

THE STOIC ETHOS OF LAW & EQUITY:
GOOD FAITH, LEGAL BENEFACTION AND JUDICIAL
TEMPERAMENT

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SECTION ONE: INTRODUCTION

I. THE PHILOSOPHICAL PREAMBLE OF STOICISM

The ethos of this work is principally informed by the tenets of Stoic tradition, an ancient philosophical school of thought. Consequently, the philosophical foundation that underlies this discussion should be examined first. To that end, it is sufficient to say that “philosophy” means the “love of wisdom.” Beyond this, it is also necessary to provide a brief explanation of what Stoicism is, where it comes from, and why it is relevant to the practice of law.

Socrates, the Prometheus of Western philosophical tradition, lit the spark of the discipline with the immortal words, “I know that I know nothing.”¹ These deceptively simple words shifted the paradigm of philosophy towards intellectual humility. This proclamation laid the stones of an enduring discipline, Socrates’ sacrifice² provided the mortar, and together they built a philosophical foundation that has stood the test of time. Since Socrates, each new philosopher has added their own stone to the structure,³ and in this regard, Stoicism was quick to follow.⁴

¹ The Oracle of Delphi is said to have told Socrates that he was ‘the wisest of all the Greeks, because he alone, among all Greeks, knew that he knew nothing.’ PLATO, COMPLETE WORKS, APOLOGY 21 (John M. Cooper ed., G.M.A. Grube trans., 1997).

² Socrates was sentenced to death for corrupting the youth of Athens. Socrates is said to have been a *gadfly* biting the donkey or *ass* that was representative of Athens. This charmingly symbolized the then-existing Athenian propensity for comforts absent concerns and Socrates’ tendency to disquiet that comfort with concerns. *See generally Id.* at 19.

³ According to Socrates, Well-being is a virtuous state of mind that is “attained by little and little, and nevertheless is no little thing itself.” 2 DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS 139 (R.D. Hicks trans., 1925) (Diogenes attributed this to both Zeno of Citium and Socrates).

⁴ Stoicism was founded by Zeno of Citium, originally a follower of the Cynic school of philosophy.

The first step towards understanding Stoicism in the context of law is to first overcome a common and false impression of Stoic tradition, which is fittingly a tradition concerned with overcoming *false impressions* itself. Colloquially, the term Stoic or Stoicism denotes an “emotional desert” and a character indifferent or devoid of compassion for others.⁵ Nevertheless, few things are less emblematic of the Stoic tradition, whose initial impression reflects the proverb *still waters run deep*, that is, its first impression obscures a profound reservoir of meaning.⁶

Guiding the Stoic discipline is a belief in the “universal brotherhood of mankind,” that the Stoic must bind himself to those principles which “promote the interests of a fellow-man, whoever he may be, just because he is a fellow-man.”⁷ The Stoics believed this was a principle founded in natural law, “Nature’s law,” that the law must preserve the “bonds of fellowship” by promoting “common purpose” between and amongst citizens, and that it should embody the belief that the “chief end of all men” is “to make the interest of each individual and of the whole body politic identical.”⁸ The ethos and ethics of Stoicism urge the formation of a character of emotional endurance, public advocacy, altruism, and self-discipline through the imposition of moral duties developed through habitual exercise. This disposition has the potential to enhance the public’s confidence in the legal tradition if more widely adopted by its practitioners.

Stoicism is an unsung hero of our heritage as well. Consider John Adams, who believed “indurated Stoick as I am,” and his letters expressing frequent appreciation for the tenets of Stoic philosophy.⁹ In particular, one letter to his son provides special

⁵ MALCOLM SCHOFIELD, *THE CAMBRIDGE COMPANION TO THE STOICS*, STOIC ETHICS 255 (Brad Inwood ed., 2003).

⁶ Discussing the Stoic plea for public service and devotion towards community, friends and human fellowship in general. *See generally* infra note 183.

⁷ CICERO, *ON DUTIES* 293-95 (Walter Miller trans., Jefferey Henderson ed., 1913).

⁸ “For, if the individual appropriates to selfish ends what should be devoted to the common good, all human fellowship will be destroyed.” *Id.*

⁹ Letter from John Adams to Benjamin Rush (28 August 1811), <https://founders.archives.gov/documents/Adams/99-02-02-5659>. *See also* Letter from John Adams to J. Quincy Adams (19 May 1783), <https://founders.archives.gov/documents/Adams/04-11-02-0009>, recommending to his son that he should acquire the habit of carrying a “Book of Amusement” where he goes, which he recommends be a “Book of Morals, as the most constant Companions, of your Hours of Relaxation, through the whole Course of your Life” and he suggests “Cicero [and] Seneca.”

meaning to those entering the legal tradition. John Adams requests his son, then, an ambassador in Europe, to return home with the following advice in mind, “you must return with the Spirit of a Stoick- a determined Spirit to bear any neglect, any Affront from your Countrymen without resentment. To go obstinately to the Bar, in all our Courts and attend patiently in your office.”¹⁰

The Stoic tradition reaffirms the principles of character and law that inspired our founders,¹¹ exploring them has the potential to reinvigorate our legal tradition by reminding it of its origins and the powerful moral heritage that still defines it. Stoicism’s position on legal principles provides helpful interpretive guidance and supports fostering unity and civil comradery in opposition to the ever-present threat of unrest and disenchantment.¹² Studying the origin of our legal doctrines, which Stoicism informed, will impress upon us both the character and expectations of our shared jurisprudential identity. Knowing where our laws come from, the purpose they once served, will help us understand what they mean today. Those principles and doctrines, such as good faith, judicial temperament, and legal benefaction, have endured the ages for a reason; their immortality reflects their practicability and moral value. Therefore, it is imperative that students of moral and legal traditions alike be beholden to recall the principles that helped to carve our own legal doctrines, so that they may once again provide

¹⁰ Letter from John Adams to John Quincy Adams (25 August 1795). See Letter from John Adams to Benjamin Rush (11 November 1806), giving advice on the perfectibility of man he states that it is “no more than the Perfectibility of the Stoick Philosophy.” See also John Adams to John Jay (10 August 1782), n.2 (citing Seneca, John Adams gives the following advice to the soon-to-be first Chief Justice John Jay’s “anxieties,” recommending “[t]he unbroken calm of the happy soul.”

¹¹ Cicero, *supra* note 8; see also Declaration of Independence (U.S. 1776) (“[T]o assume among the powers of the earth, the separate and equal station to which the *Laws of Nature* and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation”) (emphasis added).

¹² Letter from John Adams to Samuel B. Malcolm, (Aug. 6, 1812), responding to give advice on resisting popular and partisan inclinations in public life, there are “two Tyrants of [human] life,” “Fashion and *Party*,” and that the virtues of “Truth, Reason[,] Honour[,] Justice[,] Gratitude and Humanity itself” are “no Match for the [Tyrants’] Coalition.” However, he continues, “Nothing Short of the Philosophy of Zeno, Socrates, Seneca and Epictetus, could ever Support an Antient” and so now, “Nothing less than the Spirit of Martyrdom is sufficient: for Martyrdom will infallibly ensure” if we wish to resist the controlling forces of “Fashion and *Party*.”

their service and inspire solutions to the contemporary needs of our evolving corpus juris.

SECTION TWO: DISCUSSION

II. THE OPTICS OF STOICISM: DISCOURSES ON MORAL AND LEGAL PRINCIPLES

A. THE STOIC POSITION ON THE NATURE OF LAW: GOOD FAITH, MUTUAL OBLIGATION AND LEGAL BENEFACTION

Moral law begets communal law.¹³ Our corpus juris is a tapestry of moral beliefs, a codification of varying customs, principles and norms that has been woven together into an enduring system of jurisprudence. Consequently, philosophical inquiry into the origins, purpose and nature of our legal doctrines cannot be avoided if one is to understand our body of law.¹⁴ It was the case for both Cicero¹⁵ and ourselves that “our forefathers chose to understand one thing by the universal law and another by the civil law.”¹⁶ The Stoic legal ethos is built on this dualism and the idea that moral law is the fount from which the laws of a community must spring.

Distilling practicable law from the moral ethos of a community requires careful calibration. If the spirit of the law is to survive its statutory transplant, retaining the morals and collective purpose that first gave it life, then the legislature’s scalpel must be careful and sound principles must guide its hand. First among such principles is that the essential nature of *justice* is that it be accessible to everyone. As the Stoics say, “laws were invented, to

¹³ Cicero, *supra* note 7, at 339.

¹⁴ Oliver Wendell Holmes, Jr., *THE COMMON LAW, EARLY FORMS OF LIABILITY*, *The Legal Classics Library* 37 (1982) (stating “[W]e must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is”).

¹⁵ Marcus Tullius Cicero was a Roman senator, statesman and stoic philosopher, whose writings on the philosophy of law would go on to inform much of the Anglo-American legal tradition. *Id.*

¹⁶ *Id.* See also *THE DIGEST OF JUSTINIAN, ON JUSTICE AND LAW* 5, Cambridge University Press (Charles Monro, trans., 1904), where the same distinction is made in discussing the meaning of the word *justice*. They say, “[t]he word jus is used in a number of different senses: in the first place, in that in which the name is applied to that which is under all circumstances fair and right, as in the case of natural law; secondly, where the word signifies that which is available for the benefit of all or most persons in any particular state, as in the case of the expression [of] civil law.”

speak to all men at all times in one and the same voice.”¹⁷ While it is likely that some spirit will be lost during the legislative process, and by the interpretative postures or procedures that follow in court, this loss will be limited, provided the laws are built to provide accessibility and justice for all.

The Stoic sense of justice stems from their belief that “Nature ordains that one man shall desire to promote the interest of a fellow-man, whoever he may be, just because he is a fellow-man.”¹⁸ Moreover, that they believed “we are all subject to one and the same law of Nature”¹⁹ and as such are each indivisible members of the “universal brotherhood of mankind.”²⁰ In the normal course of daily life, they advise that:

[W]e ought to follow Nature as our guide, to contribute to the general good by an interchange of acts of kindness, by giving and receiving, and thus by our skill, our industry, and our talents [we] cement human society more closely together, man to man.²¹

It is by reference and reliance on natural law that Stoicism’s rests its belief that we all possess “interests that all men have in common” and that “men, too are born for the sake of men, that they may be able mutually to help one another.”²² It is by this principle of natural law that the Stoics believed the ends of justice and the bonds of civil society could be most assuredly secured.

¹⁷ *Id.* at 211.

¹⁸ *Id.* at 295.

¹⁹ *Id.*

²⁰ Cicero, *supra* note 7, at 295.

²¹ *Id.* at 25.

²² *Id.* at 23. See also Walton, *Historical Introduction to the Roman Law*, 257-58 (1920) (discussing the equitable impact Stoicism’s principle of natural law had on Roman jurisprudence, “[t]his idea of natural law drawn from ... the Stoa was like a new spirit breathing upon the dry bones of the jus civile”); See also Sir Henry Sumner Maine, *Ancient Law: its Connection with the Early History of Society and its Relation to Modern Ideas*, 49, Hazell, Watson & Viney (1908) (Noting the “alliance of the lawyers with the Stoic philosophers [, which] lasted through many centuries” and that “unless we use the Stoic tenets as our key,” “several positions [(doctrines)] which we find in the remains of the Roman juriconsults are scarcely intelligible”).

With the Stoic ethos in mind, the following divisions of this section will cover (1) good faith and the sacred nature of promises and agreements within Stoicism, (2) excuses and enforceability in those agreements, and (3) Seneca's principle of punishment for bad faith.

1): THE SACRED PROMISE: *MADE IN GOOD FAITH*

The Stoics maintain the “foundation of justice ... is good faith,” which they define as “truth and fidelity to promises and agreements.”²³ Discussing this doctrine, Cicero advises, “therefore we may follow the Stoics, who diligently investigate the etymology of words; and we may accept their statement that “good faith” is so called because what is promised is “made good.”²⁴ The doctrine of good faith, that “as between honest people there ought to be honest dealing, and no deception,”²⁵ was vital to maintaining the common bonds of society. As Cicero exclaimed, “how weighty are the words: “That I be not deceived and defrauded through you and my confidence in you.”²⁶ The “expression “good faith” had a very extensive application” in both the Stoic legal ethos and the overlapping Roman law it helped shape:

[F]or it was employed in trusteeships and partnerships, in trusts and commissions, in buying and selling, in hiring and letting — in a word, in all transactions on which the social relations of daily life depend.²⁷

So much depended upon the belief that your interests were shared with your fellow-citizens, neighbors and those with whom commerce was conducted. Good faith was an adhesive doctrine that cemented

²³ Cicero, *supra* note 7, at 25.

