

Caroline Humfress

# Natural Law and Casuistic Reasoning in Roman Jurisprudence

**Abstract:** “The Roman jurists, ‘calculating with concepts,’ did not need any natural law.” (Christoph Kletzer). Focusing on classical juristic material, this essay argues that natural law was in fact one concept, amongst others, that Roman jurists calculated with. There is no evidence for Roman juristic treatises dedicated to natural law, yet as Levy noted in 1949: “Hundreds of texts are concerned with *ius naturale*, *naturalis ratio*, *rerum natura* and other phrases related to *natura* or *naturalis*. It is impossible to find a common denominator.” The essay divides into two parts: first, it surveys a series of arguments drawn from those hundreds of juristic texts that relate to natural reason and natural law(s). Second, it analyses the Roman juristic method of “calculating with concepts.” The argument throughout is that the common denominator which eluded Levy is the Roman jurists own, highly particular, type of case-methodology.

## 1 Introduction

“The Roman jurists, ‘calculating with concepts’, did not need any natural law.”<sup>1</sup> Christoph Kletzer’s statement neatly summarizes the celebrated nineteenth-century Prussian jurist Friedrich Carl von Savigny’s understanding of the relationship between Roman and natural law. Natural law for Savigny “[...] was not a highly complex and eternally valid emanation of reason, but a mere abbreviation or simplification of positive law” (Kletzer 2007, 128). For Savigny (1814, 29), the fact that the Roman jurists “calculated with concepts” (*rechnen mit Begriffen*) which they had themselves developed, meant that they had no need for a systematizing natural law doctrine that stood ‘behind’, ‘above’ or ‘beyond’ their civil law. This basic understanding of the relationship between Roman and natural law can also be traced through the so-called school of the *usus modernus pandectarum* (“the modern use of the *Digest/Pandects*”) that developed in the Netherlands and Germany from the sixteenth century onwards. Jurists associated with the *usus modernus pandectarum* attempted to resolve modern legal questions through the use of Roman civil law, more specifically through the use of the Roman emperor Justinian’s *Digest* or *Pandects*, a text promulgated in

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<sup>1</sup> Kletzer unpublished, 8; see also Kletzer 2007, 146.

533AD and mostly made up of heavily excerpted extracts from the writings of second- and third-century AD Roman jurists. As James Gordley (2013, 157) states:

Unlike the late scholastics, the *iusnaturalists*, Pothier, Domat, and the later rationalists, they [sc. “the school of the *usus modernus pandectarum*”] did not try to resolve legal problems by means of higher principles [...] Typically, they did not dismiss the importance of the higher principles of natural law or of philosophy, although they did not apply them to legal problems. They began their treatises with accounts of law and justice that were squarely in the Aristotelian tradition, although these accounts became sketchier as time went on. Yet they rarely drew on these accounts to explain the Roman law.

Whereas seventeenth- and eighteenth-century jurists who worked within the tradition of the *usus modernus pandectarum* tended to neglect natural law, nineteenth-century German ‘pandectists’ such as Georg Friedrich Puchta and Bernhard Windscheid, who both worked within a Romanist tradition established by Savigny, framed their conceptual jurisprudence against contemporary natural law theorists (Haferkamp 2004). The nineteenth-century Pandectists may have been the “sworn enemies of natural law” (Grossi 2010, 106), but was Savigny right to claim that the Roman jurists themselves had no need for a natural law doctrine?

There is no evidence for any Classical Roman jurist (c.130BC–c.235AD), or indeed any ‘epiclassical’ (c.284–c.330AD), postclassical (c.330–527AD) or Justinianic (527–565AD) jurist, writing a treatise entitled *On Natural Law* or similar. According to William Warwick Buckland (1925, 29) the Roman jurists thought of *ius naturale* as: “[...] an ideal to which it is desirable that law should conform, but it was not really at any time, for them, a test of the validity of a rule of law.” Jean Gaudemet (1952) concluded that natural law had a very limited place in Roman jurisprudence, as did Alberto Burdese (1954). Similarly, in his entry on ‘Ius Naturale’ Adolf Berger (1953a, 530) states that:

Unknown to Republican jurists, the *ius naturale* is not considered by those of the Principate as a juristic conception denoting a special sphere of law, a particular category of law, or a system of legal norms. Nor do the occasional ‘definitions’ of the *ius naturale* found in the sources, give the picture of a certain uniformity of the conception, although the influence of Greek philosophy is evident.

The idea that *ius naturale* was not a juristic concept but rather a philosophical one is also found in Barry Nicholas’ (2005) entry *Law of Nature* in the third edition of the *Oxford Classical Dictionary*: “For them [sc. the jurists] the philosophical natural law is no more than an ornament, carrying no suggestion that an in-

consistent man-made law might be invalid.”<sup>2</sup> In other words, Classical Roman jurists did not treat “the philosophical natural law” as a source of legal obligation above and beyond man-made (‘human’) law: the philosophical natural law was a mere ‘ornament’ to Roman jurisprudence.

