Nomos, Nature, and Modernity in Brague’s The Law of God


Introduction

By looking at the historical paths of Greece, Israel, Christianity, and Islam, Brague’s The Law of God compares each civilization’s conceptions of law and divinity. For the Greeks, the law was divine because it was a perfect expression of a natural order; for the Jews and Muslims, the law was divine because it was revealed by God; and for the Christians, the law was similar to the Greek’s conception but required a personal relationship with God that went beyond legislation. The modern period represented a departure from the Christian conception of the divine law and later a rejection of the notion of any divinity in law. Law for the modern was the rule that a human community gave unto itself, considering only ends that it proposed to itself, and did not require external sources, whether it be the divine or the cosmos.

These two ideas of law and divinity are the two sources for divine law in Western civilization, as Leo Strauss noted: “This notion . . . the divine law, it seems to me is the common ground between the Bible and Greek philosophy. . . . The common ground between the Bible and Greek philosophy is the problem of divine law. They solve that problem in a diametrically opposed manner” (LG, 24). Whereas the Greeks resorted to reason as articulated in philosophy for their understanding of the divine law, the religious were dependent upon the sacred texts of faith. This dual source of the divine law raises the questions about preference, superiority, and the relationship between these two sources—the so-called “theologico-political problem” (or “theio-political,” as Brague prefers)—that cover not only the political but also the ethical and
economic aspects of human behavior (the “theio-practical”) (LG, 7 & 256).

Confronted with the “theio-political” problem, each pre-modern civilization provided its unique solution. But it was modern Western civilization that challenged the assumptions of the divine law. The emergence of the will as the source of law, the model of the scientific laws of nature, and the changed relationship between commandment and counsel all accounted for a revolutionary understanding about the nature of law that dispensed with the divine (LG, 262). The law of modern society lacked the divine dimension and was presented as a path of emancipation from primitive sacrality. The result was one where the state no longer was bound by anything except its own will, what Stephen Toulmin has referred to as the hidden agenda of modernity (LG, 263).

In this article, I revisit Brague’s account of the “theio-political” problem as encountered by both classical Greek and modern Western civilizations, with specific attention paid to the concept of nature. According to Brague, nature is a repository for both the divine and the law for the Greeks—a position that is contrary to Leo Strauss’s and therefore deserves closer examination. But, according to Brague, over time this conception of nature became radically transformed with its elimination of the divine from law. What accounted for this change is only loosely sketched in Brague’s book and also requires further exploration. I hope to accomplish both of these tasks and hopefully shed more light on Brague’s and our own understandings of the divine law.

**Nature, Nomos, and the Divine**

According to Brague, there are three possible relationships among the divine, political power, and the law. The divine could either 1) affect political power directly and the law indirectly, as in Greece; 2) affect the law directly and political power indirectly, as in revealed religions; or 3) affect neither, as found in the modern Western solution (LG, 15). In pre-philosophical classical Greece, the solution adopted was the first one, where the divine could be a model of behavior but was not “an efficient cause” of it (LG, 13). Although
the divine legitimized political power in the form of kingship, it did not legislate human practice. The king was the source of the law but the law itself was not divine (LG, 14–7, 20). The result was that legislative activity was not necessarily connected with the divine: it was separate and therefore could be independent of it.

This separation between law and divinity was an evolving process that began with Homer and was completed by Aristotle (LG, 20). Initially the origin of all normative behavior was divine in origin, as evident when Homer spoke of Zeus conferring the king the scepter and judgment. Although this gift permitted the king to rule, it did not dictate a type of behavior. Solon and Demosthenes also viewed the polis as resembling a divine order and the law as an invention and gift from the gods, but, like Homer, did not conceive of the divine directly legislating human practice. Finally, the dramatists, particularly Sophocles in his Theban trilogy, wrote of the divine origins of law as visibly manifested to humans and permanent in nature.