²⁴ *Id.*

²⁵ *Id.* at 341.

²⁶ *Id.*

²⁷ *Id.* Long before the Stoics, when the Twelve Tables were carved for the Roman people, Cicero tells the story that, “in order to make good faith sacred,” the early Romans would punish certain instances of bad faith with the judgment of death. This practice ceased during the time of the Roman Stoics and some Stoics, such as Seneca, even consider punishing bad faith breach to be inadvisable. LUCILIUS, THE TWELVE TABLES, 439 (E. H. Warmington trans., 1911).

the custom and belief that honesty in trade was necessary for social life.

Good faith is implied in all contracts in the same way that the successful construction of a house implies that it has a foundation.²⁸ Both serve as a first step, an essential building block that governs the welfare of the structure, but whose contribution is nevertheless obscured by its location to those who benefit from relying on it. The difference these examples is, while the house has a foundation of stone and mortar, an agreement is founded on principle and hallowed tradition. Thus, while the constitution of carven stone shouldered the burden of many things, it is on good faith that our social fellowship has been carried forwards in common cause and mutual purpose.

According to the Stoics, few situations reflect the importance of this belief more than good faith in the performance of those “mutual-obligations” imposed by promises, agreements and the like. These obligations, if performed correctly (i.e., in good faith), further and spread, by their example, a philosophy of unity through the service of a common purpose. In the performance of these mutual obligations, they warn of the common mercantile tendency to deviate from what is morally right for what is deemed economically expedient. On this point, they emphasize that “what is morally wrong can never be expedient- not even when one secures by means of it that which one thinks expedient; for the mere act of thinking a course expedient, when it is morally wrong, is demoralizing.”²⁹ Thus, they argue, the environmental effect of this sort of opportunistic rivalry, between those who have entered into agreements together, undermines the doctrine of good faith and destabilizes the security that contracts should afford.

Cicero provides a useful fact pattern to illustrate his position on what he considered a violation of good faith by juxtaposing two competing Stoics, Diogenes and Antipater, and their positions.³⁰ The example supposed that the city of Rhodes was in a “time of

²⁸ “The lofty temples of the city rise upon their foundations; yet all that was thrown down to support their whole structure lies out of sight. The same is true in the case of all other things; always their subsequent greatness will conceal their first beginnings.” SENECA, DE BENEFICIIS 182 (John W. Basore trans., Jefferey Henderson ed., 1935).

²⁹ *Id.* at 319.

³⁰ *Id.*

dearth and famine” which left “provisions at fabulous prices,” and that a merchant had just arrived at the city loaded with a cargo of grain.³¹ This merchant had knowledge of the fact that “several other importers [had] set sail from Alexandria, and that on the voyage he [had] sighted their vessels laden with grain and bound for Rhodes.”³² The issue being raised is whether the merchant, who Cicero is assuming to be an honest man in moral doubt, who arrived before the other merchants, must disclose this knowledge to the Rhodians. In other words, prior to agreeing to sell his goods at the highest market price, is he obligated by good faith to inform his buyers that the price is soon to drop with the fast-approaching surplus?

On the one hand, Antipater, with whom Cicero agrees, holds that the seller must disclose to the Rhodians “any detail that the seller knows” so as “not to be uninformed” and where the merchant alone has this knowledge.³³ Diogenes, on the other hand, believes that the “seller should declare any defects in his wares, in so far as such a course is prescribed by the common law of the land; but for the rest, since he has goods to sell, he may try to sell them to the best possible advantage, provided he is guilty of no misrepresentation.”³⁴ Cicero constructs a dialogue between the two disputing Stoics, where Antipater responds to Diogenes with poignant retort:

It is your duty to consider the interests of your fellow-men and to serve society; you were brought into the world under these conditions and have these inborn principles which you are in duty bound to obey and follow, that your interest shall be the interest of the community and conversely that the interest of the community shall be your interest as well; will you, in view of all these facts, conceal from your fellow-men what relief in plenteous supplies is close at hand for them?³⁵

³¹ *Id.*

³² *Id.*

³³ *Id.* at 321.

³⁴ *Id.*

³⁵ *Id.*

Diogenes then attempts to make the distinction that “it is one thing to conceal” but another thing “not to reveal,” which he considers “quite a different thing.”³⁶ Essentially, Diogenes is arguing that, in the absence of a special relationship or an agreement demanding disclosure, the parties have no duty to disclose. In other words, the seller should be “under no obligation to tell you everything that it may be to your interest to be told.”³⁷

Antipater responds that taking Diogenes’s position would be to forget the “bonds of fellowship forged by Nature and existing between man and man.”³⁸ This argument is summarized as making a distinction, not as to whether a party may do a morally wrong deed if it is expedient, but rather, between the position of Diogenes “that a given act is expedient, without being morally wrong, while [Antipater] insists that the act should not be done, because it is morally wrong.”³⁹

This precise example is referenced in our own common law, by Chief Justice Marshall, in the case of *Laidlaw v. Organ*.⁴⁰ There, a dispute arose between a vendee and vendor where the ultimate issue involved “whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?”⁴¹ Marshall weighed the argument made by the vendee, which relied heavily on Cicero’s grain merchant example and argued that the issue in the case was the same dispute discussed by the two Stoics, Diogenes and Antipater. Thus, they argued, this was a case that would decide whether Diogenes’ position was “contrary to good faith,” which the plaintiff believed it was. In the end, Marshall sided with the position of the Diogenes over that of his idealistic pupil Antipater.

Ruling on the side of administrative simplicity, Marshall reasoned that holding a party to the duty to disclose, in this situation, “would be difficult to circumscribe” and would be hard to set “within proper limits, where the means of intelligence are equally accessible to both parties.” Of course, the difference between

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 323.

³⁹ *Id.*

⁴⁰ *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 195 (1817).

⁴¹ *Id.*

their facts and Cicero's example was that the parties in *Laidlaw* had equal access to the same information; whereas, in Cicero's example it was impossible for one party to acquire the omitted knowledge except through the good faith disclosure by the other.⁴²

2) STOIC AGREEMENTS: *EXCUSES AND ENFORCEABILITY*

*Semper Autem in Fide quid Senseris, non-quid Dixeris, Cogitandum*⁴³

The Stoics also have addressed the way agreements and their terms should be interpreted, enforced, rescinded, or excused and under what circumstances such excuses may be warranted. Cicero wrote extensively on these subjects and his advice has often proved instrumental in the development of our own corpus juris. The Stoics, when considering promises and agreements, placed strong emphasis on the spirit or good faith that defined the agreement. As such, they gave great weight to the reasonable expectations induced thereby. They believed that if a dispute over an agreement arose, interpreting the duties thereunder rested on the principle that: "In the matter of a promise one must always consider the meaning and not the mere words."⁴⁴ And, further still, interpreting an agreement required a general submission to the idea that "no duty is more imperative than that of proving one's gratitude" when receiving some consideration or benefit.⁴⁵

According to the Stoics, there are still a few situations that permit a party to excuse himself from binding agreements. The doctrines of changed circumstances and efficient breach are especially prominent in Cicero's discussions on the contract law. In addition, challenges to the overall validity of the contract are discussed at length, such as those situations where a party has misrepresented certain material facts that induce another person to

⁴² The vendor makes the argument that it would be "difficult to maintain even in the forum of conscience." Arguing that the Rhodians were not in such "distress" in that example as would warrant the imposition of such a duty, they were merely "in want of corn" and the Rhodians were "not in want of money to buy it." Which is arguably the case but takes the example beyond the scope of Cicero's usage by omitting facts Cicero took as granted for the sake of argument. Cicero, *supra* note 7, at 323.

⁴³ "In the matter of a promise one must always consider the meaning and not the mere words." *Id.* at 45.

⁴⁴ *Id.* at 45.

⁴⁵ *Id.* at 51.

enter into an agreement that they would not otherwise have agreed to. The Stoics also address the scenario in which someone has entered an agreement having been coerced by violence or threats of violence or harm against their property or person.⁴⁶

In Cicero's examination, the doctrine of changed circumstances is discussed in tandem with efficient breach. Cicero argues for flexibility in the interpretation of contractual obligations when he states: "When [promises] are modified under changed circumstances, moral duty also undergoes a change, and it does not always remain the same." Cicero emphasizes the importance of looking at circumstances surrounding an ongoing agreement between two parties when deciding how to resolve the dispute. He warns that it may come to be that "a given promise or agreement may turn out in such a way that its performance will prove detrimental either to the one to whom the promise has been made or to the one who has made it."⁴⁷ He proceeds to argue that when these situations arise "it is no violation of moral duty to give the greater good precedence over the lesser good."⁴⁸

Cicero provided a scenario in the context of a fiduciary relationship between a lawyer and the client he represents at court.⁴⁹ In the scenario, the lawyer's son had suddenly fallen ill and the lawyer went to the son and missed the court appearance.⁵⁰ On these facts, Cicero asserts that "it would be no breach of [the lawyer's] moral duty to fail in what [he] agreed to do" and his view was that under these facts the client had "a false conception of duty, if he should complain that he had been deserted in his time of need."⁵¹

⁴⁶ It is also worth reiterating that throughout the discussions of Cicero, Seneca and other Stoics, there is a belief in a dualism that the moral (or universal) law comes before communal law, making it the preempting principle the Stoics employ to weigh conduct and determine the efficacy of communal laws. *Id.* at 51, 339.

⁴⁷ Cicero described the story of Theseus whom, "in a fit of anger," "prayed for the death of Hippolytus [his son]." Had Neptune been a proponent of Cicero's doctrine, Theseus would not have been put into "unspeakable grief" after Neptune performed what he had promised. *Id.* at 33.

⁴⁸ Cicero continues to describe what is essentially the concept of efficient breach, albeit not in terms of financial efficiency, but rather in terms of equity or moral expediency. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

In situations where a party seeks to rescind an agreement on the grounds that it was invalidly entered, Cicero briefly discusses challenges to the enforceability of agreements made with duress or fraud in the inducement. On these points, Cicero states that, “[p]romises are not binding which are extorted by intimidation or which we make when misled by false pretenses.” This practical wisdom is as valuable to our modern contract law as it was over two thousand years ago in Roman civil law. Cicero continues by stating that “such obligations are annulled in most cases by ... equity, in some cases by laws.”⁵²

Cicero and the Stoics argued that good faith should be implied in every contract, as it is in our common law today:

Some general rule, therefore, should be laid down to enable us to decide without error, whenever what we call the expedient seems to clash with what we feel to be morally right; and, if we follow that rule in comparing courses of conduct, we shall never swerve from the path of duty.⁵³

He further exclaims that “[t]hat rule, moreover, shall be in perfect harmony with the Stoics’ system and doctrines. It is their teachings that I am following in these books.”⁵⁴ Cicero argues that “the older Academicians and your Peripatetics (who were once the same as the Academicians) give what is morally right the preference over what seems expedient.”⁵⁵ However, the Stoics “consider whatever is morally right also expedient and nothing expedient that is not at the same time morally right.”⁵⁶

⁵² Cicero references a fascinating and familiar tradition of Roman law, where praetors (magistrates and some military commanders), who had the power to issue “edicts of equity”, would “announce publicly the principles and policies that should guide him in the administration of his office. These were the source of the *Ius Praetorium*.” Cicero, *supra* note 7, at 34. Not unlike our own legal Restatements, these announcements “explained and supplemented the common law (*Ius Civile*) and even modified its ancient rigor so as to conform with a more advanced public sentiment.” *Id.*

⁵³ *Id.* at 287.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 289.