In fact, much of the modern scholarship on natural law and Roman jurisprudence encompasses the broader question of the extent to which Classical Roman jurists borrowed abstract terminology from Greek philosophical sources (the classic argument in favour of juristic borrowing is Villey 1953; the classic argument against, Nocera 1962). More specifically, the question of philosophical influence on Roman jurisprudence also tends to include discussions on the extent to which Roman jurists borrowed or developed Ciceronian and/or Stoic concepts of natural law. In a subtle and persuasive article, Yan Thomas (1991, 204 and 209) concluded that: “On chercherait vainement dans le Digeste une formule équivalente au ‘ius a natura’ cicéronien. Pas davantage n’est admise la supériorité normative de la nature sur le droit [...] Aucune hiérarchie n’est suggérée entre droit naturel et droit civil, contrairement au modèle cicéronien.” With respect to Stoic influence, on the other hand, Tony Honoré (2002, 80) has argued in a number of publications that Ulpian – a leading jurist and advisor to successive emperors of the Severan age (193–235 CE) – espoused “an outlook that is predominantly Stoic.” According to Honoré, Ulpian: “[...] shares with the Stoics the view that we are born free and equal and should live according to nature” (although note the qualification at Honoré 2010, 208: “It is a mistake to attribute to a lawyer a system of philosophy rather than a set of values. The nature of the discipline requires lawyers to be eclectic, to compromise between different aims”). As Schiller (1978, 560) wrote, perhaps with more than a hint of irony: “In spite of the fact that the attention paid by the Roman jurists to the concept of *ius naturale* may have been minimal, modern commentary on the subject is quite extensive.”

In an important article published in 1949 and entitled *Natural Law in the Roman Period*, Ernst Levy accepts the premise that philosophical concepts of natural law played a very minor role in Classical Roman jurisprudence. Having explained that Cicero, schooled in Greek philosophy and rhetoric, developed a systematic idea of a law that is “above space and time”, a law that has its “[...] very root and origin [...] in nature or, as [Cicero] also puts it, in God”, Levy (1949, 45) turns to the Roman jurisprudence of the Classical era. As Levy (1949, 50) rightly argues, Roman juristic sources – in contrast with the writings of Cicero – do not offer an “unequivocal line of thought” on natural law. None-

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<sup>2</sup> See also Vander Waerdt 1994, 4887.

theless, continues Levy (1949, 50), the juristic sources are not barren: “Their wealth rather is disturbing. Hundreds of texts are concerned with *ius naturale*, *naturalis ratio*, *rerum natura* and other phrases related to *natura* or *naturalis*. It is impossible to find a common denominator.” The lack of ‘a common denominator’, according to Levy, is due to the fact that the Roman jurists worked with multiple, different, meanings of ‘nature’:

The outlook brightens, however, if different meanings are recognized and explained as such. Cicero, the philosopher, believes in a universal and eternal law. The jurists consider this type of natural law only in a minority of instances [...] As a rule, they refer to nature and preferably to the nature of things when they deal with factual situations of daily life. There the jurists feel at home. To master such problems they, and they alone, are called upon. They have to do with the law binding here on earth, and, if necessary, to be enforced by the courts.

For Levy, the hundreds of juristic texts referring to *ius naturale*, *naturalis ratio*, *rerum natura* etc. are all concerned with multiple, different, factual situations in daily life. Nature, for Levy, thus tended to be used by the Roman jurists as a ‘yardstick’ for measuring and determining the proper outcomes of the private law scenarios that dominated their collective thought. “For ‘natural’ was to them not only what followed from physical qualities of men or things, but also what, within the framework of that system, seemed to square with the normal and reasonable order of human interests and, for this reason need not be in need of any further evidence” (Levy, 1949, 51).<sup>3</sup>

Levy would thus agree with Savigny that the Roman jurists had no need for a *systematizing* natural law doctrine, but Levy also draws our attention to a fundamental aspect of Roman juristic thought: its method. If we return now to Christoph Kletzer and the argument that “The Roman jurists, ‘calculating with concepts’, did not need any natural law”, I argue – to the contrary – that natural law was one concept, amongst others, that Classical Roman jurists calculated with.

In Section 2 below, I explore a number of specific examples of Roman Classical jurists using the concepts of natural reason and natural law in order to determine solutions to legal problems. Moreover, I will argue that on the few occasions where we do find what seem to be general philosophical or metaphysical statements about natural reason and natural law in Classical jurisprudential sources, those sources were most likely written with beginners in mind. In other words, what we tend to view as general definitions were originally intend-

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<sup>3</sup> See also 54–55.

ed as initial ‘footholds’, which would enable those students who were (as yet) untrained in the highly specific kind of casuistic reasoning demanded by Roman jurisprudence to begin their steep ascent. In Section 3, we turn to Classical Roman juristic reasoning itself. As we shall see, the ‘common denominator’ which eluded Levy in his own analysis of those hundreds of Classical Roman juristic texts that contain phrases relating to *natura* or *naturalis* was the Roman jurists own, specific, type of casuistic method.

## 2 Roman law and natural law(s)

One of the most frequently quoted Roman juristic statements on the relationship between Roman law and natural law(s) was written by the second-century AD law teacher Gaius. Gaius’ *Institutes*, based on an elementary set of lectures delivered to students in 160/1AD, was identified by Savigny in 1816 in a fifth-century palimpsest manuscript – one of only a handful of Classical Roman juristic texts to have survived independently from Justinian’s sixth-century *Digest* compilation. We are not going to begin, however, with the famous reference to *naturalis ratio* that opens Gaius’ *Institutes* (although we will return to this passage below). Rather, we start our exploration of how Roman Classical jurists worked out solutions to legal problems with an analysis of four highly specific examples, each of which highlights Gaius’ casuistic use of the concepts *naturalis ratio* and *ius naturale*.