But the clear separation between law and divinity emerged only after the dual process of the de-sacralization of knowledge into philosophy and of kingship into democracy (LG, 19). Human law (nomos) was freed of its divine origins and normative direction. However, nomos was still rooted in human mores and norms, and it was accompanied by the notion of justice (dike), a gift of divine origins from Zeus to humans, but which, like kingship, did not legislate human conduct (LG, 20). Democratic governance became possible with these two concepts of nomos and dike, for neither the content of the law nor the qualities of justice were dictated by the divine. Both nomos and dike permitted democratic citizens to govern themselves with “all the rules approved and enacted by the majority in an assembly whereby they declare what ought and what not ought to be done” (LG, 20).

Philosophers introduced the concept of nature (physis) and situated nomos in relation to it: the law was either in opposition to nature, and therefore pure convention, or in accord with it, and therefore expressed the natural law. For philosophers, this notion that divinity operated within this relationship made divinity no longer
associated with the anthropomorphic gods but with an abstract understanding of nature. For example, Heraclitus spoke of the “need to distinguish between the gods and the source from which they hold their divinity, or, to put it differently, between the divine and what of the divine is crystallized in one concrete figure or another, such as the Olympian gods” (LG, 23). Separated from its gods, the idea of divinity became associated with nature; and nature, in turn, became associated with law (LG, 23–4).

Humans could discern the law from what was most divine within them, i.e., their intellect (*nous*). As Plato wrote, “Of all studies, that of legal regulations provided they be rightly framed, will prove the most efficacious in making the learner a better man; for were it not so, it would be in vain that our divine and admirable law (*nomos*) bears a name akin to intellect (*nous*)” (LG, 24). Aristotle also concurred: “He therefore that recommends the law (*nomos*) shall govern seems to recommend that God and intellect (*nous*) alone shall govern, but he that would have man govern adds a wild animal also” (LG, 24). Through their *nous*, humans were able to uncover the origins of *nomos*.

Thus, the notion of divinity in Greece was its association not only with anthropomorphic gods but also with nature (*physis*) and human intellect (*nous*). As the human law became conceptually separated from divinity, starting from Homer and ending in Aristotle, divinity also shifted from the gods to human intellect and to nature itself. But freed from its anthropomorphic origins, the law still remained rooted in a notion of the divine, with divinity re-conceptualized as nature. The Greek divine law consequently became the expression of a permanent structure of the natural order that was to be discovered by the human intellect (LG, 29).

**Reason, Revelation, and Nature**

Brague’s confluence of nature and divinity as the basis of *nomos* and *nous* runs contrary to a position held by Leo Strauss and therefore requires closer attention. Like Brague, Strauss argued that the Greeks used intellect (or what he preferred to call “reason”) to understand the world; but, unlike Brague, this cognitive faculty was not
rooted in the divine. Strauss believed that reason was autonomous and completely independent of the divine, as opposed to someone like Aquinas, who wrote that “the very light of natural reason is a participation of the divine light” and “natural law is the participation of the eternal law in the rational creation.” Brague’s interpretation of the Greek philosophy follows in this tradition, whereas Strauss held a clearer separation between reason and revelation where wisdom could only come through “the unassisted human mind.”

According to Strauss, natural reason—“the human mind which is not illumined by divine revelation”—proceeded from sensation, logical reasoning, and an awareness (noesis) that “is never divorced from sense perception and reasoning based on sense perception.” The objects of natural reason presumably were non-spiritual ones, the “experiences as can be had by all men at all times in broad daylight,” and eventually would be systematized in order to create a set of sense-based, logically consistent propositions about reality. This characterization of Greek philosophy, particularly of Plato and Aristotle, not only rejected the evidence of reason’s being divinely inspired as Brague has presented, but it made Greek philosophy a forerunner of positivism. In Strauss’s hands, Greek philosophy resembled Spinoza’s project “of modern science according to its original conception—to make the universe a completely clear and distinct, a completely mathematizable unit.”

