Philosophy of Law
An introduction

2nd Edition

Mark Tebbit

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

Philosophy of Law

2nd edition

Philosophy of Law: An Introduction provides an ideal starting point for students of philosophy and law. Assuming no prior knowledge of philosophy or law, Mark Tebbit introduces readers to fundamental legal theories and concepts, and to the philosophical questions they raise. He provides an exceptionally wide-ranging overview to the competing theories and the disputes in the subject, both classical and contemporary.

The book is structured around the key issues and themes in philosophy of law:

- **What is the law?** - the major legal theories including natural law, positivism and realism.
- **The reach of the law** - obligation and civil disobedience, rights, liberty and privacy.
- **Criminal responsibility and punishment** - legal defences, intention and recklessness, insanity, diminished responsibility and theories of punishment

This new edition has been updated to cover important developments in English law, such as the changes in the tests for recklessness and defences to rape, the general impact of the Human Rights Act since it came into force in 2000, and the defence of necessity in relation to the Case of the Conjoined Twins. Also in this 2nd edition, radical Marxist, feminist, critical legal studies and critical race theories are explained against the background of the ongoing controversy between postmodernism and defences of modernity. These radical perspectives on legal theory and criminal law are compared with those of the mainstream liberal tradition, giving students a more complete picture of the current state of jurisprudence and philosophy of law. The new chapters assess the value of both traditional legal theory and the various critical perspectives, and study questions at the end of each chapter help students explore the most important issues in philosophy of law.

Mark Tebbit is Lecturer in Philosophy at the University of Reading. He is also a Member of Faculty at the University of Notre Dame (London Centre).

Philosophy of Law
An introduction

2nd Edition

Mark Tebbit

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2005
by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Ave,. New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group

This edition published in the Taylor & Francis e-Library, 2005.

"To purchase your own copy of this or any of Taylor & Francis or Routledge's collection of thousands of eBooks please go to www.eBookstore.tandf.co.uk."

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
Tebbit, Mark, 1950-
Philosophy of law : an introduction / Mark Tebbit.-- 2nd ed.
p. cm.
"Simultaneously published in the USA and Canada."
Includes bibliographical references and index.
ISBN 0-415-33440-3 (hardback : alk. paper) -- ISBN 0-415-33441-1 (pbk. : alk. paper) 1. Law--Philosophy. I. Title.
K230.T43A37 2005
340'.1--dc22
2005000798

ISBN 0-203-36687-5 Master e-book ISBN

ISBN 0-203-68053-7 (Adobe eReader Format)
ISBN 0–415–33440–3 (hbk)
ISBN 0–415–33441–1 (pbk)

Contents

Preface to 2nd edition

With the addition of new material in this edition, it is important to stress that this remains an introductory book aimed at philosophy and law students in the early stages of a course in the philosophy of law or jurisprudence. The main aim is still that of providing a basic grounding in the concepts and arguments that have been prominent throughout the history of philosophy and law, and to stimulate interest in wider reading in these areas. The dispute between natural law theories and positivism, along with the radical challenge represented in the early twentieth century by American legal realism, remains the central focus of the book, because these disputes have not been supplanted by the more recent radical challenges. With the extended treatment of the subject for this edition, however, I have included a general description and assessment of the contemporary critical onslaught on the mainstream, with a selection of representative themes from the most prominent of these critical theories.

There is no common factor behind the critical theories operating today, and they do not come in neat packages. Behind the diversity, however, the greatest single influence upon radical legal analysis is that of postmodernist philosophy, which by its very nature resists easy definition. 'Postmodern' and all the terms associated with it can be highly mystifying to the uninitiated. In the short chapters dealing with the attacks on 'modernity', I have done what I can to demystify these terms and explain with concrete examples the implications of postmodernism for legal theory. We are constantly assured in the media today that we now live in 'a postmodern world', that we are living through an irreversible shift in the direction of 'a postmodern culture'. This sometimes means no more than that some of us now are lucky enough to be living in a more tolerant and diverse political climate, or that all the old religious and moral certainties have gone. Postmodernism also does, however, have serious philosophical content, in as far as it represents a revolution in the philosophy of language and attempts to dismantle the philosophies traditionally associated with or derived from the Enlightenment. It is against this background that I have explained its impact on the mainstream legal theories.