### 2.1 Calculating with concepts: *naturalis ratio* and the *ius naturale*

Our first example comes from Book 3 of a work by Gaius entitled *On Verbal Obligations*, excerpted by the Emperor Justinian’s legal commissioners at *Digest* 3.5.38. The passage states that anyone paying a debt on behalf of someone else, even without his knowledge and agreement, frees him from liability, but a person cannot lawfully demand payment from another without his consent: “For both natural reason (*naturalis ratio*) and civil reason (*civilis ratio*) are in favour of our being able to improve another’s position, even without his knowledge and agreement, but not of our being able to make it worse” (Mommsen, Krueger, Watson et al. 1985, Volume I, 108; translation modified). Gaius’ statement that we are able to improve another’s position without his knowledge and agreement is an example of a Roman juristic rule (*regula*): a general principle that serves as an interpretative elucidation of what the law is. According to

the Severan jurist Paul: “A rule is something which briefly describes how a thing is. The law (*ius*) may not be derived from a rule (*regula*), but a rule must arise from the law (*ius*) as it is” (*Digest* 50.17.1 = Paul, *Plautius* Book 16; Mommsen, Krueger, Watson et al. 1985, Volume 4, 956). At *Digest* 3.5.38, Gaius first demonstrates the civil law ‘as it is’, then states the ‘rule’ that arises: both natural and civil reason agree that we can improve another’s position, even without his knowledge and agreement, but we cannot make it worse.

Turning to our second example, this time from Gaius’ *Provincial Edict* (Book 4) as excerpted at *Digest* 4.5.8 (Mommsen, Krueger, Watson et al. 1985, Volume I, 139; translation modified), we again see Gaius using civil reason and natural ‘rights’ to explain the law as it is:

It is obvious that those obligations which are understood to have a natural warranty, do not perish with change of civil status, because civil reason (*civilis ratio*) cannot destroy natural rights (*naturalia iura*). Therefore, the action concerning the dowry, because it is framed with reference to what is right and just, continues to exist even after change of civil status.

As already noted, this passage comes from Gaius’ commentary on the *Provincial Edict*, a formal legal source that belonged to a branch of Roman law referred to by scholars as the *ius honorarium* or *ius praetorium*: the law that was introduced by the ‘praetors’ (magistrates) at Rome, in the public interest, to aid, supplement and correct the *ius civile*. Gaius’ specific question here concerns whether the praetors at Rome would grant an action for recovery of a dowry from someone who had lost their civil status. Gaius’ answer is that the praetor would grant the action – and from the process of reasoning out that answer comes a rule that “civil reason cannot destroy natural rights.” A similar process of reasoning can be seen in our third example, *Digest* 7.5.2, a passage again attributed to Gaius’ *Provincial Edict* (Book 7). Here Gaius mentions a *senatusconsultum* – a decree issued by the Senate at Rome – that dealt with legacies which contain usufructs for goods that are consumed by the very fact of their use (for example wine, wheat, oil and, by analogy, coined money). The rule that Gaius states: “natural reason (*naturalis ratio*) cannot be altered by the authority of the senate” (Mommsen, Krueger, Watson et al. 1985, Volume I, 239; compare Gaius, *Institutes* I.83), is reasoned out from the Senate’s specific decision to create a new class of ‘quasi-usufructs’ for this type of goods. Once again, Gaius’ *regula* is reasoned out from the law as it is. The method of reasoning that underpins our fourth example, from Gaius’ *Institutes* I.158, should be understood in the same way: “The agnatic tie is broken by status loss. Cognatic relationship, by contrast, is not affected by status loss. While the logic of state law can destroy rights founded on state law, it cannot affect rights founded on the law of nature” (Seckel, Kuebler,

Gordon and Robinson 1988, 103). Gaius first states the ‘law as it is’ and then identifies the *regula* that arises therefrom.

I have chosen to begin with these four, rather hard-core, examples of Gaius’ casuistic problem-solving because it is precisely this kind of technical, specific, reasoning that lies behind what we today tend to read as general definitions of *naturalis ratio* and *ius naturale* in Roman juristic sources. Keeping in mind the fact that “a rule must arise from the law (*ius*) as it is”, we can now turn to the celebrated passage that opens Book 1 of Gaius’ *Institutes* (Seckel, Kuebler, Gordon and Robinson 1988, 19; translation modified), a text that probably originated as lectures to first year law students:<sup>4</sup>

All peoples who are governed by laws and customs use law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to itself. It is called city-state [‘civil’] law, the law peculiar to that city-state. But the law which natural reason [*naturalis ratio*] makes for all mankind is applied in the same way everywhere. It is called the *ius gentium* because it is common to every nation. The law of the Roman people is also partly its own and partly common to mankind. Which parts are which we will explain below.