Strauss’s theory of natural right was rooted in a conception of nature that was objective (accessible by a reason based on sense-perception) and independent of the divine. Such a theory dispensed with divinity for only natural things where its principles revealed which natural things were consistent with the whole of reality, thereby raising them to the level of ethics or “rights,” and which natural things were inconsistent with the whole of reality and therefore should be discarded. But in order to proceed on this quest, one must have faith to philosophize that the whole of reality was intelligible and rational and that it can reveal to us a right way of life. Like Kant, whose philosophical project ultimately relied upon a type of faith, Strauss likewise must start his inquiry with a belief that the whole of reality can be known by human reason.
Although Brague would agree with Strauss that the Greeks believed nature was intelligible and rationally structured, he would disagree with Strauss that nature was independent of the divine. For Brague, both nature (physis) and reason (nous) are consubstantial with the divine. Now that we know both thinkers’ positions, the question that confronts us is how to resolve this impasse? I propose to look at Aristotle’s account of nature, particularly his “right by nature” (physei dikaion), to see whether divinity is associated with nature and thereby reveals to us which thinker has a more accurate understanding of Greek philosophy.

The selection of Aristotle, as opposed to Plato, makes understanding the Greek conception of nature easier since Aristotle’s known writings are all treatises instead of dialogues: we can somewhat avoid the whole deciphering exercise that Strauss’s esoteric thesis would demand.11 The focus of Aristotle’s right by nature is also important because it had become the basis for Strauss’s and other thinkers’ theories of natural right and consequently raises questions about the origins of such theories. But more importantly, Aristotle was the last of the great Greek philosophers where the separation between human law and divinity as expressed in anthropomorphic gods would be the greatest, according to Brague’s argument.12 If the concept of divinity did indeed shift from the gods to nature in the history of Greek thought, as Brague contends it did, then we should find the fullest manifestation of this shift in the last great Greek thinker, Aristotle.

Aristotelian Paradoxes
Aristotle’s right by nature (physei dikaion) was where “everywhere [it] has the same force and does not exist by people’s thinking this or that . . . and yet it is changeable—all of it (kineton mentoi pan).13 Thus, Aristotle’s physei dikaion appeared self-contradictory, where it was valid everywhere and always, but it was also everywhere changeable. One possible solution was that Aristotle wrote esoterically, although it is not clear what would be the hidden truth.14 A more likely answer was that Aristotle meant what he wrote and left it to us to figure out what he meant by physei dikaion as being both universal and contingent.
On the one hand, Aristotle argued that *physei dikaion* was universal: it had the same force everywhere in the forbidding of such acts like murder and theft. On the other hand, *physei dikaion* was changeable in the sense that universal principles can have diverse actualizations according to time, object, aim, and method. The criteria of time, object, aim, and method allowed us to make the distinction between killing and murder. If certain acts fell short of or exceeded this criterion (the mean), then they were considered bad, for as Aristotle wrote, “There is neither a mean of excess and deficiency, nor excess and deficiency of a mean.”

Murder consequently did not break some abstract rule, but it missed the mean for concrete action. Although the criteria of time, object, aim, and method may appear vague, e.g., “Do not kill at the wrong time, involving the wrong object, with the wrong purpose and method,” for Aristotle it was appropriate to a reality that did not yield a permanent, detailed standard. Moral and ethical acts were not governed “by any art or set of precepts” but rather “according to right reason,” because what was right was “not one, nor the same for all.” Each situation must be evaluated on a case-by-case basis with the underlying universal substance of ethics—the one way of being good—driving all of the means.

This paradox of *physei dikaion* was personified in the mature person (*spoudaios*) who saw “the truth in each class of things, being as it were the norm and measure of them,” and who possessed the virtue of practical wisdom (*phronesis*) that included other virtues, for “with the presence of the one quality, practical wisdom, will be given all the excellences.” Like *physei dikaion*, Aristotle defined *phronesis* paradoxically: its possessor had the “ability to deliberate well about what sorts of things conduce to the good life in general” but could produce “no demonstration” of its first principles, even though its particular actions were true in practice. *Phronesis* could not become a science (*episteme*) because it was bogged down in the particulars of the world, yet, at the same time, it required deliberation of what was generally good.