Not all of the radical criticisms, however, are postmodernist in their basic orientation. Equally important is the more traditional radicalism of socialist

and Marxist thinking on the law, in particular in their critiques of liberal individualism, the sometimes subliminal influence of which can be seen through the whole field of critical theories today. Just as most of the Marxist schools of thought, despite or perhaps because of the sharp decline of communism since the early 1990s, still stand on the side of 'modernity', so also do many of the feminist critical writings. The most valuable critical discussions have emerged from those who are engaged with the detailed analysis of legal concepts and legal reasoning. The rise of the Critical Legal Studies movement and those associated with it has also been significant in this respect. In presenting these criticisms as fairly and objectively as possible, what I have aimed at is a text that can be used to compare critical theories with mainstream thought, with a selective bibliography to point readers in the direction of deeper analysis. One point that should be noted is that the chapters on modernity and critical thought (Chapters 5, 9 and 13) presuppose familiarity with the arguments in the foregoing chapters.

The book is presented in three parts, each of which covers one of the main areas in which philosophical analysis has been prominent. Each of the chapters into which these parts are divided is followed by a set of study questions and selections for suggested further reading on issues dealt with in that chapter. The questions can be used in various ways. The main point is to indicate the kind of questions a student should be able to discuss at that stage of the book. They can also be used as formal essay titles and suggestions for essay content. They are loosely structured and need not be adhered to rigidly. The further reading recommendations, which are selected on the principle of diversity of opinion within the tradition, can be found in full in the bibliography at the end of the book.

Acknowledgements

Above all, I want to thank Rosalind Dunning for her constant encouragement and useful suggestions, especially on matters of law. I am also especially indebted to John Cottingham for his initial advice and constructive criticism. Comments on early stages of the draft by David Jabbari and Harry Lesser were also greatly appreciated, as were the comments and suggestions by a number of anonymous readers. The Reading University Philosophy Department as a whole, in particular the Head of Department, Mike Proudfoot, made this project possible. Special mention should be made of Dave Burnet and Hugh Maguire for valuable bibliographical suggestions. John Smallwood's legal advice was also greatly appreciated. The students who have taken my philosophy of law course at Reading and at Notre Dame, London, since the 1990s have also helped more than they realised. Patrick Dunn pointed out an inconsistency in the material in Chapter 10. Finally, I would like to thank all the philosophy and law lecturers who responded to my questionnaire in 1995.

Mark Tebbit
University of Reading
2005

Part I

What is the law?

1 Morality, justice and natural law

We all know what it means to break the law. It is perhaps the most fundamental fact governing our social behaviour that we understand the constraints and the pressures to stay within the law and the consequences of not doing so. The law is pervasive, controlling our lives in many more ways than we are usually aware; nevertheless, in most commonplace situations we have a fairly accurate knowledge of what the law requires and what it forbids. In those grey areas in which this is not clear, you might seek legal advice about your rights and obligations. In such situations, one thing you are unlikely to ask of a solicitor is where the law comes from, or, for that matter, why you should obey it; such questions would be quite inappropriate. These, however, are among the fundamental questions about the law. What exactly is the law? What does legal validity mean? What is a legal system? What is the 'rule of law'? These questions have been asked by legal philosophers since the first appearance of civilised legal systems, and the variation in answers has been of practical as well as theoretical significance. The purpose of this first chapter is to introduce the main points of disagreement on these questions and to explain some central strands of traditional approaches to an understanding of the meaning of law.

Morality and law at variance

The issue that stands behind nearly every controversy in contemporary legal theory is the problem of how law is to be understood in relation to moral values. A distinctively modern claim that any student of the subject will encounter almost immediately is the insistence that a systematic and rigorous analysis of the law requires 'the separation of law and morality'. This is frequently referred to as 'the separation thesis', and it is generally held to be the defining characteristic of legal positivism. Despite its apparent clarity, this thesis has been the source of much confusion and dispute. What does it mean to say that the law and morality are separate, that the law is one thing and morality is another? Before we proceed with the analysis of the various perspectives on law, it will be helpful to consider some ways in which law and morality appear to intersect and overlap, and other ways in which they clearly diverge.