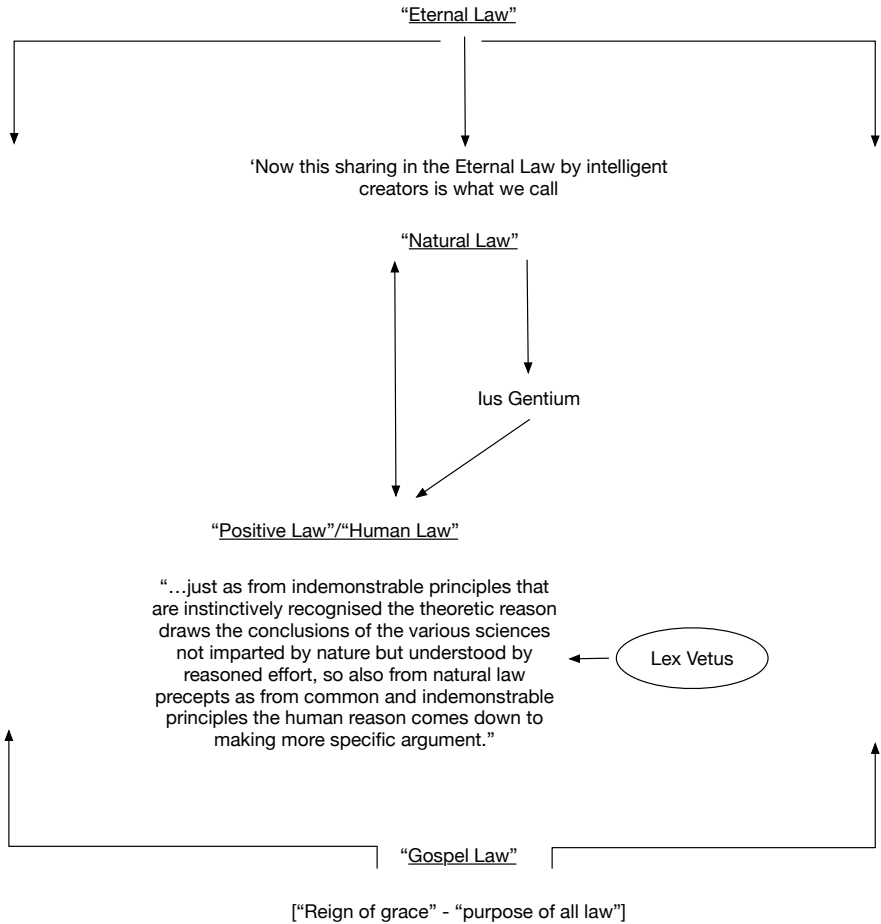
According to Gaius’ *Institutes* 1.1.1 there is a law which natural reason makes for all mankind (*ius gentium*) and a law that each [civilized] people makes for itself (*ius civile*). As we saw in our first example above (*Digest* 3.5.38), these two *rationes*, the natural and the civil, can agree; but they can also differ, as in our second example above (*Digest* 4.5.8). Given that the civil law can destroy civil rights, but not natural ones – as we saw in our third and fourth examples above (*Digest* 7.5.2 and Gaius’ *Institutes* 1.158) – it must follow that the law of the Roman people is partly its own and partly common to all mankind. Gaius promises to explain to his students which parts of the *ius civile* are peculiar to the Romans and which parts are “common to all mankind”, but he gives up on this explanation part way through Book 2 of the *Institutes*. In any case, by juxtaposing the opening statements of Gaius’ *Institutes* 1.1.1 with the *regulae* stated in our four examples from Gaius’ other writings, we can clearly see that his general definitions are not a priori statements, but rather arise out of his problem-solving casuistry. Gaius intended the general definitions given in Book 1 of his *Institutes* to function as provisional ‘place-holders’: he expected his students to move beyond them, once they had mastered the art of reasoning out from the civil law for themselves.

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<sup>4</sup> See also *Digest* 1.1.9.

The famous definition of the *ius civile* given at *Digest* 1.1.6 also originated in Book 1 of a pedagogic text: Ulpian's *Institutes*. The preamble to *Digest* 1.1.6 (Mommsen, Krueger, Watson et al. 1985, Volume I, 2) states: "The *ius civile* is that which neither wholly diverges from the natural [law] or the *ius gentium* nor follows the same in every particular. And so, whenever we add anything or take anything away from the common law, we make a law specific to ourselves, that is the civil [law]." If we leave to one side the complex and ultimately inconclusive debates concerning Justinianic interpolations to this passage, we can see that in broad outline it agrees with the text from Gaius' *Institutes* 1.1.1 quoted above. As *Digest* 1.1.1, 2 (Mommsen, Krueger, Watson et al. 1985, Volume I, 1), also attributed to Ulpian's *Institutes* Book 1, succinctly states: "Private law is tripartite, being collected out of natural, common or civil precepts." This idea of private law being collected out of natural, common (i.e. the *ius gentium*) or civil precepts is fundamental to the Roman juristic method. Roman jurists did not hypothesize an eternal or natural law from which human law ought to be derived, as the thirteenth-century Dominican Priest Thomas Aquinas did (see Figure 1). Rather, the Classical Roman jurists invariably began with the civil law of Rome and then worked outwards (see Figure 2), drawing upon 'natural' precepts in their problem-solving as and when the problem demanded.