This paradox of *phronesis* can be somewhat clarified by looking at Aristotle’s concept of *nous* (intellect) as both divine and hu-
man. *Nous* was “something divine” and superior to “our composite nature,” but it also “more than anything else is man.” By following *nous*, humans could make themselves immortal and “strain every nerve to live in accordance with the best thing in us.” Thus, Aristotle discovered that human beings possessed something within themselves that was different from them and yet paradoxically was the best thing of them—something superior to humans, which they were able to locate through a cognitive faculty that Aristotle termed *nous*. By making this cognitive faculty both human and divine, Aristotle had shifted divinity from the anthropomorphic gods to the intellectual faculty of the human soul.

It is clear that Aristotle believed in a divinity that was superior to but connected with humans. He wrote that there were “things much more divine in nature even than man,” which included not only the heavenly bodies but also the creator god as a physical force. In the *Metaphysics* Aristotle also stated that “first philosophy” studies ontology, eternal causes, and the “first mover” god who was “in a better state” than humans. However, this “first mover” was not a creator god. Aristotle conceived of it as a final cause and not as one who set things in motions. The prime mover therefore was not the cause of the world, but the preservation of it by its rational and love-inspiring attraction. Thus, for Aristotle, the notion of divinity had shifted from the anthropomorphic gods to both the human intellect and the prime mover, the two of which were different yet attracted to each other.

Nature therefore was all of reality’s present form moving towards the prime mover. Defining nature as a member of “the class of causes that acts for the sake of something,” Aristotle declared that the “form” of any reality and the “mover” of any nature often coincide. If nature could become identical with divinity, then it would be both natural and divine. Like *nous*, nature was both divine and non-divine in its composition, with the latter being drawn towards the former. This claim rested upon the human reflection of their *nous*: “The object of our search is this—what is the commencement of movement in the soul? The answer is evident: as in the universe, so in the soul, it is God. For in a sense the divine
element in us moves everything.” As a result of this conceptualization of nature, Aristotle’s *physei dikaion* was the attraction that humans have both physically and ethically to the prime mover.

The apparent contradiction in Aristotle’s *physei dikaion*—it was universal in force but changeable in action—was resolved by his understanding of nature’s being everything and everywhere and having a dual final cause at the same time. All of reality sought unity with the prime mover and for what it was supposed to be. For humans, the path to unity with the prime mover was through *nous*: humans were to follow a single ethical direction with various adjustments made to remain on this path. Virtue was not the obedience to abstract rules but following practical wisdom (*phronesis*) as led by the prime mover’s pull. *Phronesis* consequently was the motion between the primer mover and humans that occurred within the *nous* of the mature person (*spoudaios*).

**Strauss, Brague, and Greek Philosophy**

Given the variability of *phronesis*, Aristotle denied it the status of science (*episteme*) while categorizing it as a deliberate intellectual virtue. The universal-variable principle of *phronesis*, the many practical paths towards the prime mover in ethical action, precluded logical and consistent proofs. But the universality of the objective was unchanged, which allowed the *spoudaios* to make decisions rooted neither in relativism nor deontology but something in between as a *physei dikaion*. However, if *physei dikaion* cannot be studied at the level of *episteme*, how can it be demonstrated, especially with regards to Strauss’s and Brague’s differing understandings of nature’s relation to divinity? Is a theory of natural rights only accessible by an autonomous reason that uncovers a nature devoid of divinity? Or does a theory of natural right rest upon an account where both nature and reason are consubstantial with divinity?

The impossibility of studying *physei dikaion* at the level of *episteme* certainly restricts the types of demonstration of its existence where the objects of natural reason can be known as the “experiences as can be had by all men at all times in broad daylight.” Such an account of *physei dikaion* cannot be verified by the positivism...
that Strauss seemed to advocate or that modern science demands. Deductive and logical reasoning are also avenues that are blocked, since \textit{physei dikaion} has no axioms from which one can reason to conclusions or first principles. By relying upon habituation in virtue and the experience of a mature person to make correct judgments, \textit{physei dikaion} is beyond the grasp of those who are neither virtuous nor mature. In short, the traditional demonstrations are not available for the proof of \textit{physei dikaion}.