Within the present-day common law jurisdictions, there is a general expectation that the written law and legal judgement will at least roughly approximate to prevailing moral values and moral judgements. A victim of a fraudulent contract or a libel, for example, seeks legal redress in the expectation that the court will adjudicate in the same manner as would any fair-minded individual independently of the legal context. In this respect, it seems that morality and the law have a common purpose. Similarly, the system of criminal justice is expected to reflect popular norms of approval and disapproval. The primary function of the criminal law is commonly taken to be the protection of people from those who threaten or violate the interests of others. The most characteristic criminal offences are those that are commonly regarded as morally wrong: assault, murder, theft, burglary, fraud, criminal damage, and so on. In this respect also, it seems that the law is no more than the enforcement of a moral code, distinguishing right from wrong in much the same way. In short, if it is wrong, it must be illegal; if it is legal, it must be morally required or at least morally acceptable. To the extent that this is true, it can be said that there is a large area of overlap between morality and the law.

Closer examination, however, shows this to be a superficial assessment. There are in fact a number of distinct ways in which legal norms substantially diverge from moral norms. On the one hand, the law is in many respects *less* demanding than any serious moral code. The great majority of laws are prohibitions rather than positive commands, their main purpose being the negative one of establishing boundaries. The law generally does not require acts of charity or assistance that might be thought morally obligatory. In this sense, the law operates a minimal morality, based primarily on the need for restraint.

On the other hand, however, the law is in some senses *more* demanding than morality. In some relatively trivial respects, such as the requirements of bureaucracy or non-life-threatening traffic offences, it is arguable that one can break the law without doing anything morally wrong. What is often overlooked is that there are also more serious ways in which this can be the case. Legislation in the twentieth century has greatly extended the area of liability for harmful acts or omissions that are not directly intended and for which one would not normally be blamed. Whether or not this gradual extension of the 'duty of care' does actually reflect changing moral beliefs about responsibility is an issue about which more will be said in the course of the book. It is enough to say at this point that, on the face of it at least, the law has been ahead of popular perceptions of moral responsibility in this respect.

There is another distinct sense in which it can be seen that law and morality do not easily harmonise. Contemporary disagreement over such issues as the right to own firearms, the hunting of various kinds of animal, the stage of pregnancy at which abortions become unacceptable, the illegality of nearly every form of euthanasia, reveals an uneasy relationship

between morality and the law. On such matters, the law cannot reflect the prevailing moral code, because there is no general agreement on the rights and wrongs at stake. In these contexts, the law must be out of step with morality, in the specific sense that it cannot match the prevailing moral beliefs of society as a whole.

The myth of the congruence between morality and law is also exposed by any reflection on the history of institutionalised injustice and the struggles for equality and human rights. Penal codes sanctioning excessively cruel or inappropriate punishment, the legal endorsement of slavery and the slave trade, the barring of religious and ethnic minorities from the professions, and the denial of civil rights to women have all been opposed primarily through pressure for legal reform. The Nazi Nuremberg laws, the laws establishing and upholding apartheid in South Africa and the US racial segregation laws have all been taken as outstanding examples of manifest incongruence between morality and law.

Many of these, of course, have been in step with the prevailing local morality of the day, and hence there is no necessary antagonism between the state of the law and the demands of contemporary moral perceptions or sense of justice. It is only from the standpoint of moral objectivism that it can be argued that the demands of justice rise above any particular social belief system, and that such laws can be judged in absolute terms as right or wrong. Moral relativists tend to argue that what usually happens is that with the advance of civilisation, the law comes into conflict with evolving moral norms, as these practices are increasingly perceived to be wrong; and that the law continues to protect outdated moral beliefs until it is reformed. Either way – moral objectivist or relativist – these examples show that there is at least a permanent tension between morality and the law, and that moral values never rest easily with the state of the law at any given stage of its development.

The positivist separation thesis insists that the law is one thing and morality, or the moral evaluation of the law, is another. This means that the connection between law and morality is contingent; laws do not always coincide with moral values or moral codes. There is no necessary connection between morality and the law. A law does not have to conform with any moral standard to be counted legally valid. One thing the separation thesis does not mean, however, is that legislators and judges are concerned exclusively with legal matters and should be quite indifferent to the moral rights and wrongs of the law. This may in practice be true up to a point, if the administration of a specific law is concerned more with the protection of sectional interests than with promoting justice, or if a judge believes that he or she is obliged to apply the letter of the law even when it is morally counterintuitive. These, however, are mistaken interpretations of the meaning of the separation thesis, the function of which is primarily to develop an accurate description of the reality of law. This is a crucial point in legal theory, and it will be developed and clarified in the following chapters. To understand the

prime target of the positivist separation thesis, we need first to focus on the concept of justice and the natural law theories that were built on an absolutist interpretation of this concept.