**Figure 1:** Representation of Aquinas' hierarchical scheme of law at Summa Theologiae Ia2 ae. 91

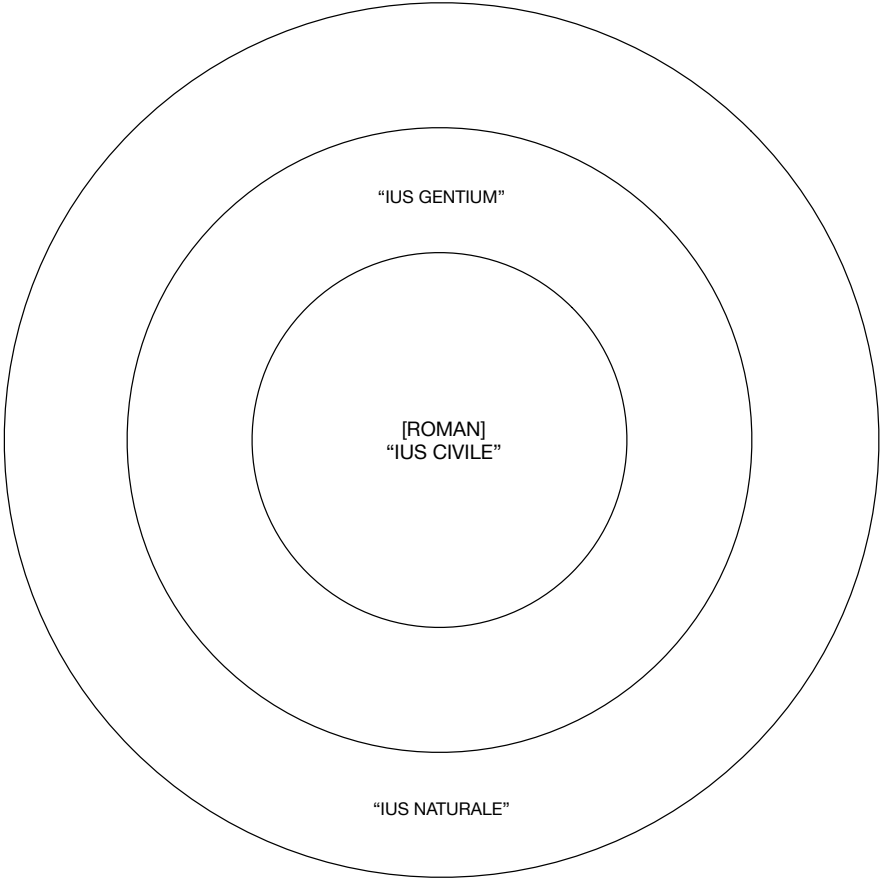


Figure 2: Classical Roman Juristic Framework

## 2.2 Does nature give rise to norms that are binding “in and of themselves”?

“Since ways of life are to be implanted, and not everything is to be sanctioned by written law, I will seek the root of justice (*ius*) in nature, which we are to take as our guide as we lay out the whole discussion” (Cicero, *On the Laws* 1.20).<sup>5</sup> Are there examples of Classical Roman jurists working with a philosophical concept of natural law or justice (*ius*), comparable to that of Cicero? *Digest* 1.1.1, attributed by Justinian’s sixth-century compilers to Ulpian, *Institutes* Book 1, provides probably the most celebrated – and controversial – Classical juristic definition of natural law (*Digest* 1.1.1, 3; Mommsen, Krueger, Watson et al. 1985, Volume I, 1; translation modified):

*Ius naturale* is that which nature taught all animals; for it is not a law specific to mankind but is common to all animals – land animals, sea animals, and the birds as well. Out of this comes the union of male and female which we call marriage, and the procreation of children, and their rearing. So we see that other animals, including wild animals, are taken to have experience of this law.

Berger (1953, 530) concluded that this Ulpianic definition of *ius naturale* is “striking by its peculiarity” and “has no juristic content at all.” Roman legal scholars have long disagreed over the extent to which the text at *Digest* 1.1.1 may have been altered by its Justinianic editors in order to reflect a new and distinctive postclassical doctrine of natural law (see Justinian, *Institutes* 1.2.11). We should note here, however, that the text at *Digest* 1.1.1, 3 fits with the preceding statement at *Digest* 1.1.1, 2 that private law is collected out of natural, common and civil precepts. According to *Digest* 1.1.1, 3, the union of male and female which ‘we’ (sc. Romans) call marriage, together with the procreation of children and their rearing, are examples of natural precepts that are to be found within the Roman private law. *Digest* 1.1.1, 4 moves immediately onto the relationship between *ius gentium* and natural law: “*Ius gentium* is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals, whereas the *ius gentium* is only common to human beings among themselves” (Mommsen, Krueger, Watson et al. 1985, Volume I, 1). As we have already seen, Gaius connected the *ius gentium* with *naturalis ratio* (Gaius, *Institutes* 1.1.1). Unlike Gaius, however, Ulpian specifies a difference between the *ius gentium* that all humans observe and the *ius naturale* that is common to all animals. Honoré (2002; 2010) suggests that this definition origi-

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<sup>5</sup> Quoted from Annas 2017, 173.

nated in Stoic philosophy, but ultimately there can be no definitive answer to the question of whether Ulpian (or any other Classical Roman jurist) systematically conceptualized *ius naturale* or *ius gentium* according to a particular philosophy or metaphysics. The crucial point is that Roman jurists were primarily interested in how – and to what extent – natural reason, natural law and the *ius gentium* interacted with the Roman civil law on a case-by-case basis.

The Roman concept of *ius gentium* also had a concrete, practical, context. From at least the late Republic, the court of the Peregrine Praetor at Rome heard cases involving foreigners (*peregrini*) who were freemen. Classical Roman jurists could thus be called upon by a Roman magistrate – as well as by private litigants – to advise on legal transactions with foreigners (i. e. freemen who were not citizens of Rome) or among foreigners.<sup>6</sup> The legal institutions which Roman jurists considered to be shared by all (free) men included the *ius commercii*, which covered basic commercial transactions such as informal sale, informal transfer of ownership, specific forms of promise, loan, partnership and other obligations; and the *ius connubii*, the ‘right’ or capacity to conclude a form of marriage, which would be recognized by Roman civil law, between a Roman and a non-Roman. In contrast with Early Modern ‘philosophical’ definitions,<sup>7</sup> the Classical Roman *ius gentium* should be understood as: “[...] those legal habits which were accepted by the Roman law as applying to, and being used by, all the people they met, whether Roman citizens or not” (Crook 1967, 29). The Classical *ius gentium*, like Ulpian’s *ius naturale*, was a concept to work with.