Cicero prefers the Stoic position that whatever is morally right must also be expedient (e.g., economic) because by not distinguishing between what is moral and what is economic, the potential wrongdoer has less room for argument. Cicero was concerned that giving “wide liberty” for someone to argue that something morally wrong was still expedient is “contrary to Nature” because it would allow someone to “profit by his neighbor’s loss,” be unjust, and he warns that “injustice is fatal to social life and fellowship between man and man.”⁵⁷ Stoicism and Cicero warn against treating good faith separately from expediency:

[I]f we are so disposed that each, to gain some personal profit, will defraud or injure his neighbor, then those bonds of human society, which are most in accord with Nature’s laws, must of necessity be broken.⁵⁸

Arguing by analogy, Cicero describes that this would be analogous to a part of our body seeking to prosper at the expense of another part, by taking for “itself the health and strength of its neighboring member, the whole body would necessarily be enfeebled and die.”⁵⁹ The Stoics were concerned that “without any conflict with Nature’s laws ... everybody may prefer to secure for himself rather than for his neighbor what is essential for the conduct of life,” a proverbial war of all against all.⁶⁰ Cicero reiterates this prohibition against wrongful gains and unfair dealing, stating, “Nature’s laws do forbid us to increase our means, wealth, and resources by despoiling others.”⁶¹ Thus, the Stoics maintain that natural law forbids violations of good faith, regardless of whether you stand to gain a profit by doing so and whether it is expressly forbidden by law.⁶²

Cicero urges that because we are all members of the “universal brotherhood,” then we should adhere to the principle that “the chief end of all men,” and their laws, should be “to make the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 289-91.

⁶² The Stoics define “Nature’s laws” (or natural law) as “the common rules of equity.” *Id.* at 291.

interest of each individual and of the whole body politic identical.”⁶³ After all, “there are interests that all men have in common” in society and “Nature ordains that one man shall desire to promote the interests of a fellow-man, whoever he may be, just because he is a fellow-man.”⁶⁴ To support this argument, Cicero provides the example of a person selling their house “on account of certain undesirable features of which he himself is aware but which nobody else knows.”⁶⁵ Cicero then asks the question, if the owner then sells the house “for far more than he could reasonably have expected to get for it, I ask whether his transaction is unjust or dishonorable.”⁶⁶ Cicero provides the answer, “Yes, says Antipater, it is; for to allow a purchaser to be hasty in closing a deal and through mistaken judgment to incur a very serious loss, if this is not refusing ‘to set a man right when he has lost his way’ (a crime which at Athens is prohibited on pain of public execration), what is? It is even worse than refusing to set a man on his way: it is deliberately leading a man astray.”⁶⁷

The Stoics believed that the doctrine of good faith was natural law, a common rule of equity, that was designed to challenge the belief that the common interest was divorced from the individual’s own interest. Furthermore, the doctrine warned, and prohibited in some cases by statute, against the mindset that an individual should be allowed to claim expediency at the cost of harming another, however great that gain might be. The Stoics believed it was a violation of natural law to allow a person seeking personal profit to acquire it at the cost of harming another person, particularly, where that harmed person was someone with whom the wrongdoer had had an agreement and who reasonably expected, in good faith, that that mutual agreement was in their mutual interest. Said differently, good faith “originate[s] in our natural

⁶³ *Id.* at 293.

⁶⁴ *Id.* at 293, 295.

⁶⁵ He continues to describe, “suppose it is unsanitary, but has the reputation of being healthful; suppose it is not generally known that vermin are to be found in all the bedrooms; suppose, finally, that it is built of unsound timber and likely to collapse, but that no one knows about it except the owner.” *Id.* at 323.

⁶⁶ *Id.*

⁶⁷ *Id.*

inclination to love our fellow-men, and this is the foundation of justice.”⁶⁸

3): BAD FAITH & SENECA’S PRINCIPLES OF PUNISHMENT: *TRUSTING IN CONSCIENCE NOT SEALS OF LAW*

Cicero was not the only Stoic who prolifically lauded the importance of good faith. Seneca the Younger discussed the doctrine extensively and had his own ideas on how it should be enforced. Particularly, Seneca, unlike Cicero, believed that the doctrine of good faith should not be enforced by legal sanctions. Seneca insists that a person to whom a promise was given should trust in “good faith and a conscience that cherishes justice” and “look only to the good faith of the recipient” of the promise, consideration or “benefit.”⁶⁹ Seneca did not want “covenants and agreements [to be] safeguarded by the impress of seals, but good faith [alone].”⁷⁰ While this position was not shared by other stoics, being unique to Seneca, and while it would have difficulty finding a place in modern law, it is worth exploring for the simple reason that it represents a part of the history of this most ancient of doctrines, good faith.⁷¹

Seneca argues that by enforcing good faith, and punishing those who act in bad faith, we do a greater harm to society and to the marketplace. Seneca states, “would it not have been more desirable to allow some men to break their word than to cause all men to fear treachery?”⁷² One of the more notable arguments that Seneca makes, for relying solely on the communal shame that would come from violating good faith, is the following:

“More men,” you say, “will become ungrateful if no action can be brought against ingratitude.” No, fewer men, because benefits will be given with a greater discrimination. Then, too, it is not advisable that all men should know how many are ungrateful; for the multitude of the offenders will

⁶⁸ CICERO, ON LAWS 345 (Clinton Walker Keyes trans., Jefferey Henderson ed., 1928).

⁶⁹ Seneca, *supra* note 28, at 153.

⁷⁰ *Id.*

⁷¹ See Holmes, *supra* note 14.

⁷² Seneca, *supra* note 28, at 155.

remove the shame of the thing, and what is a general reproach will cease to be a disgrace.⁷³

Seneca seems to argue that public policy would benefit more from preventing the community from becoming accustomed to witnessing bad faith and dishonesty in transactions. He is concerned that bad faith could even become a custom, arising out of a community of bad faith actors who now felt secure to act wrongfully with the peace of mind that they would have safety in numbers. Seneca would prefer to increase the risk of contracting than to allow bad faith to become a familiar sight in commerce.

Nevertheless, Seneca provided that it was still worth giving contracting partners a ‘nudge’ to remember their obligations, by giving them a “simple reminder.”⁷⁴ In this respect, Seneca states that it is acceptable when a “friend stimulates the flagging loyalty of a friend.”⁷⁵ For Seneca, it is far more important that we do not lose faith in our fellow man and to give each the benefit of the doubt, after all:

There are many who do not know how either to disavow or to repay what they have received, who are neither good enough to be grateful, nor bad enough to be ungrateful—slow and dilatory people, backward debtors, but not defaulters. Of these I shall make no demand, but shall admonish them and turn them back from other interests to their duty.⁷⁶

Seneca argues that the party in breach of a contract is like a friend who is “asleep” and that “it is necessary only to shake, not to strike,” to “refresh his memory” because in “some men, their sense of honor about returning gratitude is, not extinct, but only asleep. Let us

⁷³ *Id.* at 155.

⁷⁴ “If anyone is so ungrateful that a simple reminder will not suffice, I shall pass him by, and judge him unworthy of being compelled to be grateful.” *Id.* at 353.

⁷⁵ *Id.* at 355.

⁷⁶ *Id.* at 353.

arouse

it.”⁷⁷

B. THE TRADITION OF LAW: KIND SERVICE AND PUBLIC CONFIDENCE

1): KIND SERVICES: *THE STOIC ETHIC OF LEGAL BENEFACTION*

*Who kindly sets a wanderer on his way
Does even as if he lit another's lamp by his:
No less shines his, when he his friend's hath lit.*⁷⁸

Legal benefaction is an important feature in the legal ethos of Stoicism. It is a principle of uniform agreement between the Stoics, most notably between Seneca and Cicero, that lawyers should engage in what Cicero called “kind service,”⁷⁹ a moral imperative to represent those without a defense or the resources to acquire one.⁸⁰ Essentially, indigency should not weigh the scale towards guilt, and the legal tradition should maintain amongst its practitioners a “habit of kindness”⁸¹ and give to the “needy ... personal service.”⁸²

The Stoic call for legal altruism permeates their ethos and is appealing to a world concerned with injustice and inequities, whatever they are perceived to be. Cicero notes:

The door of opportunity for generous patronage to others, then, is wide open to the [lawyer] whose heart is in his work and who follows the custom of our forefathers in undertaking the defense of many

⁷⁷ *Id.* at 355.

⁷⁸ Cicero, *supra* note 7, at 55.

⁷⁹ *Id.* at 201.

⁸⁰ An imperative to “lend his aid to one who seems to be oppressed and persecuted by the influence of someone in power.” *Id.* at 221.

⁸¹ *Id.* at 223.

⁸² *Id.*

clients without reluctance and without compensation.⁸³

The Stoic position on benefaction has value outside the charitable representation as well. Of particular significance, Seneca's general discussion on giving charitable gifts and bequeathing.⁸⁴ In the context of a bequeathments in a will, Seneca asks that we consider the following:

[W]hy is it that we wish to be grateful at the hour of death, that we carefully weigh the services of each one, that, with memory as judge of the whole of our life, we try to avoid the appearance of having forgotten the service of any? Nothing then is left for us to hope for; nevertheless, as we pause upon the threshold, we wish to appear as grateful as possible at the time of our departure from human affairs.⁸⁵

Seneca believed, as does the rest of Stoicism, that a person receiving charity "rejoices in viewing, not the gift, but the intention of him from whom he received it"⁸⁶ and in doing so "he who receives a benefit gladly has already returned it."⁸⁷ In other words, those who give charitable representation have been repaid through the knowledge that their service brought peace of mind to the recipient.

The Stoic position on benefaction is worthy of the legal tradition because it stands to support a central principle within the law, namely, that it maintains public confidence. It does this by refocusing our personal motivations away from purely economic gain and towards those actions that stand to give the greatest benefit to others. The Stoics believed that giving a benefit, e.g., providing charitable representation, was a good in itself and Seneca

⁸³ Cicero, *supra* note 7, at 241.

⁸⁴ Seneca uses the term "benefit" interchangeable with both the exchange of benefits given in good faith (i.e., contracting) as well as giving benefits without thought of return (e.g., gifts, altruism and charitable work).

⁸⁵ Seneca, *supra* note 28, at 249-51.

⁸⁶ *Id.* at 159.

⁸⁷ *Id.* at 113.

states, “It is not gain that I try to get from [giving] a benefit, nor pleasure, nor glory; content with giving pleasure to one human being, I shall give with the single purpose of doing what I ought.”⁸⁸

Regarding legal benefaction or charitable representation, Seneca provides several worthwhile examples. First, he describes the scenario of providing “bail for a man who has been condemned.”⁸⁹ Second, he offers that “when a friend’s goods are put up for sale, I quash the indictment [even though it may] make myself responsible for what he owes to his creditors.”⁹⁰ Third, he asserts that “in order to save a proscribed person, I myself run the risk of proscription.”⁹¹ Seneca characterizes this selfless good-will as being like the situation where, “I come to the rescue of a man who has been surrounded by robbers although I am at liberty to pass by in safety.”⁹² These examples reflect the character of benefaction that is expected within the Stoic legal ethos.

Seneca does advise that there are limits to this philanthropic spirit.⁹³ That is, to determine who is deserving of our benefaction, those we are not otherwise obligated to represent, the private actor should weigh thoughtfully the ramifications of their gift of service.⁹⁴ This is especially important in a situation where the choice is limited by resources (e.g., hours in the day) and where it is the case that helping one potential client means the choice not to represent the another. In terms of making this choice, Seneca directs us to

⁸⁸ *Id.* at 225.

⁸⁹ *Id.* at 229.

⁹⁰ *Id.* at 251 (describing the virtue of benefaction, notably with regard to legal benefaction: “It is evident that the great reward for an action lies in the deed itself, and that virtue has great power in influencing the minds of men, for souls are flooded with its beauty, and, marveling at the brilliance and splendor of it; good men live in greater security, and have the love and respect of good men, and existence is less troubled when accompanied by innocence and gratitude”).

⁹¹ Seneca, *supra* note 28, at 229.

⁹² This example raises another topic worth discussing under the Stoic legal framework, specifically, *Good Samaritan* statutes and the distinction between duties ascribed by law and those that flow naturally from altruism. Stoicism would likely argue that they erode the spirit of altruism, which is founded on choice, by turning moral imperative into legal commandment. *Id.*

⁹³ Seneca, *supra* note 28, at 223.