The demonstration of \textit{physei dikaion} is the same as the demonstration of \textit{nous} as something both human and divine. To repeat from above, Aristotle wrote about his claim of \textit{nous}, “The object of our search is this—what is the commencement of movement in the soul? The answer is evident: as in the universe, so in the soul, it is God. For in a sense the divine element in us moves everything.”\textsuperscript{25} Aristotle appealed to a philosophical introspection of human experience for the demonstration of \textit{nous} and, one could infer from his other statements, for \textit{physei dikaion}, too. The acknowledgement that an action is ethical—that it is right by nature—can be verified by others not through empirical, mathematical, or modern scientific reasoning but through the introspection of one’s own experiences as a mature, serious, and virtuous person.

Some may find this proof unsatisfactory because it lacks the objective character that positivism claims for itself. Be that as it may, it should be evident after investigating Aristotle’s concepts of nature (\textit{physis}), right by nature (\textit{physei dikaion}), human intellect (\textit{nous}), and practical wisdom (\textit{phronesis}) that Aristotle had rejected an epistemological framework of sense-based, logically consistent propositions that Strauss advocated. The end result is that Aristotle’s \textit{physei dikaion} is not the theory of natural rights that Strauss attributed to Greek philosophy. Aristotle’s appeal to the philosophical introspection of one’s own experiences as a mature person (\textit{spoudios}) to verify whether one’s actions were \textit{physei dikaion} is as different as can be when compared to Strauss’s account of Greek philosophy. Simply put, when compared to Brague, it appears that Strauss had misread Aristotle, and perhaps more broadly, misinterpreted Greek philosophy.
However, Brague’s account of Greek philosophy as one where the concept of divinity became separated from anthropomorphic gods to reside in \textit{physis} is only partially correct. What Brague fails to account for is Aristotle’s prime mover as the other repository of divinity. 26 That is, \textit{physis} was the expression of divinity as an intelligible, rational structure, but this expression was incomplete because it longed for unity with a prime mover. \textit{Physis} therefore had a dual \textit{telos}: it sought to realize its own essence as well as unity with the prime mover. The neglect of the prime mover—and Aristotle more generally—in Brague’s work does not weaken his overarching argument, but, it does not strengthen it either.

\textbf{The Emptying of Nature}

Strangely, Strauss appears to be more of a modern than a classicist in his understanding of nature as a forerunner to positivism. According to Brague, the concept of nature underwent a transformation that not only banished divinity from itself but also expelled divinity from the concept of law. The modern period is characterized as a period where humans became fully autonomous in their ethical, economic, and political actions. The law no longer required divinity: it was legislated by and for human beings.

Mathematics, and to a lesser extent, the natural sciences, became the model of causality and later of nature itself. For Brague, Descartes was the first thinker who sought to understand nature as a mathematical entity: nature was conceived of as laws instead of rights (LG, 234). The law of nature was one of motion without \textit{telos}: there was no prime mover, with which nature sought unity (LG, 234). 27 With the rise of “scientific law,” mathematical physics, both the concepts of nature and law moved away from an Aristotelian ontology to a scientific causality. By the time of the sixteenth century, law was understood as natural in the sense it was a type of motion that was neither violent nor accidental; as Hooker wrote, “That which doth assigne unto each thing the kinde, that which doth moderate the force and power, that which doth appoint the forme and measure of working, the same we tearmed a \textit{Lawe}” (LG, 235).
Coinciding with the change in the concept of nature was the change in the concept of divinity. Descartes still required a God for his law of nature to work, but it was a God characterized by its omnipotence rather than by its teleology: “The lawgiver of nature is freed from His own laws” (LG, 235). Descartes asserted that “it is God who has established the laws of nature [as eternal mathematical truths], as a King establishes laws in his Kingdom,” with such a law of nature “inborn in our minds, as a king would establish law in the hearts of his subjects, if he had power enough to do so” (LG, 235). The law of God therefore was the law of nature, making the normative and the descriptive one and the same, but removing nature’s teleological drive towards the divine.