The specific ways in which Classical Roman jurists used the concepts of natural law, natural reason and *ius gentium* in their casuistic reasoning can be seen in the following examples of juristic discussions relating to slavery, *patria potestas* and guardianship for minors. At *Institutes* 1.52 Gaius notes that, according to the Roman civil law, slaves are in the power of their owners; this power, however, must rest on the *ius gentium* “[...] for we can observe the same thing everywhere” (Seckel, Kuebler, Gordon and Robinson 1988, 45). Note that here Gaius makes good on his promise to specify which parts of the Roman civil law are “common to all mankind.” Ulpian, in his *Institutes*, takes this reasoning a step further in order to explain the Roman practice of ‘manumitting’ (freeing) slaves: manumissions must also belong to the *ius gentium*, since all men are born free by natural law and where slavery is not known, manumission too must be unknown.<sup>8</sup>

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<sup>6</sup> See further Daube 1951.

<sup>7</sup> Tuori 2012; Haakonssen 2017.

<sup>8</sup> *Digest* 1.1.4pr, Ulpian *Institutes* Book 1.

Gaius' *Institutes* 1.55, on the other hand, go on to compare the power that masters have over slaves with the power that a Roman *paterfamilias* has over children born to a marriage concluded according to Roman civil law. *Patria potestas*, concludes Gaius, is a right which only Roman citizens have; it is an institution that belongs to the Roman *ius civile* alone. The fact that Roman citizens are unique in having their children "in power" (*in potestate*) is stated again by Gaius at *Institutes* I.189, but here he clarifies that the institution of guardianship for minors who have been released from *patria potestas* – for example by death of the *paterfamilias* – comes from the *ius gentium*: "The institution of guardianship for those who are still children is provided for by the *ius gentium*, because it is in accordance with natural reason for a young child to be ruled by a guardian" (Seckel, Kuebler, Gordon and Robinson 1988, 115). Again, we see here how definitions that we tend to assume are 'general' and 'a priori' were in fact arrived at via a highly specific juristic process of reasoning.

If we move beyond the beginners' handbooks (ie. the *Institutes*), we can begin to appreciate the complexity and subtlety of Roman juristic casuistry involving the concept of nature. Ulpian's discussion of 'natural obligations', for example, suggests that there are cases where nature can give rise to norms that are binding in and of themselves. *Digest* 44.7.14 (Ulpian, *Disputations*, Book 7) states: "Slaves are bound by civil delicts and, if manumitted, they remain bound. They are not bound by contracts in a civil way (*civiliter*), but in a natural way (*naturaliter*) they bind and are bound. Furthermore, if I pay a manumitted slave who gave me money on loan, I am released" (Mommsen, Krueger, Watson et al. 1985, Volume IV, 643). The broader legal question here involves changes to legal status: If a slave commits a delict whilst a slave and is then manumitted, he still has to answer for the wrong. But what of contracts and obligations? A slave was incapable of being a debtor, as defined by the Roman civil law – which partly led to the development of the Roman institutions of the *peculium* and the *actio de peculio*.<sup>9</sup> Debts not enforceable according to Roman civil law, however, were still 'debts'. Hence, as Gaius put it, debts incurred by a slave should be classified as natural obligations (*obligationes naturalis*, Gaius, *Institutes* III.119). In our passage, Ulpian states that slaves are bound by contracts in a natural way, rather than a civil way; moreover, contracts with a slave bind and are bound 'naturally'. Thus, if a slave gives money on a loan to a freeman they are both obligated 'in a natural way'; if the slave is subsequently manumitted, however, and I pay back the loan owed 'in a natural way', does the fact that the slave is now a free man create a new civil obligation, which is in excess of the natural one? Ulpian's an-

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<sup>9</sup> On which see Johnston 1995.

swer here is no, but the fact that this discussion originated in a text entitled *Disputations* implies that the issue was controversial. This is further supported by an extract from a work by Tryphoninus, a contemporary of Ulpian, given at *Digest* 12.6.64 and also attributed to a work entitled *Disputations*. It is exactly this kind of technical problem solving and juristic ‘disputation’ that provides the context for what otherwise might appear to us to be broad and general statements of (philosophical) principle.

In some instances, the way in which the sixth-century compilers of Justinian’s *Digest* cut Classical juristic passages from their original context and pasted them as stand-alone statements creates a heightened sense of general, timeless, principles. For example, *Digest* 50.17.32 (Ulpian, *Ad Sabinum* Book 43) states: “As far as the *ius civile* is concerned, slaves are not regarded as persons. This, however, is not true under natural law, because, so far as natural law is concerned, all men are equal” (Mommsen, Krueger, Watson et al. 1985, Volume IV, 959; translation modified). According to Otto Lenel’s reconstruction of Ulpian’s *Ad Sabinum* (1960, 1173), the passage excerpted at *Digest* 50.17.32 was originally part of a detailed discussion under the title *On the Condition of Debtors*. Hence what appears in the *Digest* as a universal principle, namely that according to natural law all men are equal, in fact originated as a *regula* in the sense defined by the Severan jurist Paul. As the Italian scholar Carlo Alberto Maschi concluded in his 1937 study *La Concezione Naturalistica del Diritto e Degli Istituti Giuridici Romani*: “Far from being a supra-legal norm, the basis upon which the civil law in force is to be criticized or altered, ‘nature’ is an intra-legal principle, a corollary of the civil law as it is currently defined” (Colish 1990, 365).