⁹⁴ This position is shared by Cicero who believes “in selecting worthy cases, we ought to use judgment and discretion. For, as Ennius says so admirably, ‘Good deeds misplaced, methinks, are evil deeds.’” Cicero, *supra* note 7, at 235.

examine and balance the worthiness of the potential beneficiary's character:

I am not without choice in doing what I ought... I shall choose a man who is upright, sincere, mindful, grateful, who keeps his hands from another man's property, who is not greedily attached to his own, who is kind to others.⁹⁵

Seneca states that it is important to know "how and when a gift is a benefit; for if it is given to one who is base, it can be neither an honorable act nor a benefit."⁹⁶ That is, it is important to consider when a gift should be given,⁹⁷ "to whom to give it, and how and why. For reason should be applied to everything we do; and no gift can be a benefit unless it is given with reason, since every virtuous act is accompanied by reason."⁹⁸

Individual and introspective moral reflection and judgment are cornerstones of the Stoic tradition. Here, Seneca urges that reflection, that in determining whether we choose to provide our limited services, we should thoughtfully weigh the character and circumstances of those to whom it would be given. Limited in our resource, this process helps to decide which of two we should represent in a charitable capacity. Furthermore, Seneca is attempting to reconcile the potential conflict between a private actor's desire to do good regardless of cost and the belief that benefaction or altruism exists if it follow from the giver's own moral judgment and balancing.

⁹⁵ Seneca, *supra* note 28, at 225. Similarly, Cicero states "in rendering helpful service to people, we usually consider either their character or their circumstances. And so, it is an easy remark, and one commonly made, to say that in investing kindness we look not to people's outward circumstances, but to their character." See Cicero, *supra* note 7, at 243.

⁹⁶ Seneca, *supra* note 28, at 223.

⁹⁷ "The man who gives advice ought first to have regard to the modesty and character (reputation) of those whom he advises; for those who have lost the capacity of blushing are incorrigible." EPICTETUS, ENCHIRIDION 44 (George Long trans., Paul Negri ed., 2004).

⁹⁸ Seneca, *supra* note 28, at 223.

Seneca warns against “thoughtless benefaction”⁹⁹ because giving without first determining the reason and the worthiness of the recipient’s character is “the most shameful sort of loss.”¹⁰⁰ Seneca continues, comparing the difference between failing to receive a return on an agreement and giving thoughtlessly, “it is a much greater offence to have ill bestowed a benefit than to have received no return; for it is the fault of another if we have received no return, while, if we did not select the one to whom we were giving, the fault is our own.”¹⁰¹ Furthermore, that “it is the duty of man, amongst other things, to give ... benefits. Why, then, does he give? For fear that he should fail to give, for fear that he should lose an opportunity of doing good.”¹⁰²

According to Seneca, in determining whether a person is a suitable recipient, we should also consider who will stand to gain the greatest benefit, i.e., those who are likely to receive the greatest utility from our assistance (e.g., those suffering the indignities of “extreme poverty”).¹⁰³ He also explains that in determining who is in the greatest need, we should look to who is most likely to be “grateful”¹⁰⁴ and we should not look for those most likely to “make a return.”¹⁰⁵ The central aspect of Seneca’s position is the conscious motivation to avoid even indirect self-gifting or the promotion of our personal interests.¹⁰⁶

⁹⁹ A similar formulation is found in Aristotle’s *Nicomachean Ethics*, wherein Aristotle describes the virtue of Generosity (i.e., Benefaction, to the Stoics) as lying between its deficiency (i.e., vice), Ungenerosity, and its excess (i.e., vice), Wastefulness (i.e., thoughtless benefaction, to the Stoics), the latter being most contemptible of the two vices to Aristotle. ARISTOTLE, *NICOMACHEAN ETHICS* 49-51 (Terence Irwin trans., 1999).

¹⁰⁰ Seneca, *supra* note 28, at 223.

¹⁰¹ *Id.*

¹⁰² *Id.* at 231.

¹⁰³ *Id.* at 225.

¹⁰⁴ Here, it would be prudent to clarify the term “grateful” is qualified by Stoic doctrine as being part of the virtue of showing gratitude, which they consider an indispensable part of a person’s moral constitution; its inverse undermines the bonds of fellowship. Here, the Stoic term “grateful” does not reflect an assessment of what colloquially might be considered as the person more likely to praise the benefactor. Instead, it refers to a specific virtue of character in the Stoic tradition with broad meaning.; *see also supra* note 56.

¹⁰⁵ Seneca, *supra* note 72.

¹⁰⁶ Epictetus’s approach is less rigid: “Give of what you have to strangers and to those who have need: for he who gives not to him who wants, will not receive himself when he wants.” Epictetus, *supra* note 97, at 45.

Seneca is concerned with the erosion of altruistic motivation in benefaction with those essentially governed by self-interest.¹⁰⁷ Seneca wants us to remember that, it “often happens that the grateful man is one who is not likely to make a return, while the ungrateful man is one who has made a return.”¹⁰⁸ Thus, avoiding the possibility of a return (financial or otherwise) is critical to the Stoic ethos and instead we should weigh the “heart” or character of the beneficiary.¹⁰⁹ The Stoics would agree¹¹⁰ with Seneca’s sentiment that:

[I]t is to the heart that my estimate is directed; consequently I shall pass by the man who, though rich, is unworthy, and shall give to one who, though poor, is good; for he will be grateful... and, when he lacks all else, this heart he will still have.¹¹¹

This position advocates for an internalized and self-imposed process, whereby private citizens regulate and reflect on the proper motivation behind each of their charitable acts.¹¹²

Seneca’s formulation of thoughtful benefaction and the Stoic ethic of charitable representation has the potential to effectuate greater engagement by private practitioners in the law by reinforcing the general idea that charitable good-will is not an

¹⁰⁷ “[W]e are bad judges of our duties only so long as they are distorted by hope and fear and that most slothful of vies, pleasure.” Seneca, *supra* note 27, at 227.

¹⁰⁸ *Id.*

¹⁰⁹ Moral character governs because “[f]ortune may [have] bestow[ed] upon him nothing with which he may repay my favor” and “I shall have accomplished my purpose when I have made choice of such a man.” *Id.* at 225.

¹¹⁰ “[A] good man ... can do it at least in thankfulness of heart.” Cicero, *supra* note 7, at 243.

¹¹¹ Seneca, *supra* note 28, at 225. *See also* Cicero, *supra* note 7, 241 (“the door of opportunity for generous patronage to others, then, is wide open to the [lawyer] whose heart is in his work and who follows the custom of our forefathers in undertaking the defense of many clients without reluctance and without compensation”).

¹¹² Describing the inherent goodness in defending those who, though lacking wealth, are wealthy in character: “If one defends a man who is poor but honest and upright, all the lowly who are not dishonest- and there is a large proportion of that sort among the people- look upon such an advocate as a tower of defense raised up for them. I think, therefore, that kindness to the good is a better investment than kindness to the favorites of fortune.” Cicero, *supra* note 7, at 245.

exchange of services, but of giving for its own sake (without regard for praise or return). Moreover, this formulation is practical in that it merely attempts to refocus the aims of existing legal aid away from seeking self-aggrandizement and back towards benefaction.¹¹³ The Stoics maintain that within natural law there exists a “peculiar power that compels us to give benefits, first, because we ought, then, because we have already given them,” and “this would not happen if the benefits themselves were not the source of [this] pleasure.”¹¹⁴

2): THE LEGAL FIDUCIARY: MAINTAINING PUBLIC CONFIDENCE IN THE LEGAL TRADITION IS ESSENTIAL TO ORDERED LIBERTY

Duties and the moral principles that govern them are a subject of tireless discussion within the Stoic school of thought. The Stoic system of ethics largely revolves around the question of duties or obligations imposed on us by our actions, relations, or by simply being a member of civil society. Volitional obligations, those we bind ourselves to by our own free will, are those Stoicism pays special attention to. As the legal tradition is both a foundation for society and an adhesive that keeps us together by the imposition of a minimum standard of conduct.¹¹⁵ Furthermore, it provides redress for harm and assures the bonds of human fellowship are maintained.¹¹⁶ A tradition of regulating conduct should hold its

¹¹³ “[T]he great reward for an action lies in the deed itself, and that [this] virtue has great power in influencing the minds of men, for souls are flooded with its beauty, and, marveling at the brilliance and splendor of it; good men live in greater security, and have the love and respect of good men, and existence is less troubled when accompanied by innocence and gratitude.” Seneca, *supra* note 27, at 250.

¹¹⁴ Seneca, *supra* note 27, at 235.

¹¹⁵ “For how else do we live in security if it is not that we help each other by an exchange of good offices? It is only through the interchange of benefits that life becomes in some measure equipped and fortified against sudden disasters. Take us singly, and what are we? The prey of all creatures, their victims, whose blood is most delectable and most easily secured. For, while other creatures possess a strength that is adequate for their self-protection, and those that are born to be wanderers and to lead an isolated life have been given weapons, the covering of man is a frail skin; no might of claws or of teeth makes him a terror to others, naked and weak as he is, his safety lies in fellowship.” Seneca, *supra* note 27, at 241.

¹¹⁶ An illustration of the importance of protecting fellowship is made also by Seneca. He states that Nature has “given to [mankind] two things, reason and fellowship, which, from being a creature at the mercy of others, make him the most powerful of all; and so he who, if he were isolated, could be a match for none is the master of the world.” *Id.*

regulators to the highest standard of propriety, otherwise it runs a risk of becoming the *rule by law* not the *rule of law* and with that public faith is lost.

For the Stoics, it appears that the mere state of being human gives rise to an almost fiduciary obligation to one another. To Seneca, Aurelius and Cicero, to be human is to be obligated to the ends of *fellowship*, by providing what services we can to our fellow man.¹¹⁷ Now, while this is a characteristically broad Stoic ideal, for the purposes of practical application, this section will narrow the scope to that of the attorney-client relationship and the Stoic formulation thereof.

When providing legal services, there is the basic understanding that the role of the fiduciary is that of an agent, whose duties of care and loyalty require that he makes his decisions on behalf of, and with the purpose of promoting the interests of his principal. To that end, we can recall the discussions of Seneca and Cicero on the proper motivation behind providing benefits¹¹⁸ and the extent of our discretion within that process.¹¹⁹ Seneca's belief is shared by Cicero who mandates: "Honest counsel give to one who is in doubt," and that the "first rule of duty requires us-other things being equal-to lend assistance preferably to people in proportion to their individual need."¹²⁰ That the "interests of society... and its common bonds will be best conserved" if we recognize that the "closeness of [this] relationship"¹²¹ is one of "good-will" and "good-will is won principally through kind services."¹²²

According to the Stoics, within the attorney-client relationship there exists an expectation of confidence, not just in confidentiality, but in two distinct understandings. First, that the attorney is effective and able to, in a legal sense, provide "insight into the future" for a client.¹²³ In doing so, "when an emergency

¹¹⁷ To bestow even upon a stranger what it costs us nothing to give. Cicero, *supra* note 7, at 55.

¹¹⁸ See Cicero, *supra* note 7, at 55-60, 84.

¹¹⁹ See Cicero, *supra* note 65-66.

¹²⁰ Cicero, *supra* note 7, at 55.

¹²¹ *Id.* at 53.

¹²² When Cicero describes "kind services" he is referring to those provided by a lawyer to the indigent. Interestingly, during Cicero's time in Rome, lawyers were forbidden from accepting fees and so representing people meant "acts of kindness." *Id.* at 201.

¹²³ *Id.* at 203.

arises and a crisis comes” for the client, the attorney “can clear away the difficulties and reach a safe decision according to the exigencies of the occasion.”¹²⁴ This expectation of effectiveness is what he calls a “kind of practical wisdom.”¹²⁵ Second, in addition to effectiveness, the attorney must be “just and true” for that effectiveness to be realized, and for the client’s confidence to be warranted.¹²⁶ That is, according to Cicero, there exists a:

[D]efinite assumption that [lawyers’] characters admit of no suspicion of dishonesty or wrongdoing. And so we believe that it is perfectly safe to entrust our lives, our fortunes, and our children to their care.¹²⁷

In this way, Cicero is illustrating not only should the attorney be free of impropriety, but that, at least from perspective of their client and the public, the attorney should try to avoid even the appearance of impropriety.