What is justice?

The concept of justice is not only the most prominent theoretical concept in the philosophy of law, equalled in importance only by that of 'law' itself, it is also so regular a feature of common discourse about public life that virtually everybody has an immediate intuitive understanding of it. It is one of those concepts – like 'being' or 'truth' – that is so readily understood, especially in the context of its negation, 'injustice', that any questioning of its meaning tends initially to cause consternation. We can all give examples of an injustice, but when faced with the direct abstract question of what exactly is the justice that is being denied, it is difficult to know where to start. One good starting point is to ask what kinds of thing the quality of justice can be ascribed to, and to confine our answer in the first place to common usage of words.

What rapidly becomes clear is that justice, as a fundamental moral concept, can only be ascribed in situations involving consciousness, rationality and a moral sense. The suffering caused by hurricanes, earthquakes or elephant stampedes is not in itself an injustice. What might be thought an injustice is the failure to relieve such suffering, or to help some at the expense of others. Justice is an issue only where there is conscious, purposive activity. Whether this is the activity of natural beings such as legal officials and emperors, or supernatural agencies such as angry or benevolent gods, the presence of conscious purpose is a necessary condition for speaking of justice.

The kinds of thing that can be described as just or unjust fall into three basic categories: agents, actions and states of affairs that are created by the actions of agents:

1 In traditional usage, the quality of justice is commonly attributed to individuals as such, a 'just God', 'a just monarch' or 'a just man'. Although this usage is still extant, it is more common today to speak of persons with a greater or lesser sense of justice. We also use the term collectively to describe governments, which can have a general reputation for justice or for tyranny.
2 It is also more common in contemporary discourse to ascribe justice to particular actions and decisions rather than to people as such. A just action or decision is one that is sensitive to the rights of all those affected by it. An unjust action or decision is one that violates these rights.
3 The institutions typically held to exhibit the qualities of justice or injustice in varying degrees are those of a human society, a rule of law and a legal system. A society can be just or unjust in different ways: it can be organised in such a way that its benefits or burdens are distributed

unfairly, and 'an unjust society' can also be understood as one in which the discrimination against or persecution of minorities is commonplace. More specifically, a legal system – which is often assumed to be the very embodiment of the pursuit and protection of justice – can be just or unjust to a greater or lesser degree. Legal systems that fall into disrepute are those that, for example, suspend *habeas corpus* or pervert the rules of evidence. Legal systems can be defective in other substantive ways, by failing to provide just and accessible remedies for civil wrongs, or by failing to develop an effective system of criminal justice. More specifically again, an unjust law is one that is perceived to perpetrate a formal or substantive injustice. For example, laws that are retrospective in their effect are widely regarded as unjust, because the subjects of the law are unable to decide whether or not to obey. In such cases, the form of the law is unjust. If there were a law, for example, preventing women from owning property, it would also be unjust in substance because there are no objective grounds for believing that they lack the ability to administer it.

The above threefold classification can be supplemented by Aristotle's pioneering analysis, which remains a classical point of reference for legal theory. Aristotle (384–322 BC) divided justice into the distributive and the corrective (or 'emendatory'), the latter being subdivided into voluntary private transactions and involuntary transactions, the second distinction turning on the presence or absence of violence towards the victim of the injustice. This classification corresponds roughly to the distinction between social justice, civil justice and criminal justice.

Justice and equality

In the context of distributive justice, the problem of how the equality and inequality of status and entitlements between individuals are to be understood is paramount. Each political interpretation of what is to count as a fair distribution – whether rewards should be based on, for example, personal ancestry, individual worth and desert, effort or needs – has different implications for conclusions about political equality.