By the time of Hobbes, the law of nature still was the law of God, but it had become plural. This shift from the singular to the plural removed the notion of a universal order and was replaced by a universal science of constant and observable relations. This new science no longer searched for causes, or, as Auguste Comte wrote, “the inaccessible determination of causes—that is, for the constant relations that exist between observable phenomena” (LG, 235). God was re-conceived as the clock-maker deity and eventually became superfluous to any claim to observe the regularities that exist in nature. The notion of the “laws” of nature was replaced in the nineteenth century by mathematical equations or vaguely-formed principles. Nature thus was no longer understood as the general laws of God, whether singular or plural, but as a phenomenon of uniform motion that was regular, observable, and ultimately purposeless.

Law in the strict sense was no longer conceived of as natural and, therefore was entirely human, as Spinoza claimed: a law is “a prescribed rule of conduct (ratio vivendi) that man prescribes for himself or that he prescribes for others with some aim in mind” (LG, 238). Montesquieu continued in Spinoza’s footsteps with his Esprit des lois, where he remarked, “Laws, taken in the broadest meaning, are the necessary relations deriving from the nature of things. . . . Law in the general is human reason insofar as it governs all people of earth” (LG, 238–9). Law was entirely a human
invention. If there were any association of divinity attached to the law, it was the result of clever people; as Montesquieu wrote, “Any law, without which [society] could not exist, becomes by that token a divine law” (LG, 240). Earlier, Machiavelli had made a similar observation about how civil authority required divine authority regardless of its truth. The divine was the recourse of clever people who wanted to establish laws that went beyond what was commonly accepted. Although the law was not divine, it still needed divinity not because it was true but rather because it provided the foundational legitimacy for the state (LG, 240).

According to Brague, Austin was the last example of one who resorted to a notion of divinity to support his theory of legislation. In *The Province of Jurisprudence Determined*, Austin asserted that “the divine law is the measure or test of positive law and morality,” with God defined as “the intelligent and rational Nature which is the soul and guide of the universe” (LG, 240). However, humans recognized the divine law not as something revealed, but rather as derived from the principle of general utility, for positive law was “fashioned on the law of God as conjectured by the light of utility” (LG, 240–1). What was commonly demanded was what God had demanded. By invoking God as the standard of positive law and equating Him with the principle of general utility, Austin did not have appeal to the “ambiguous and misleading” law of nature (LG, 240–1).

Austin’s notion of divinity was so vague that the contents of it could be arranged by humans to suit themselves, while at the same time he discarded the notion of nature as a standard and thereby also the requirement that humans subject themselves to it. Previously, the concept of nature had been stripped of any idea of divinity; now it had been emptied of any notion of mathematical and logical causality to which humans would have to submit themselves. All that remained was an entity to be prodded and exploited by humans for the principle of general utility. The scientific method and the instrumentalization of the divine had emptied nature of any meaningful content for either law or human beings.
The Emptying of Divinity
If nature had become emptied of any meaningful content, then the divine would become transformed from Aristotle’s prime mover to Kant’s legislator. The elimination of divinity’s magnetic attraction for nature as informed by *nous* would result in a deontological ethics of self-imposed duties. According to Brague, this transformation started with the Protestant Reformation, with Luther’s return to St. Paul’s polemic concerning faith alone against the law. Although Luther redirected the polemic against the Roman Catholic Church with an understanding of grace as the unmerited favor of God, he also emphasized the law as being an essential aspect of Christianity, such as in his teaching of the two kingdoms (LG, 242). Christianity came to be perceived in juridical categories, with Jesus known as the Lawgiver, to both the defenders and critics of Christianity.