Upholding public confidence in the legal tradition is an important part of maintaining ordered liberty.¹²⁸ The current state of legal tradition is reflected in the customs (and conventions) of those who practice it, which requires attorneys challenge, defend and promote confidence in the law. It follows that if one of the primary goals of this tradition is to further fellowship by maintaining human collaboration,¹²⁹ then, those who practice law should bear in mind that:

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Comparing the relationship between public confidence in the legal tradition and ordered liberty, Chief Justice Burger, joined by Justice Rehnquist and Justice Blackmun, stated that “this permissiveness will tend further to erode public confidence in the law—that subtle but indispensable ingredient of ordered liberty.” *Rosenfeld v. New Jersey*, 408 U.S. 901, 902 (1972) (Burger, C.J. Dissenting) (although this case involved a question of free speech in the context of profane and aggressive speech at a school board meeting attended by children, it nevertheless makes a useful comparison between the two concepts stated above).

¹²⁹ “Deny no one the water that flows by... Let anyone who will take fire from our fire.” Cicero, *supra* note 7, at 55.

The distinguishing part of our Constitution is its liberty... But the liberty, the only liberty, I mean is a liberty connected with order: that not only exists along with order and virtue, but which cannot exist at all without them. It inheres in good and steady government, as in its substance and vital principle.¹³⁰

If lawyers seek to provide practical wisdom to those in need of advice, they must inspire confidence not just in the client, but, where it is reasonably possible, in the public at large. Regardless of whether an attorney is ultimately effective in producing the desired result, if he is not effective in his propriety, he does not inspire confidence in the law and undermines the integrity of the legal profession as a whole: “[F]or take from a man his reputation for probity, and the more shrewd and clever he is, the more hated and mistrusted he becomes.”¹³¹ In this respect, being a representative part of the legal tradition, such an attorney would, though effective for his client, erode “popular thinking... [,] popular sense[,]” or public confidence of the whole.¹³²

There is, therefore, some merit to the argument that if we think of fiduciary duty within attorney-client relationships not only as a duty to the client, but also as a furtherance of the integrity of the legal tradition, we stand to gain much as a society. We stand to bolster not only public confidence and fiduciary relationships, but also the foundations of ordered liberty. Doing so is aided, at least in part, by practiced familiarity of the Stoic underpinnings of the law and its duties.

C. JUDICIAL TEMPERAMENT: STOIC INTERPRETATION OF THE CANONS OF JUDICIAL CONDUCT

1): THE ROLE OF THE JUDICIARY: *SPEAKING LAW*

The Stoic conception of the judicial officer (“magistrate” or “judge”)¹³³ is emblematic of a tradition deeply rooted in practiced

¹³⁰ EDMUND BURKE, speech at his arrival at Bristol, October 13, 1774, *THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE*, vol. 2, p. 87 (1899).

¹³¹ Cicero, *supra* note 7, at 55.

¹³² *Id.*

¹³³ Cicero, *supra* note 7, at 293.

habitual ethics and justice.¹³⁴ Good judicial character is essential to maintaining the ordered liberty necessary for a fair and just society.¹³⁵ As the role of the judge is chiefly concerned with the ends of justice, it follows that every judicial officer should not only seek to define their role within the administration of justice, but should seek to define, for themselves, what justice means as well.¹³⁶

Justice, the Stoics say, is that virtue which “binds all human society, and is based on one Law, which is right reason applied to command and prohibition.”¹³⁷ To accomplish this, the judge must, in rendering judgments, “follow precedent and tradition.”¹³⁸ The Stoic ideal for the judicial officer is that, by regulating the habits of his character by “right reason,” and his “commands” by “precedent and tradition,” then it becomes possible for him to embody that necessary role; namely, that the “magistrate is a speaking law, and the law a silent magistrate.”¹³⁹ The Stoic notion of the ideal judge as a “speaking law”¹⁴⁰ comports with our own judicial tradition, which holds it is “emphatically the province and duty of the judicial department to say what the law is.”¹⁴¹

This discretion is not without limits, however, and moral standards are necessary for the judicial officer’s effective performance of his duties.¹⁴² Cicero provides: “There seems to be sound advice, therefore, in this word of warning: The higher we are

¹³⁴ Justice “originate[s] in our natural inclination to love our fellow-men.” Cicero, *Laws*, p. 345. It seeks to maintain the “universal brotherhood of mankind,” that “chief end of all men ... to make the interest of each individual and of the whole body politic identical.” Cicero, *supra* note 7, at 293.

¹³⁵ “Accordingly, we must have magistrates, for without their prudence and watchful care a State cannot exist. In fact the whole character of a republic is determined by its arrangements in regard to magistrates.” *Id.* at 127.

¹³⁶ “He must also understand the customary procedure in the passage of a decree, and know the precedents which our ancestors have handed down to us. Thus you can form a conception of the wide knowledge, the great industry and the excellent memory which are absolutely indispensable... for the performance of his duties.” Cicero, *supra* note 68, at 509.

¹³⁷ *Id.* at 345.

¹³⁸ *Id.* at 517.

¹³⁹ *Id.* at 461.

¹⁴⁰ The “laws govern the magistrate” the same. *Id.* Still more, “the very word ‘law’ implies a decree or command which is binding upon all.” *Id.* at 513.

¹⁴¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹⁴² “Not only must we inform them of the limits of their administrative authority; we must also instruct the citizens as to the extent of their obligations to obey them.” Cicero, *supra* note 68, at 515.

placed, the more humbly should we walk.”¹⁴³ Still more, that for the judge to fulfill his role he must be obedient to those overarching principles of justice that represent the spirit of the law: “Law intends indeed to do service to human life, but it is not able when men do not choose to accept her services; for it is only in those who are obedient to her that she displays her special virtue.”¹⁴⁴ With respect to his adjudicating the wrongs in society, Cicero states he should regard the law as remedial and in this way: “[a]s to the sick[,] physicians are as saviors, so to those who are wronged[,] are the laws.”¹⁴⁵

2) PARAGONS OF PROPRIETY: REGULATING JUDICIAL CHARACTER FOR THE INDEPENDENCE AND INTEGRITY OF THE JUDICIARY

As the fire-lights in harbors by a few pieces of dry wood raises a great flame and give sufficient help to ships which are wandering on the sea; so also an illustrious man in a state which is tempest-tossed, while he is himself satisfied with a few things does great service to his citizens.¹⁴⁶

The judicial character is a paragon of propriety, governed by “rules of reason” and “respect for law.”¹⁴⁷ This serves the practical end of maintaining “public confidence in the impartiality of the judiciary” and ensures that “essential independence of judges in making judicial decisions.”¹⁴⁸ The cultivation of this character requires self-regulated restrictions and “[t]his prohibition applies to both professional and personal conduct.”¹⁴⁹

Both the Stoic and judicial traditions share the belief that the judge should “bear in mind ... that all this has been committed

¹⁴³ Cicero, *supra* note 7, at 93.

¹⁴⁴ Epictetus, *supra* note 97, at 47.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 39.

¹⁴⁷ Canon 1, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

¹⁴⁸ *Id.* On the point of maintaining independence, Epictetus states: “No man is free who is not master of himself. Epictetus, *supra* note 97, at 46.

¹⁴⁹ Canon 2A, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

to him as a sacred trust.”¹⁵⁰ In accordance with the belief that judges must meet the highest of standards,¹⁵¹ both prescribe ethical guidelines for judges to adhere to. These largely govern matters of regulating character and policing public impressions, with the general goal being to promote the integrity and independence of the judiciary.¹⁵²

The Stoics believed that eligibility for judicial office should depend on the judge’s moral character.¹⁵³ This requires the judge to be a person of “moderation,” someone who acts with “calm and quiet behavior, for the presiding officer regulates and determines not only the spirit and desires, but almost the facial expressions, of those over whom he is presiding.”¹⁵⁴ In other words, a calm and composed demeanor serves to command those subject to the judge’s control and reinforces a steady disposition resistant to “partisan interests, public clamor, or fear of criticism.”¹⁵⁵ The judge’s duties in maintaining public confidence by resisting “public clamor” is an expectation shared by the Stoics who say: “As the goose is not frightened by cackling nor a sheep by bleating, so let not the clamor of a senseless multitude alarm you.”¹⁵⁶ Epictetus continues, stating that it is crucial to “not be moved from your purpose even by a rabble when they unjustly attempt to move you.”¹⁵⁷

¹⁵⁰ Cicero, *supra* note 7, at 127; *See* Butz v. City of Muscatine, 75 U.S. 575, 582 (1869) (Writ of Mandamus granted, Supreme Court stated: “Were we to accept [the City’s] solution we should abdicate the performance of a solemn duty, betray a *sacred trust* committed to our charge, and defeat the wise and provident policy of the Constitution which called this court into existence.”) (emphasis added); *see* Supervisors v. United States, 85 U.S. 71, 77. (1873) (In a similar Writ of Mandamus grant, this concept of the judge’s “sacred duty” is restated).

¹⁵¹ The Stoics recognized that when figures of authority become morally unrefined or lack propriety, the habits of society suffer: “I believe that a transformation takes place in a nation’s character when the habits and mode of [those authority figures] are changed ... because they not only indulge in vicious practices themselves, but also infect the whole commonwealth with their vices; and not only because they are corrupt, but also because they corrupt others, and do more harm by their bad examples than by their sins.” Cicero, *supra* note 48, at 497.

¹⁵² Canon 1, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

¹⁵³ “For whatever propriety may be, it is manifested only when there is pre-existing moral rectitude.” Cicero, *supra* note 7, at 97.

¹⁵⁴ Cicero, *supra* note 68, at 507.

¹⁵⁵ 28 USCS Code of Conduct for United States Judges, Canon 3, cmt. 1.

¹⁵⁶ Epictetus, *supra* note 97, at 40.

¹⁵⁷ *Id.* at 41

Duties of composure were not only expected of the judges. The Stoics urged that citizens not “rebel against their magistrates,”¹⁵⁸ and they advise that we “yield to law and to a magistrate and to him who is wiser than yourself.”¹⁵⁹ Cicero advises that some sanction should be imposed for what would be, by today’s standards, contempt.¹⁶⁰ He urges that we be “obedient and dutiful” when under judicial discretion.¹⁶¹ On this point Epictetus explains, “As the stone which tests the gold is not at all tested itself by gold, so it is with him who has the faculty of judging.”¹⁶² Here, like the stone which measures gold, if the measuring stone was itself the subject of measurement, then the whole system of measuring the truth of the gold would collapse. In other words, the practical point of this position was that both parties in a dispute had a chance of losing their case, honoring the result (appeals aside), was necessary for the system to function. Therefore, it is for this reason that it “is shameful for the judge to be judged by others,” outside of some lawful appeals process. A similar sentiment is found in the ABA Model Rules of Professional Conduct, which encourages lawyers to help prevent this:

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.¹⁶³

While it might be difficult to effectively turn this encouragement into a rule and then to circumscribe as to what “unjustly criticized” means, it is nevertheless worth noting that, like the Stoics thousands of years ago, today we understand the importance of

¹⁵⁸ Cicero, *supra* note 68, at 463.

¹⁵⁹ Epictetus, *supra* note 97, at 47.

¹⁶⁰ Cicero continues, arguing that “[w]e must provide [in law], not only that the citizens be obedient and dutiful toward the magistrates, but also that they love and honor them. Indeed my beloved Plato thought that those who rebel against their magistrates, as the Titans did against the gods, are to be classed of the Titans’ brood.” Cicero, *supra* note 68, at 463.

¹⁶¹ *Id.*

¹⁶² Here, Epictetus appears to be arguing an ancient parallel to Absolute Immunity for judicial officers. Epictetus, *supra* note 97, at 36.

¹⁶³ Model Rules of Professional Conduct, Rule 8.2, cmt. 3.

protecting the dignity of the judicial tradition from internal and external threats.