### 2.3 Juristic arguments from the ‘nature of things’

Maschi’s argument that Classical – and Postclassical – Roman jurists invariably understood nature as an “intra-legal principle” rather than as “a supra-legal norm” has not been without its critics.<sup>10</sup> Maschi (1937, 2) was right, however, to stress that there are numerous instances in classical Roman juristic sources where the concept of ‘nature’ simply equates to ‘that which is’. Air, running water, the sea and the seashore are not amenable to private ownership, thus they belong in common to all men ‘by natural *ius*’ (*Digest* 1.8.2; Marcian, *Institutes* Book 3; Mommsen, Krueger, Watson et al. 1985, Volume I, 24). Wild animals are free by nature and can be acquired by ‘first taking’, which is “a matter of nat-

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<sup>10</sup> For example, Jolowicz 1938.

ural reason” (Gaius, *Institutes* II.65–68; see also *Digest* 41.1.1; Ps.-Gaius’ *Common Matters or Golden Things*, Book 2). Hence, as Ulpian argues, if a bear – ‘wild by nature’ – breaks loose and causes harm, its former owner cannot be sued for liability because he ceased to be the owner the moment that the bear escaped (*Digest* 9.1.1.10; Ulpian, *Edict* Book 18; Mommsen, Krueger, Watson et al. 1985, Volume I, 276). Ulpian uses the fact of the bear’s wild nature to reason out a problem relating to liability for damages under Roman private law.<sup>11</sup>

Classical jurists also developed arguments from the ‘nature of things’ using analogical reasoning. For example, *Digest* 44.7.1, 12 (Ps.-Gaius, *Golden Words* Book 2) states: “It is clear in the nature of things that a lunatic, whether he makes a stipulation or a promise, performs no valid act.”<sup>12</sup> *Digest* 44.7.1, 13 goes on to draw an analogy between the legal capacity of a lunatic and a minor: “Very near to him [sc. the lunatic] in position is a person who is of an age that he does not yet understand what is being done; but in respect of him a more benevolent view has been accepted; for one who can speak is regarded as being able lawfully to stipulate as well as to promise.”<sup>13</sup> Having distinguished the lunatic from the minor, *Digest* 44.7.1, 14 reasons from the ‘nature of things’ as they pertain to a dumb person: “It is clear in the nature of things that a dumb person has no part in a verbal obligation” (Mommsen, Krueger, Watson et al. 1985, Volume IV, 640). *Digest* 44.7.1, 15 states that this is also the case for a [completely] deaf person, on the grounds that someone who promises must be able to hear the words of the stipulator and vice-versa. The *regula* that emerges across these discussions is that ‘speaking’ is a pre-requisite for the legal capacity to stipulate or to promise, but it is not the only pre-requisite (as is clear from the ‘the nature of things’ that pertain to the lunatic and the deaf).

Finally, with respect to Classical Roman juristic arguments from ‘the nature of things’, we should note a further, related category: appeals to normative principles that are said to exist according to ‘natural reason’ (*naturalis ratio*). For example, natural reason permits us to defend ourselves against attack (*Digest* 9.2.4pr, Gaius, *Provincial Edict* Book 7; also *Digest* 43.16.1.27, Ulpian, *Edict*, Book 69). It also invalidates a contract where “[...] the thing which we stipulated to be given is of such a nature that it cannot be given” (*Digest* 44.7.1.9, Ps.-Gaius, *Golden Words* Book 2; Mommsen, Krueger, Watson et al. 1985, Volume IV, 640). According to Peter Stein (1974), these kinds of Roman juristic arguments from natural reason underwent an important development between the Late Republic

<sup>11</sup> See further Ashton-Cross 1953, 395–6.

<sup>12</sup> Mommsen, Krueger, Watson et al. 1985, Volume IV, 640. On ‘stipulation’ see Berger 1953b.

<sup>13</sup> Mommsen, Krueger, Watson et al. 1985, Volume IV, 640.

and early Empire, with a shift from “what is self-evident” to “what is universally valid.” Tony Honoré detects a similar change in the concept of natural equity (*naturalis aequitas*). In the writings of Ulpian, ‘natural equity’ does not simply refer to what is self-evidently equitable: “The special feature of natural equity is that it operates even when the civil law does not cater for the problem [...] Natural equity is not fundamentally different from civil equity, but the equitable solution to a problem may or may not already have been embodied in the civil law” (Honoré 2002, 93). Again, we should note here that natural equity, like natural reason and natural law, was a concept used by classical jurists in order to solve problem cases within the Roman civil law – moving outwards to consider natural equity as and when the specific case demanded.

