing has argued that legal discourse should be open to diverse voices not only because this benefits individual speakers, but also because it improves the law for us all. A variety of arguments in this vein have been made: that an awareness of diverse perspectives will deepen and broaden the understanding of judges and others with power; 67 that the legitimacy of law, either as an expression of social value or an exercise of coercive force, depends upon it being accessible to all; 68 and that participation in legal discourse facilitates group identification and cohesion. 69

The rhetorical character of justice in Cicero's account suggests yet another way to think about openness in law. Because justice is forever contingent and controversial, discourse about justice requires openness. And the openness must reach beyond merely acknowledging the existence of other perspectives, because participation in the practice of talking justly requires that one is able to persuade others and to be persuaded oneself. In a rhetorical universe, persuasion is the only way in which justice and other human virtue can be known. And to persuade and be persuaded, people must not merely be allowed to speak, they must be spoken with, listened to, questioned, sometimes refuted, and sometimes affirmed.

The vision of good legal discourse suggested by Cicero's account is that of a community in which the practice of talking justly flourishes. The practice is carried on not only by government officials, but by all people who value justice, as they talk with one another about the numerous and complex activities of life. 70 Sometimes these discussions involve the allocation of valuable resources. Sometimes they are addressed to threats of violence. Sometimes they involve highly contested questions of human dignity or human excellence. Sometimes the importance of the conversation is felt with a special urgency, but throughout, there is an awareness that what each says and thinks is determined in part by how

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others talk and think and that these rhetorical ways of discovering what is valuable and what is not, what is appropriate and what is not, what is good and what is not, are crucial to the quality of each person’s life.

In this vision, the engagement of all people who would be part of the community is important not merely because it is fair, broadening, and cohesive but also because it is the only way for we in a community to know ourselves and to discover the potential goods available to us. Politics is seen not as a struggle among predetermined interests but rather as an on-going public conversation in which we discover who we are and thus what our interests are. Although not all will choose to participate, and not all will value the practice, the existence of justice among us requires that the practice of talking justly be open, pervasive, and vital. So long as our legal discourse does not genuinely engage poor women and men, disabled women and men, lesbians, women and men of color, working class women and men, gays, white women, we will not be, any of us, the kind of people capable of knowing justice. We will continue to talk and to act, and we may even think we understand the consequences of our actions for other people. Yet without genuine conversation, we cannot know this and without open discourse we will be unable to see the injustice we actually do. In ignorance, we will be the unjust.

71. "The community of victims is the same as that which unites victims and executioner. But the executioner does not know this." Albert Camus, The Rebel, trans. Anthony Bower (New York, 1956), 16, n. 2. I am grateful to J. Kastely for this reference.