Judicial propriety asks more than just following the law, but that the judge limit or completely restrain himself from doing things that others are free to engage in.¹⁶⁴ This reflects the importance the judiciary places on avoiding the appearance of impropriety. Moreover, the Stoics urge also that the judge “employ reason and speech rationally, to do with careful consideration whatever one does, and in everything to discern the truth and to uphold it- that is proper.”¹⁶⁵ For maintaining the appearance of propriety, Cicero provides some guiding advice: “[T]he chief thing in all public administration and public service is to avoid even the slightest suspicion of self-seeking.”¹⁶⁶

Propriety in public office is essential to maintaining the integrity of that office, and nowhere is it more proper for propriety to be maintained than in the administration of justice:

For the reason that all the parts combine in harmony and grace, so this propriety, which shines out in our conduct, engages the approbation of our fellow-men by the order, consistency, and self-control it imposes upon every word and deed.¹⁶⁷

Here, the Stoics reaffirm their belief both in the unifying force of judges who are morally disciplined and the threat of social disarray that comes from its antithesis.¹⁶⁸

Judges should also be careful to avoid “speaking law” in their private lives in the sense that they “should avoid lending the prestige of judicial office to advance the private interests of the judge or others.”¹⁶⁹ In this respect, judges should “be sensitive to

¹⁶⁴ Canon 2A, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

¹⁶⁵ Cicero, *supra* note 7, at 97.

¹⁶⁶ Cicero, *supra* note 7, at 251.

¹⁶⁷ *Id.* at 101.

¹⁶⁸ If for no other reason than the fact the judge is a “speaking law” and that if not careful, they will reduce the efficacy of laws and undermine the ordered liberty it maintains. Cicero, *supra* note 111.

¹⁶⁹ Canon 2B, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

possible abuse of the prestige of office” and, for example, in the case of the judge’s publications, should “retain control over the advertising to avoid exploitation of the judge’s office” by others who may use it to further their own business initiatives.¹⁷⁰ Judges should consider themselves under “constant public scrutiny” and so must “accept freely and willingly restrictions” on “both professional and personal conduct.”¹⁷¹ On these points, the Stoics offer this general advice:

In entering upon any course of action, then, we must hold fast to three principles: first, that impulse shall obey reason; for there is no better way than this to secure the observances of duties; second, that we estimate carefully the importance of the object that we wish to accomplish, so that neither more nor less care and attention may be expended upon it than the case requires; the third principle is that we be careful to observe moderation in all that is essential to the outward appearance and dignity of a gentleman. Moreover, the best rule for securing this is strictly to observe that propriety... of these three principles, the one of prime importance is to keep impulse subservient to reason.¹⁷²

Depending on the degree and regularity, failure may result in a sanction to the judge,¹⁷³ but most importantly it undermines the integrity of the judicial office and is a disservice to “his duty to uphold its honour and its dignity, [ability] to enforce the law, to dispense to all their constitutional rights.”¹⁷⁴

A deliberate and self-disciplined character is necessary for the effective administration of the judicial office. Some states have even gone so far as to enshrine the canons of judicial ethics into their

¹⁷⁰ *Id.*

¹⁷¹ Canon 2A, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

¹⁷² Cicero, *supra* note 7, at 145.

¹⁷³ Canon 1, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges.

¹⁷⁴ Cicero, *supra* note 7, at 97.

own state constitutions.¹⁷⁵ This decision acknowledges that, as a constitution restricts those who govern for the sake of the governed, judicial officers also must serve the “public trust,” a sort of “confidence in the legal system,” which is essential to maintaining “principles of justice and the rule of law.”¹⁷⁶ On this point, both the Stoic and judicial traditions agree.¹⁷⁷ The Stoics would argue that a judge should be considered eligible only if they possess the requisite temperament and if they “at all times conduct themselves in a manner that garners the highest level of public confidence in their independence, fairness, impartiality, integrity, and competence.”¹⁷⁸ Stoicism advises, “[d]o not give judgment in one court (of justice) before you have been tried yourself before justice.”¹⁷⁹

Maintaining this moral character requires a regular and disciplined effort. Moral habits must be developed, which take time: “A man ought to know that it is not easy for him to have an opinion (or fixed principle), if he does not daily say the same things, and hear the same things, and at the same time apply them to life.”¹⁸⁰ For these habits to hold, they must permeate professional and private life alike, and reach a point of practice where “what we ought not to do, we should not even think of doing.”¹⁸¹

For the Stoics, habitual effort is the key to virtuous character traits and one important aspect of this involves developing the ability to distinguishing between good or bad activities or pleasures. Epictetus states that we “should choose (pursue) not every pleasure, but the pleasure which leads to goodness” and that “it is the part of a wise man to resist pleasures, but of a foolish man to be a slave to them.”¹⁸² Developing a temperate character is important to the Stoic

¹⁷⁵ See, e.g., “canon of . . . judicial ethics” enshrined in Article V, Section 17(b) of the Pennsylvania Constitution, which states, in pertinent part: “Justices and judges shall not engage in any activity prohibited by law and shall not violate any canon of legal or judicial ethics prescribed by the [Pennsylvania] Supreme Court.” See also Code of Jud. Conduct, Preamble, 42 Pa.C.S.A. (1).

¹⁷⁶ Code of Jud. Conduct, Preamble, 42 Pa.C.S.A. (2).

¹⁷⁷ “A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.” Canon 2A, 28 USCS, Code of Conduct for United States Judges. See accord 42 Pa.C.S.A. Code of Jud. Conduct, Rule 1.2.

¹⁷⁸ Code of Jud. Conduct, Preamble, 42 Pa.C.S.A. (3).

¹⁷⁹ Epictetus, *supra* note 97, at 36.

¹⁸⁰ *Id.* at 38.

¹⁸¹ *Id.* at 43.

¹⁸² *Id.* at 45.

and judge alike, and so they say: “Check your passions [so] that you may not be punished by them.”¹⁸³

For the Stoics, being careful when entering into associations was an important skill to master, and it is the same for judges. The Judicial canons explicitly forbid association in “discriminatory organizations,”¹⁸⁴ and expect judges to remain vigilant against membership in such organizations, as they create the appearance of impropriety.¹⁸⁵ The canon also mandates that a judge becoming aware of such an organization, which they define in specific terms,¹⁸⁶ must leave them immediately or make immediate and continuous efforts (not exceeding two years) to have that organization discontinue those practices.¹⁸⁷ This is an extreme example, but it illustrates why it is important for judge to develop these private habits of moral analysis so that they can be vigilant when they are not operating officially.¹⁸⁸ In this regard, the Stoics provide useful advice on the process of selecting associates, both in business and in friendship.¹⁸⁹

The manner by which we express passion is an important part of this process.¹⁹⁰ Much of the Stoic tradition addresses the proclivities of passion, how to regulate it, and the understanding that “duties are universally measured by relations.”¹⁹¹ Thus, it is

¹⁸³ *Id.* at 24.

¹⁸⁴ Canon 2C, cmt. 1, 28 USCS, Code of Conduct for United States Judges, Code of Conduct for United States Judges; similar prohibitions are found in Pennsylvania’s Judicial Code of Conduct.

¹⁸⁵ *Id.* See also 42 Pa.C.S.A. Code of Jud. Conduct, Rule 1.2, “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” This will serve to protect against “Public confidence in the judiciary [from being] eroded,” ensuring “access to justice for all.” *Id.*

¹⁸⁶ Where “reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination...[and] an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.” *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ “You will fail (stumble) least in your judgments, if you yourself fail (stumble) least in your life.” Epictetus, *supra* note 97, at 36.

¹⁸⁹ “As a wolf resembles a dog, so both a flatterer, and an adulterer and a parasite, resemble a friend. Take care then that instead of watch-dogs you do not without knowing it let in mischievous wolves.” Epictetus, *supra* note 97, at 33.

¹⁹⁰ See *supra* note 147.

¹⁹¹ Epictetus, *supra* note 97, at 12-13.

important “you are accustomed to contemplate the[se] relations”¹⁹² and maintain propriety and the appearance of propriety by stimulating a more observant self.¹⁹³ It also enhances self-restraint, deliberate speaking, and patience over the more common tendencies of passion or outburst.¹⁹⁴ In hearing cases in court, a must judge effectively embody the sound wisdom of Zeno’s words, “[t]he reason why we have two ears and only one mouth is that we may listen the more and talk the less.”¹⁹⁵

Lastly, above all else, the Stoics abhor anger and violence, especially in those who are obligated by a law and equity to be steady.¹⁹⁶ It is no surprise, then, that the Stoics have something to say about this too and so they ask a judge to remember:

In administering punishment, it is above all necessary to allow no trace of anger. For if anyone proceeds in a passion to inflict punishment, he will never observe that happy mean which lies between excess and defect.¹⁹⁷

Such a display would amount to impropriety, erode public confidence and would reflect something spiteful, petty or mean-spirited and undermine the public perception of the legal and judicial traditions.¹⁹⁸ It “is to be desired that they who administer the [laws] should be like the laws, which are led to inflict punishment not by wrath but by justice.”¹⁹⁹

III. ADDITIONAL THOUGHTS ON STOICISM: AREAS OF POPULAR INTEREST

¹⁹² *Id.*

¹⁹³ With respect to their private lives, Epictetus would advise lawyers and judges to make a habit of: “Attempt[ing] on every occasion to provide for nothing so much as that which is safe: For silence is safer than speaking. And omit speaking whatever is without sense and reason. Epictetus, *supra* note 97, at 39.

¹⁹⁴ “Deliberate much before saying or doing anything, for you will not have the power of recalling what has been said or done.” *Id.* at 43.

¹⁹⁵ Diogenes Laertius, *supra* note 3, at 135.

¹⁹⁶ *Id.*

¹⁹⁷ Cicero, *supra* note 7, at 91.

¹⁹⁸ Cicero, *supra* note 7, at 91.

¹⁹⁹ *Id.*

This last section is a supplement to the discussion on Stoicism and the Law. It provides a general overview of the Stoic tradition, some additional doctrinal matters and its origins in antiquity. It also provides brief discussions on Stoicism's position on areas of popular interest in the law and in general for those interested in further investigation into the relevance of the Stoic tradition in our contemporary world.

A. ORIGINS OF STOICISM: REFORMED CYNICISM

Stoicism was founded by Zeno of Citium²⁰⁰ in the latter half of the 4th century BC. Zeno began his philosophical career as a student of Cynicism,²⁰¹ a related school of thought that began with Antisthenes (a counterpart to Plato and a student of Socrates), and was continued by Diogenes the Cynic and then by Crates (Zeno's teacher).²⁰² Stoicism gets its name from the location where Zeno and his fellows met to discuss matters of philosophy, the *Stoa Poikilê* or "Painted Porch."²⁰³

Stoicism is principally a philosophy of practical action, duty, habit and the development of character in accord with Nature. The Stoics were not prolific writers in comparison to other schools of thought at the time.²⁰⁴ Furthermore, much of their formative writing, from the early Hellenistic period, has been lost. What remains of the Stoic teachings, for the most part, is found in the

²⁰⁰ A city in modern-day Cyprus.

²⁰¹ Zeno began his philosophical career with an unfortunate yet auspicious twist of fate. On a merchant voyage he was shipwrecked. Losing his cargo, he went to nearby Athens and stopped at a bookseller to read (as was his passion) the works of Athenian philosophers. Enamored by what he read, he turned to the bookseller and asked him where he could find such philosophers. As he did "Crates passed by in the nick of time, so the bookseller pointed to him and said, 'Follow yonder man.' From that day he became Crates's pupil." Diogenes Laertius, *supra* note 3, at 99-101.

²⁰² *Id.* at 101.

²⁰³ The *Stoa Poikilê* was a part of the Athenian Agora complex. It was famous for elaborate paintings and spoils of various Athenian wars. SEE DAVID SEDLEY, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL FROM ZENO TO ARIUS DIDYMUS* 10 (Brad Inwood ed., 2003).