The tendency to place law at the center of religion found its culmination in the works of Kant, who re-conceptualized ethics as commandments. The moral law that commanded someone, with no hope to appeal, has no need of a source, even if that source were God Himself (LG, 243). Morality consequently did not rest on a religious foundation—in fact, religion rested on the foundation of morality. Kant wrote of “the recognition of all duties as divine commands, not as sanctions, i.e., arbitrary and contingent ordinances of a foreign will, but as essential laws of any free will as such.” However, “even as such, they must be regarded as commands of the Supreme Being, because we can hope for the highest good (to strive for which is made our duty by the moral law) only from a morally perfect (holy and beneficent) and omnipotent will; and, therefore, we can hope to attain it only through harmony with this will” (LG, 243). Like Strauss, Kant required a type of “faith” in an omnipotent God and in the immortality of the soul in order for his philosophy to operate.

Kant’s conception of God was the author of divine commandments. Human obligation towards one’s fellow being started from these commandments, which Kant called “statutory commandments.” But the actual legislators of moral commandments were human beings themselves; God was the author of divine legislation, but moral legislation was self-created and self-directed by human
conscience. The moral commandments required the statutory commandments to clarify certain matters, such as the worship of God, but ultimately they were from the human and not from the divine. Religion was nothing “but laws” for Kant—a simple appendix to morality (LG, 244). The divine had been reduced to law, and the functional source of that law resided in human conscience.

After the French Revolution, the connection between divinity and law resurfaced, but in a historical context. The historical study of law arose in reaction to the fabricated juridical rules born of the French Revolution that Burke had criticized. This school of thought emphasized the organic development of law as a historical process. Brague concentrates on three thinkers to represent this turn in Western thought: Henry Sumner Maine in England, Johann Jakob Bachofen in German Switzerland, and Numa Denis Fustel de Coulanges in France. Believing in the notions of progress and evolution, these three thinkers pushed divinity back to its primitive origins and reduced it to a phenomenon from which humans had escaped in order to pursue a purely rational and systematic law for modern Western civilization.

Maine modeled his historical method after the natural sciences and concluded that the idea of the natural originated in the need to find principles to integrate foreigners, who had no legal status, into ancient Rome (LG, 245–6). The Roman ius gentium was combined with the Greek notion of physis to solve this problem, with the family as the starting unit for law. Although religion never appeared as a theme, it did surface as something associated with law throughout his works, particularly with canon law. Maine recognized that the divinity prescribed certain laws; however, divinity in his overall account was something from which humans and the law should escape. The history of law was one of the individual liberating himself over time from various group units to his autonomous, independent self.

Bachofen conceived of history progressively but different in content when compared to Maine: history was the march from a maternal and material principle to the paternal and immaterial ones (LG, 246–7). Initially there was one great law that governed all of humankind, and this one great law was associated with the religion
of Mother Earth and Her notion of equality. This law of equality was older than the positive law of the state but now has been supplanted by the paternal and immaterial law of humankind’s historical progress. Like Maine, Bachofen recognized the divine origins of the law and also dismissed it as a relic of a primitive and no longer needed civilization.

Coulanges also concurred with Maine and Bachofen that the law was initially religious, with the familial existing before the civic (LG, 246–7). No human invented the law; the law was presented to humankind without being sought. A direct and necessary consequence of religious belief, the law applied itself to the relations among all people. The ancient law was never explained, written, or taught; it was learned in the religious rituals of a people. Contrary to Rousseau’s contention, the law was not the work of a legislator but was imposed on the legislator. However, Coulanges, like the others, argued for the inherent limitations in the ancient law and rejected it for a more progressive—rational and systematic—account of law for the civilization of his day.

Conclusion

The emptying of the conception of divinity reduced God to human conscience and later to primitive civilization, while the emptying of the conception of nature reduced its teleology to Austin’s entity of ambiguity and purposelessness. The emptying of these concepts yielded a positivist (or what Brague calls “sociological”) study of both legal and religious phenomena (LG, 248). Setting aside all claims of the validity of the object he studies, the positivist reduces notions of divinity, nature, and law to mere opinions. The irony is that the positivist can follow the development and path of these opinions, but he himself is unable to leave any mark on history because he has nothing to say about the truth of what he is studying.