### 3 Casuistic reasoning in Roman jurisprudence

Classical Roman jurists used a particular kind of casuistic ‘problem-thinking’ and, in the process, developed and clarified a distinctive set of legal concepts and principles. Their objective, however, was not to arrive at a set of ‘higher-level’, governing legal principles or concepts, but rather to define the Roman *ius civile* case by case. As James Gordley (2013, 948) notes: “Their method did not require them to define their concepts or explain the relationship between one concept and some higher-level concept.” The concepts that we find in classical Roman juristic sources: ownership (*dominium*), possession (*possessio*), contract (*contractus*) etc. – and, as I argue above, ‘natural law’ (*ius naturale*) and ‘natural reason’ (*naturalis ratio*) – are effectively ‘working’ concepts.

Classical juristic discourse reveals the concept of natural law ‘at work’ (in the Wittgensteinian sense referred to by Hart 1983, 277). We should not, however, assume from this fact that Roman classical jurists were only interested in “the factual situations of everyday life” (contra Levy 1949, 50). Their casuistic problem-case method was related – in various ways – to concrete, factual, situations. Nonetheless, in classical jurisprudential writing it was the “hypothetical case” that dominated (Frier 1985, 164):

The hypothetical case is so characteristic of later Roman [classical] juristic casuistry that its unusual form and its importance are not always realized; in particular, it has little or nothing to do with Anglo-American ‘case law’. Above all, cases in Roman juristic writings normally omit most references to contingent circumstances, even when it can be presumed that an actual case underlies the jurist’s decision [...] the hypothetical cases in juristic writings serve a large number of purposes; they range from entirely plausible and everyday situations to which rules can be straightforwardly applied, to farfetched ‘limiting cases’ through which highly theoretical propositions can be elucidated.



As Fritz Schulz put it (1936, 51), Classical Roman juristic sources are casuistic in a peculiar way. They are not intended to showcase abstract principles by means of concrete or fictitious cases. Instead, they develop a series of predominately ‘hypothetical’ cases in which legal concepts and rules are identified, but are not abstracted from the cases themselves, in order to determine Roman legal solutions to Roman legal problems. *Definitio* (definition), for a Classical Roman jurist, was not a tool for generalisation or for the formation of abstract rules.<sup>14</sup> In sum, Classical Roman juristic sources show us the concepts of natural reason, natural equity and natural law ‘at work’, as part of the jurists’ hypothetical case-method. As I argued in Section 2 above, where we (seem to) find general definitions of natural law in Classical Roman juristic sources this should be attributed either to the pedagogic nature of the text or to the editorial practices of the sixth-century compilers of Justinian’s *Digest*.

According to Yan Thomas (1991, 227) the ‘few’ generalized reflections on nature that we find in Roman jurisprudence are solely a function of the jurists’ casuistic reasoning: “Ces quelques réflexions ont été conduites à partir des seules opérations de la casuistique: Ce sont évidemment des opérations de la pensée. On y découvre, me semble-t-il, qu’il n’est d’autre nature, pour les juristes, que créé par eux. La cohérence du discours institutionnel vaut à la nature son statut – fort original – d’institution.” ‘Nature’ was created by jurists, for jurists and it is the ‘coherence’ of the jurists’ ‘institutional discourse’ that gives the jurisprudential concept its reality. Whether Thomas is right to dismiss philosophy as a source for jurisprudential thought remains an open question. What is more important, as I have argued above, is the recognition that Classical Roman jurists were not interested in defining concepts of nature, natural law, or natural reason, for their own sake. Nature, natural law, and natural reason were concepts to be calculated with – as such they played an important role in the search for Roman legal solutions to Roman legal problems.

## 4 Conclusion

The Roman jurists’ method of calculating with natural law – and related concepts – is sharply different from medieval and modern uses of natural law. The difference does not lie, necessarily, within a casuistic approach. Casuistic argument was a feature of both medieval scholasticism and early modern humanism. Thomas Aquinas (1224/5 – 1274 AD), Hugo Grotius (1583 – 1645) and John Fin-

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<sup>14</sup> See further Carcaterra 1966; Martini 1966.

nis (born 1940) all used casuistic reasoning, to varying degrees and extents, but their aim was to investigate how an abstract law of nature could be applied to concrete cases. Between the sixteenth and eighteenth centuries natural law arguments were made and developed in English, European and American courtrooms (Helmholz 2015). According to Helmholz, the nature, if not the detail, of these arguments exhibit a “remarkable consistency”: “The law of nature was an abstract law. It stated some general principles, but most of them required refinement and specificity before they could be put into practice” (Helmholz 2015, 35). As I have argued above, the Roman hypothetical case method was strikingly different.

Classical Roman jurists did not begin with an abstract law of nature which was to be applied (or not) in practice. Instead, nature, natural law, and natural reason were working concepts, applied in the search for Roman legal solutions to Roman legal problems. This ‘peculiar’ kind of Roman juristic casuistry may, in fact, have left more than a trace in modern natural law discourse. As Knud Haakonssen (personal communication) has suggested, some early modern lawyers, in particular Samuel Pufendorf, understood the distinctiveness of Roman jurisprudential discourse and used it as a resource to challenge both Catholic and Protestant natural law theorists. Similarly, Ian Hunter (2010) has also identified “[...] a casuistical discourse where inconsistent principles are deployed strategically” in Emer de Vattel’s *Le droit des gens*, a foundational text for modern histories of international law. As Savigny rightly understood, the Roman jurists had no need for a philosophical doctrine of natural law. But the fact that natural law was one concept – amongst others – which Roman jurists calculated with, left a distinctive legacy for some modern natural law ‘theorists’ to rediscover.

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