²⁰⁴ *Id.*

works of the Roman Stoics or in fragments referenced by doxographers.²⁰⁵

The history of Stoicism has traditionally been divided into three key phases of development, with some disagreement among the academics as to the finer points or subdivisions therein.²⁰⁶ It may suffice to say that Stoicism is divided into three phases, (1) Early Stoa, Zeno and the foundation of the school, c. 300 BCE, (2) Middle Stoicism and the Roman introduction to Stoic teachings, and (3) Roman Stoicism and its enduring impression.²⁰⁷ Of these phases, Roman Stoicism will dominant this discussion owing to the fact that the vast majority of surviving Stoic texts come from this period.²⁰⁸

B. SOCIAL DUTY: THE STOIC MANDATE OF PUBLIC SERVICE

[T]his is the highest statesmanship and the soundest wisdom on the part of a good citizen, not to divide the interests of the citizens but to unite all on the basis of impartial justice.²⁰⁹

The foregoing civic or social duty is one of the most important pillars of the Stoic ethical code of conduct. In the furtherance of this goal, much of Stoicism belabors the virtues of self-control, temperance and propriety in all things. By promoting these virtues, the Stoics demonstrate that theirs is not a tradition of seclusion or detached indifference but one that is chiefly concerned with the affairs of public life. Stoicism is a philosophy of practicing rational sobriety with an eye towards social responsibility, governance and adherence to civic duty.²¹⁰

The teachings of Stoicism reinforce those interested in pursuing judicial or public office. This is evidenced by the great

²⁰⁵ The scarcity of the Stoic texts, the result being a markedly Roman direction. See DAVID SEDLEY, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL FROM ZENO TO ARIUS DIDYMUS* 10 (Brad Inwood ed., 2003).

²⁰⁶ *Id.* at 7.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Cicero, *supra* note 7, at 259.

²¹⁰ MALCOLM SCHOFIELD, *THE CAMBRIDGE COMPANION TO THE STOICS, STOIC ETHICS* 255 (Brad Inwood ed., 2003).

historical figures of Ancient Rome.²¹¹ It is not too much to suppose that engagement with a philosophy, devoted in large part towards espousing the principles of public service and self-regulation, gave advantage to those individuals engaging in the rigorous and burdensome task of public office.²¹²

The Stoic ethic aims principally at furthering the “universal bonds of fellowship.”²¹³ They urge that knowledge of right and wrong is insufficient without action to “embody,” and through “habitual” action retain, such knowledge.²¹⁴ Among various Stoic maxims, few could capture the weight that Stoicism places on self-discipline as this: “Punish your passions, so that you may not be punished by them.”²¹⁵ The inevitable consequence of this aspect of Stoicism may be, at least in part, found in the term’s common usage, where “stoic” is defined as: “Determined not to complain or show your feelings, especially when something bad happens to you”²¹⁶ or when “expression of emotion is expected [or, arguably, common place].”²¹⁷ Note however, this form of personal regulation of one’s emotions does not express a desire for retreating from the civic affairs of public life, sentiment or common concern,²¹⁸ but instead aims to foster a level-headed disposition capable of withstanding the various hurdles of political and public life while fulfilling one’s obligations.

²¹¹ Including Seneca, senator and stoic philosopher; as well as Cicero, Cato and Marcus Aurelius the Philosopher King.

²¹² The Stoic mandate to engage in government and public life was not confined merely to the Stoics of ancient states like Rome. *See supra* note 9.

²¹³ Cicero, *supra* note 7.

²¹⁴ Epictetus, *supra* note 97, at 24.

²¹⁵ *Id.*

²¹⁶ *Cambridge Dictionary*. 2021. Stoic. [online] Cambridge University Press. Available at: <https://dictionary.cambridge.org/us/dictionary/english/stoic> [Accessed 21 January 2021].

²¹⁷ *Id.*

²¹⁸ This emphasis on social responsibility and engagement in public life is a defining difference between Cynicism and Stoicism. It represents the evolving beliefs of Zeno, a former or reforming Cynic (depending on how you look at it). Zeno’s developing morality is effectively summarized as being “a socially respectable revision of Cynic morality.” DAVID SEDLEY, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL FROM ZENO TO ARIUS DIDYMUS* 12 (Brad Inwood ed., 2003). It might be suggested further that by the time Roman Stoicism came about, what was a “socially respectable” revision, evolved further into a philosophy of ‘socially responsible’; although, this may simply be the result of Roman patriotism rather than philosophical development. *Id.*

Much of the popularity and prominence of early Stoicism, at least in ancient Rome, was due to the unique character of its moral recitation. The Stoic school of thought was “clearly creative in this period” and encouraged a sort of academic equity insofar as its scholastic structure and doctrinal simplicity enhanced public accessibility.²¹⁹ This systemic and doctrinal advantage came in the digestible form of “practical or applied ethics”²²⁰ or “practical advice (directed at non-wise people who want to become wise),”²²¹ a stark contrast to many of its competitors.²²² It is perhaps no coincidence that a philosophy that values academic accessibility also carries with it declarations of this sort by Cicero:

This, then, ought to be the chief end of all men, to make the interest of each individual and of the whole body politic identical. For, if the individual appropriates to selfish ends what should be devoted to the common good, all human fellowship will be destroyed.²²³

The Stoic belief that social or political well-being is achieved through encouraging citizens to develop a willful interest in their fellow citizens is admirable. Yet, this emphasis went beyond the borders of Roman political interest, if such a thing were possible at that time, to the world at large. The Stoics, most notably Cicero,

²¹⁹ CHRISTOPHER GILL, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL IN THE ROMAN IMPERIAL PERIOD* 41 (Brad Inwood ed., 2003).

²²⁰ *Id.*

²²¹ *Id.*

²²² There appears to have been long-standing discord between Stoicism and many of the competing schools of thought, e.g., those of the Epicurean and Platonists. Arguably, the Stoic emphasis on doctrinal accessibility and “universal brotherhood” was at odds, for example, with Platonists and their illustrious Academy, which at its threshold was inscribed the mandate: “let no one ignorant of geometry enter.” This division is illustrated, not just by their expression of doctrinal formulae (a good example of this being Epictetus’s *Enchiridion*, quite literally meaning “The Manual”), but by the location in which those lessons were taught. In the case of the Stoics, as discussed above, at the public steps of the Stoa, where the open access colonnade served as a constructive forum to Zeno and his followers.

²²³ Cicero, *supra* note 7, at 293.

held a profound belief that “Nature’s law” demanded and expected the “universal brotherhood of mankind.”²²⁴

In condemnation of philosophers who refuse to assume the mantle of public responsibility, instead remaining recluse from public life, Cicero had accused them of forsaking an implied fiduciary duty found in moral (if not statutory) law: “For they secure one sort of Justice, to be sure, in that they do no positive wrong to anyone, but they fall into the opposite injustice; for hampered by their pursuit of learning they leave to their fate those whom they ought to defend.”²²⁵ This is consistent with the Stoic mandate to promote and protect “human fellowship” and “good faith” engagement with the community at large.²²⁶

C. ANCIENT FEMINISM: HIPPARCHIA THE CYNIC & STOICISM

In the service of this mandate, Stoicism offers practical advice on individualism²²⁷, embracing character diversity,²²⁸ social inclusivity²²⁹ and countless others. One of the most notable examples of this was the story of the lesser-known philosopher Hipparchia. One important example of Hipparchia’s prowess in philosophy was an argument she engaged in with the prideful Theodorus. After besting Theodorus, leaving him with “no reply wherewith to meet the argument,” he threatened her, and not only did Hipparchia show “no sign of alarm” but lodged the following retort, “[i]t is I, Theodorus,-but do you suppose that I have been ill

²²⁴ *Id.* at 293-94.

²²⁵ *Id.* at 29.

²²⁶ *Id.*

²²⁷ Cicero states that it “goes against the grain” for citizens to engage in “copying the personal traits of others and eliminating one’s own.” Essentially, he is arguing a stoic position that individual autonomy in this respect keeps a polis healthy and strong. By giving each citizen the opportunity to explore those “peculiar gifts” that make up their unique person or “natural genius” the society and individual flourishes in a life in accord with nature. He reminds us that “countless dissimilarities exist in natures and characters, and they are not in the least to be criticized” but instead should be embraced for its moral and economic benefit to the individual and the polis. *Id.* at 113.

²²⁸ *Id.*

²²⁹ “Others again who say that regard should be had for the rights of fellow-citizens, but not of foreigners, would destroy the universal brotherhood of mankind; and, when this is annihilated, kindness, generosity, goodness, and justice must utterly perish.” *Id.*

advised about myself, if instead of wasting further time upon the loom I spent it in education?"²³⁰

Hipparchia found her passion for philosophy through Crates the Cynic, the mentor of Zeno of Citium and the founder of Stoicism.²³¹ Moreover, Zeno celebrated Crates' inclusivity and held his equal treatment of Hipparchia actions to be "implicitly Socratic," as it was the mark of Socrates to engage in what was then a "scandalous flouting of social norms."²³²

Much of Cynic ethics "remained a dominant influence on Stoic thought," and though Zeno would soon diverge from his mentor on some key aspects of public life,²³³ these influences endured.²³⁴ It is hardly surprising that Zeno, watching his mentor Crates and Hipparchia argue the great philosophical questions, saw philosophy as a great equalizing force that fought against moral apathy and societal complacency that allowed social injustice to fester.²³⁵ Philosophical inquiry was the mechanism through which the ancients could challenge the *status quo*.

²³⁰ *Id.* at 101.

²³¹ The doxographer Diogenes Laertius wrote on Hipparchia's persistence and resolve to enter the pursuit and world of philosophy: "She fell in love with the discourses and the life of Crates and would not pay attention to any of her suitors, their wealth, their high birth or their beauty. But to her Crates was everything. She used even to threaten her parents she would make away with herself, unless she were given in marriage to him. Crates therefore was implored by her parents to dissuade the girl, and did all he could, and at last, failing to persuade her, got up and told her that it was her choice: 'this is the bridegroom, here are his possessions; make your choice accordingly; for you will be no helpmate of mine, unless you share my pursuits.'" Diogenes Laertius, *supra* note 3, at 99-101.

²³² Among some of Zeno's positions, he believed that there should not be "differential dress for the sexes." David Sedley, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL FROM ZENO TO ARIUS DIDYMU* 9 (Brad Inwood ed., 2003).

²³³ "Zeno's mature philosophy, was his attempt to rescue an ethical role for conventional values." *Id.* at 10.

²³⁴ While it is by no means ethically innovative by today's standards, Zeno, Stoicism's founder, and Chrysippus, the third head of the Stoic school, is recorded as having advocated for a society that comprised "a community of wives with free choice of partners." Diogenes Laertius, *supra* note 3, at 235. Interestingly, Stoicism is also referenced in the landmark case of *Roe v. Wade*. *Roe v. Wade*, 410 U.S. 113, 160 (1973) ("There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics").

²³⁵ It is worth noting that not every Stoic followed the positive example set by Zeno on this point.

There remains little knowledge of the life and wisdom of Hipparchia. However, what remains is testament to her ability to embody the ideals of Socrates and his philosophical progeny, the Cynics and the Stoics. Like Socrates, she was a *gadfly* that bit the Athenian *ass*, waking it with questions, wit and reason.²³⁶ For those interested in Cynic and early Stoic philosophy, Hipparchia provides a worthwhile model.²³⁷

D. STOIC PANTHEISM: THE UNIVERSE, NATURE & DIVINITY

Stoicism is principally a philosophical tradition. Throughout that tradition, however, is a deeply held worldview that incorporates elements of theology and much of the corollaries that go with the study of divinity. For instance, much of Stoicism is centered on an almost spiritual belief in the fulfillment of one's social duties, exercised in accordance with Nature. The term *Nature* is of particular importance to the tradition as it is the principal source of guidance for the Stoic belief system. *Nature* is, according to the Stoic school, synonymous with reason, god, the world and the universe itself; that is, these terms are often used interchangeably. The pantheism of Stoics is reflected throughout their doctrines on cosmology, mortality, teleology, philosophy and ethics. The tradition adopts a strong belief in free will, within the confines of an unknowable yet ordered universal equation punctuated by articles of determinism.²³⁸

Studying the Nature of the Universe and its logical consequences is not just relegated to the obscure philosopher or theologian, but for the Stoics it is encouraged that all consider the

²³⁶ See *supra* note 2.

²³⁷ For additional material on the life and teachings of Hipparchia, consider the surviving letters between her and Crates. Their friendship and discussions on gender equality and the goals of philosophy are as heartwarming as they are insightful. Diogenes the Cynic, SAYINGS AND ANECDOTES WITH OTHER POPULAR MORALISTS 173-74 (Robin Hard trans., 2012).

