Natural Law – Stoicism

Cleanthes: the good lies in “living in agreement with nature”

Stoics believed that the whole of the world was identical with the fully rational creature which is God, so human law must accord with God’s law
Cicero (106-43 BCE). *De Legibus*

”the true and supreme law, whose commands and prohibitions are equally infallible, is the right reason of the Sovereign Deity”

“no law but that of justice should either be proclaimed as a law or enforced as a law”
Aquinas (1225-1274) builds upon earlier Christian thinkers, esp. Augustine: “natural law is nothing else than the rational creature's participation in the eternal law”
Grotius (Dutch, 1583-1645) looks to natural law to provide justification for Dutch maritime rights and provide law beyond sovereignty. Argues that the seas are the common property of all, given by God to further the good of humankind.
Natural Law – English Natural Rights Tradition

Locke as most significant figure (inspiration for Jefferson)

Natural law for Locke was what pertained before political society

Laws in political society must be compatible with natural law to be legitimate
U.S. Revenue Cutter *Dallas* seized the *Antelope*, sailing under Venezuelan flag, with a cargo of 281 Africans, drifting in international waters off Florida.

Marshall’s opinion frees 80% of the Africans, all but those designated as Spanish property (39) where there was clearer title than the Portuguese claims, given history of piracy involving *Antelope*. 
Positive Law

Jeremy Bentham (1748-1832).

Natural Law is “nonsense on stilts”

Positivism tied to Bentham’s scientific philosophy, focus on empirical, focus is on law in action, rather than as normative system
Positive Law

John Austin (1790-1859)

Law is command issued by the sovereign when that command is enforced by sanctions and the sovereign is obeyed by the majority.
Positive Law

Hans Kelsen (1881-1973)

“Law is not, as it is sometimes said, a rule. It is a set of rules having the kind of unity we understand by a system”

“Pure Theory” of law excludes consideration of political choices behind law’s substance
Positive Law

H.L.A. Hart (1907-92), Oxford Jurisprude

Rule of law requires both

1. Primary rules – obligations and prohibitions

2. Secondary rules – govern primary rules and give them proper effect, signaling when they are legitimate and defining their scope/power
Lon Fuller and Procedural Naturalism

Fuller’s position lies between pure theory of natural law and legal positivism.

Fuller reacts to moral emptiness of positivism, and hopes to find substantive norms within law itself as a social practice.

Law provides social goods like stability and respect for human autonomy.
“What I have called the internal morality of law is ... a procedural version of natural law ... concerned, not with the substantive aims of legal rules, but with the ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be.”

Lon Fuller
Son of the poet and physician, thrice wounded Civil War veteran with a distinctly libertarian voice, but not doctrinaire on free market economics.

Part of early Pragmatist circle with William James and others at Harvard.

Most influential jurist of his day, by far.

An example: Frank on Holmes: OWH "put away childish longings for a father-controlled world" and attained "an adult emotional status, a self-reliant, fearless approach to life."
Dworkin, “Law as Integrity,” 111

American legal philosopher, student of Fuller, who takes over H.L.A. Hart’s Chair at Oxford, now at NYU, still actively writing

Attempts to find a middle way between natural law and positivism, similar to Fuller but more dependent on judging and use of texts