Strauss seems to be following the positivist’s path, although he would reject the claim that he only wrote about opinions. Rather, it would appear that Strauss believed the positivist program would yield objective truth-claims, such as a theory of natural rights, which would have no essential need for divinity. Strauss’s criticism
of Weber, the great sociological positivist, was that he “never proved that the unassisted human mind is incapable of arriving at objective norms.”³⁰ For Strauss, natural right could be discovered by the unassisted human mind, i.e., without divinity, if only one were able to pursue this aim for his entire life. This claim is a genuine possibility, and, as Brague has traced in his book, represents where we are today. Whether this project is possible is something on which Brague refuses to comment.

Where Brague and Strauss disagree is in their interpretation of Greek philosophy. For Brague, nature was a repository of divinity for the Greeks, a position that is contrary to Strauss’s. An examination of Aristotle’s *physei dikaion* and its related concepts of *physis*, *nous*, *phronesis*, and *spoudaios* suggest that Brague’s interpretation is more accurate than Strauss’s. However, Brague’s account of *physis* is also deficient because he fails to note its dual teleological structure: it seeks to realize its own essence as well as its unity with the prime mover. Brague’s neglect of the prime mover as related to the Greek concept of *physis*, and his neglect of Aristotle more generally, has been remedied by my analysis of Aristotle’s account of nature and its relationship to the modern notion.

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1 The disappearance of the theio-political problem has caused some to view it as an accomplishment of modern Western civilization that needs to be protected by the continual elimination of religion from public life. The question confronting us today is whether humans can continue to exist without a reference to the divine: “Are we liberated or on the path to suicide?”


8 For example, Aristotle wrote in Nicomachean Ethics (1103a, 1177b, 1178a) that the highest element of the soul was a site of both human reason and the divine. However, Strauss argued in Persecution and the Art of Writing (Glencoe, IL: Free Press, 1952) that classical philosophers employed esoteric devices in their writings to protect themselves from political pressures, especially when discussing truths that may have been unpopular, such as the non-existence of divinity. Since a great deal of literature already has been devoted to this subject, this article will not delve into the validity of Strauss’s esoteric thesis, which is made all the more difficult to ascertain since Strauss himself did not make clear whether he was writing esoterically.
10 Ibid., 118.
11 Cf. n. 8.
12 Strangely, Brague pays more attention to Plato than Aristotle in his section. My focus on Aristotle should remedy this neglect.
13 Aristotle, Nicomachean Ethics, 1134b18–20, 30.
14 It would seem unlikely that Strauss would make Aristotle a nihilist, given his remark that the philosopher needs to have a type of faith in his quest to know the whole of reality.
16 Ibid., 1103b31–1104a9, 1106a32.
17 Ibid., 1113a30–35; 1144b30–1145a1.
18 Ibid., 1140a24–1140b30; 1142a11–30; 1146b35–1146a7.
19 Ibid., 1177b27–1178a8.
20 Ibid., 1141b1–2; also see Aristotle, Metaphysics, 98b–984a.
21 Aristotle, Metaphysics, 1003a–1005a, 1026a, 1072b.
22 Ibid., 1072a20–1072b4; 984b15–20.
23 Aristotle, Physics, 198a20–198h10.
26 Cf. n. 12.
27 Brague recognizes this change in the conception of nature in terms
of its teleology, thereby making his neglect of Aristotle’s “right by nature” all the more perplexing.

28 As Brague later notes, this explains why both Rousseau and the French Revolution sought a return to the sacrality of the laws when establishing a new regime.

29 For example, Brague cites Zwingli as one who returned to Old Testament Law in his Protestant Christianity. Strangely, Brague neglects Calvin, who would be the best example and evidence of this argument.

30 Strauss, *Natural Right and History*, 70.