²³⁸ "All things are mutually intertwined, and the tie is sacred, and scarcely anything is alien the one to the other. For all things have been ranged side by side, and together help to order one ordered Universe. For there is both one Universe, made up of all things, and one God immanent in all things, and one Substance, and one Law, one Reason common to all intelligent creatures, and one Truth: if indeed there is also one perfecting of living creatures that have the same origin and share the same reason." Marcus Aurelius, MEDITATIONS, 169 (C.R. Haines trans. & ed., Jeffrey Henderson ed., 1930).

larger world around them.²³⁹ Marcus Aurelius, wrote the following on Stoic pantheism:

Cease not to think of the Universe as one living Being, possessed of a single Substance and a single Soul; and how all things trace back to its single sentience; and how it does all things by a single impulse; and how all existing things are joint causes of all things that come into existence; and how intertwined in the fabric is the thread and how closely woven the web.²⁴⁰

Here, Aurelius expresses a belief in a universal equation that is constantly unfolding around us, which reacts to our actions and acts upon us, though not necessarily as an actor itself.²⁴¹

The idea that the Universe is governed by certain natural laws, and that Nature is responsible for all life and the rules governing life permeates throughout the Stoic belief system. The position that “God is one and the same with Reason”²⁴² was first presented by Zeno who believed the “substance of God is declared by Zeno to be the whole world and the heaven” and that this belief was also shared “as well as by Chrissippus ... and by Posidonius.”²⁴³ Further still, if we aspire to ‘pious,’ we should seek to embody those things that further our rational nature and so allow us to live in “in accord with Nature.”

Diogenes Laertius describes the seemingly repetitive use of the term “Nature” by the Stoics as follows:

Now the term Nature is used by them to mean sometimes that which holds the world together,

²³⁹ “Zeno’s view is that the law of nature is divine, and that its function is to command what is right and to forbid the opposite.” Cicero, Loeb Classical Library, *DE NATURA DEORUM*. 39.

²⁴⁰ Aurelius, *supra* note 238, at 40.

²⁴¹ The pantheism of Stoicism is discussed more by some stoics than others. Marcus Aurelius was especially prolific on the subject and so much of his *Meditations* concern the subject: “[T]here is both one Universe, made up of all things, and one God immanent in all things, and one Substance, and one Law, one Reason common to all intelligent creatures, and one Truth.” *Id.* at 11.

²⁴² Diogenes Laertius, *supra* note 3, at 101.

²⁴³ *Id.* at 253.

sometimes that which causes terrestrial things to spring up. Nature is defined as a force moving of itself, producing and preserving in being its offspring in accordance with seminal principles within definite periods, and effecting results homogeneous with their sources. Nature, they hold, aims both at utility and at pleasure, as is clear from the analogy of human craftsmanship.²⁴⁴

In many respects, the Stoic conception of “Nature” is merely an expression of their attempt to answer the universal questions found in the natural sciences and philosophy in general.

Stoicism has from this pantheist worldview created a formidable code of ethics that has influenced the development of emperors, states and their laws, theologies and their dispositions, and has silently²⁴⁵ shaped much of the Western world. The list of leaders who have sought guidance in the tenets of Stoic tradition are numerous,²⁴⁶ and it has in recent years it has experienced a surge in interest (and not just by the philosophy undergraduate who happens to stumble over it).²⁴⁷ Often appearing to the public in times of great social upheaval, distress or change, the tradition has seen the collapse of both the Roman Republic and Empire alike.²⁴⁸ Stoicism had a hand in the formation of early Christianity as well, as Paul began to adjust the early Christian doctrines to incorporate and consolidate the communal standards of Rome to be more

²⁴⁴ *Id.* at 254.

²⁴⁵ Ryan Holiday, *The Secret, Singular Philosophy That Today's Politics Are Desperately Missing*, THE OBSERVER, <https://observer.com/2017/03/the-secret-singular-philosophy-that-todays-politics-are-desperately-missing/>

²⁴⁶ *The Definitive List of Stoicism in History & Pop Culture*, Daily Stoic, <https://dailystoic.com/stoicism-pop-culture/>

²⁴⁷ *Id.*

²⁴⁸ Cicero wrote extensively on the need for Stoic ethics in public and political life as he attempted to protect his beloved Republic from the unfortunate rise of autocratic rule; his works give us a rare glimpse into the political application of Stoicism as a tool against Tyranny. *See generally supra* note 233. The Stoic Opposition is another interesting example of this, they were a group of stoic philosophers during the first century in open opposition to infamous Nero and Domitian. Their examples inspired the Stoic paragon Epictetus and the Four Great Emperors, the most notable of which, Marcus Aurelius. *See Stoic Opposition*, Wikipedia (Accessed Feb. 14, 2021), https://en.wikipedia.org/wiki/Stoic_Opposition.

familiar to the Roman populace.²⁴⁹ At the time of the collapse of the Rome Empire, Christianity had already taken on the appearance of the Roman culture to ease its introduction into Roman society. When Rome finally fell and Christianity entered the gap left by Roman leadership, it unknowingly spread hidden tenets of Stoicism throughout Europe.²⁵⁰ Christianity was, however, not in complete agreement with Stoicism, especially regarding the empowerment of the individual's will.²⁵¹

The justification for this Stoic pantheistic worldview in the life of a human being is particularly compelling, if we consider the Stoic argument that: “[T]o the rational creature the same act is at once according to nature and according to reason.”²⁵² That is, for a human being to live in accord with Nature (and so be happy), he must live in accord with what is unique to human beings, the ability to reason.²⁵³ Moreover, that if you aim in all instances to act according to and under total discretion of your rational faculty (i.e., reason, logic, etc.), you will find contentment and truth in the statement, “I am the master of my fate, I am the captain of my soul.”²⁵⁴

This position may at first appear to advocate for purging ourselves completely of all emotions or risk being unhappy or worse. On the contrary, it advocates for control (not eviction) of our passions with the understanding that failure to reign ourselves in may cause us to neglect our social duties and thus harm ourselves, loved ones, and society. Therefore, the importance of gathering and binding oneself to practical guiding principles is essential to the process of self-discipline. On this point, it is worth reiterating Epictetus, who provides: “Punish your passions, so that you may not be punished by them.”²⁵⁵

Whether Stoicism is better described as a philosophical tradition, theology or plain and simple practical wisdom, it makes

²⁴⁹ See generally Paul's Letters to the Galatians.

²⁵⁰ *Id.*

²⁵¹ See A.A. LONG, STOICISM IN THE PHILOSOPHICAL TRADITION 365-385 (Brad Inwood ed., 2003); See also T.H. IRWIN, STOIC NATURALISM AND ITS CRITICS 345 (Brad Inwood ed., 2003). See also KIEMPE ALGRA, STOIC THEOLOGY 153 (Brad Inwood ed., 2003).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ William Ernest Henley, *Invictus*, line 15-16, Poetry Foundation, <https://www.poetryfoundation.org/poems/51642/invictus>.

²⁵⁵ Epictetus, *supra* note 97, at 24.

little difference. In the end, it remains a reservoir of moral guidance and has made its mark on history.

E. STONEWALL AGAINST TYRANNY: A HISTORY OF VEXING TYRANTS

In the face of tyranny, the Stoics “correctly define courage as “that virtue which champions the cause of right.” Accordingly, no one has attained to true glory who has gained a reputation for courage by treachery and cunning; for nothing that lacks justice can be morally right.”²⁵⁶ Cicero says, “but even the courage that is prompt to face danger, if it is inspired not by public spirit, but by its own selfish purposes, should have the name of effrontery rather than courage.”²⁵⁷

Cicero goes on to warn against the sort of character that gives rise to a tyrant, despot or authoritarian: “But when one begins to aspire to pre-eminence, it is difficult to preserve that spirit of fairness which is absolutely essential to justice. The result is that such men do not allow themselves to be constrained either by argument or by any public and lawful authority; but they only too often prove to be bribers and agitators in public life, seeking to obtain supreme power and to be superiors through force rather than equals through justice.”²⁵⁸

Lastly, Cicero outlines what might be considered the fallback position of the Stoic political figure: “In carrying out such enterprises, some run the risk of losing their lives, others their reputation and the good-will of their fellow-citizens. It is our duty, then, to be more ready to endanger our own than the public welfare and to hazard honor and glory more readily than other advantages.”²⁵⁹

Whether it is historical coincidence or the logical byproduct of the inquisitive and meddlesome nature of the Stoic ethical system, there is a notable history of Stoic statesman speaking out against tyranny with the usual consequent being martyrdom. This theme is especially pronounced within the Roman period of

²⁵⁶ Cicero, *supra* note 7, at 65.

²⁵⁷ *Id.*

²⁵⁸ Cicero, *supra* note 7, at 66.

²⁵⁹ *Id.* at 85.

Stoicism's development. The Stoic emphasis on civic, social and political duty often resulted in the ideal statesman or magistrate within Roman society. Of particular note, was the high value Stoicism placed on public life and the service to one's community and nation as a whole. Coincidentally, this form of civic or social devotion made it the common lot of the Stoic statesman to combat the perennial rise of tyranny.²⁶⁰ It is unclear whether this was unique to the Roman stoics or whether it was Stoicism's inherent stubbornness to the changing tides of common morality; but what is clear was that regardless of the ebb of public favor or fervor, Stoicism reappeared in moments of national crisis as a public servant eager to serve the polis.

F. STOICISM & SUICIDE: A BRIEF DISCUSSION ON PHYSICIAN-ASSISTED SUICIDE

Stoicism's position on suicide is also worth noting, as it may provide insight into some of the moral (and consequently the legal) questions underlying physician-assisted suicide in healthcare law. The Stoic fixation with the independent exercise of one's own will (or agency) cannot be overstated. Yet, this moral independence comes with the binding expectation that one commits themselves not just to their own moral development, but to the service of good governance and social responsibility, which that development promotes.

Stoicism supports a "well-reasoned exit from life."²⁶¹ That is, when circumstances are such that a person can no longer live a dignified and virtuous life, e.g. as a result of serious illness,

²⁶⁰ One of the most iconic of these sacrifices was that of the Roman senator and stoic philosopher Marcus Tullius Cicero. Where, after tireless efforts to preserve his Republic against the licentious rise of Mark Anthony and the shrewd strategic mind of Caesar Octavian, Cicero was assassinated. His hands were then severed and nailed to the senate door to serve as both a warning to others and as a poignant peroration in history- as the last vestiges of Roman liberty fell away. For an interesting discussion on the political and philosophical implications this change had on social duty, consider the following discussion by Professor Hamilton of Harvard: John T. Hamilton, *Security: Politics, Humanity, and the Philology of Care, A Brief Semantic History of Securitas*, Princeton University Press 2013, 51-67. Another notable example, in this case a forced suicide, was the fate of Seneca, the senator, Stoic philosopher and personal advisor to the infamous Nero.

²⁶¹ David Sedley, *THE CAMBRIDGE COMPANION TO THE STOICS, THE SCHOOL FROM ZENO TO ARIUS DIDYMUS* 10 (Brad Inwood ed., 2003).

senility²⁶² or even to resist political subjugation,²⁶³ it becomes morally permissible to exercise one's free will (or enlist the aid of others) to "resolve to live no longer."²⁶⁴ If these circumstances of rational competency and considered judgment are not present, being muddled by passion or impulse, it becomes something shameful and repugnant to the Stoic sensibility. Essentially, it represents the forsaking of one's civic duty and runs against the Stoic ethos.²⁶⁵

²⁶² "[At] the onset of senility ... judge if the time has come to end [your] days on earth." Diogenes Laertius, *supra* note 3, at 99-101.

²⁶³ Cato the Younger and his final act of resistance against Gaius Julius Caesar. *Id.* The same view is shared by Marcus Aurelius in his *Mediations* over a century later: "but if men will not let you (live freely and in accord with Nature) ... Quit the house of life. 'The hut smokes; I move out'... Attaining goodness and integrity? If you cannot live so, you need only resolve to live no longer." Marcus Aurelius, *supra* note 213.

²⁶⁴ *Id.*

²⁶⁵ *Id.*