In sharp contrast, with both kinds of corrective legal justice, civil and criminal, the ideal of universal equality before the law is assumed. While it may often be true that legal practice falls short of the ideal, this equality in status between individuals who may be unequal in social standing or personal resources is one consequence of the first principle of formal justice, that 'like cases should be treated alike'. The relevant 'likeness' in this phrase lies in the actions and situations involved, rather than the types of people. This is not a timeless principle of formal justice, to be found in practice wherever there is a legal system; it is an ideal towards which civilised legal systems can generally be seen to be moving. It is a principle symbolised by the scales held by the statue of justice over the Old Bailey. The scales

symbolise the essential aim of corrective justice as the restoration of a balance or equilibrium that has been tilted or broken. The scales also signify that all individual interests are weighed equally, while the symbol of justice blindfold signifies that all legal judgements will be made impartially, without favour or discrimination.

The development of formal justice

This aspiration to complete legal impartiality is one essential feature of what is known as the rule of law. If the justice in all kinds of human transactions is to be measured effectively, those transactions have to be governed by rules that are applied with as much consistency as it is possible to achieve. What this requires is the formalisation, and hence the depersonalisation, of justice. While the primitive human instinct for justice (for fair treatment, revenge, compensation) is inclined towards a holistic assessment of the merits of competing parties, or of the character of aggressors and victims, the development of legal justice must take the opposite direction. Moral principles and standards have to be formalised into unbending rules that then apply to the act, rather than the actor.

This formal conception of legal justice appears to many to run against the grain. It sometimes feels like an abandonment of real justice, which should surely take account of the full context and circumstances of a legal dispute or crime. The point of it, however, is that in the history of any legal system a stage is reached at which the influence of power and wealth on the administration of law is resisted and neutralised. When judicial independence is established, the ideal of impartiality – itself a precondition of equality before the law – can be developed. The outcome of such conflicts is a strong legal presumption in favour of the courts adhering to strict general rules, without which equality of treatment of parties would not materialise, leading to an arbitrary system of *ad hoc* decisions that would be no legal system at all.

The main purpose of corrective justice, then, in seeking to restore the equilibrium by penalising civil wrongs or criminal actions in proportion to the wrong or harm done, is to deliver this justice within the limits imposed by patterns of law that have already been established. This is one of the meanings of the phrase 'justice according to law'. Judges, it is generally held – especially in the light of the doctrine of binding precedent – are not free to arrive at what they in their conscience or individual wisdom believe to be the best decision; on the contrary, they are constrained to find the just decision *within the law*.

Justice, equity and the spirit of the law

Aristotle, who was writing both about the ideas of law and justice as such, and also about the realities of justice in the highly evolved legal system of ancient Athens, recognised the problems created by this systematisation of justice. While the strict application of general rules furthers the cause of judicial impartiality,

its inflexibility does little for the adaptation of justice to individual cases that do not fall easily under such rules.

To counter the danger of justice becoming over-severe, Aristotle introduced the concept of equity (*epieikeia*), which he regarded as a quality intimately connected with, but distinct from and more precise than, justice. The equitable approach in law, for Aristotle, is aimed at the prevention of the unfortunate consequences of applying a general rule to a particular case that it does not, at a deep moral level, really cover. The feeling might be that while it is right in general that rule X should be applied, it does not really apply to this particular case Y, despite the formal requirements being fulfilled. For Aristotle, then, the function of the appeal to equity was to allow judges to temper the severity of legal justice, without departing from the constraints of law.

It is the *idea* of equity as a quality integral to law, rather than its place in the history of legal doctrine and practice, which is significant to disputes in the philosophy of law. The chequered history of its evolution, through Roman law and English common law, as the defining purpose of a higher court presided over by the Roman *praetor* or English Lord Chancellor, rendering 'equitable relief' to the victims of harsh justice in the lower courts, cannot be recounted here. What is of particular importance in this history is the role of conscience. The rationale behind the Chancellor's judicial intervention was to annul specific decisions, the outcome of which was unconscionable, or contrary to conscience.

If the spirit of equity is captured by the idea of an *ad hoc* overruling of the unconscionable, what does an 'equitable solution' mean? Does it imply that the equitable judge – for the specific purpose of this one case – casts aside the law in favour of a morally preferable standard? Or can this individualisation of justice be found within the ambit of law? This will ultimately depend, of course, on how we are to understand the concept of law. Does it exclusively consist of the explicit rules of 'black-letter law' as posited by a valid legal authority, or should it be taken in a wider sense to include the notoriously vague but irrepressible idea of 'the spirit of the law'? Those who are tempted to endorse the latter without further ceremony should bear in mind the conceptual problems here. 'Spirit' can be identified either with the justice with which the law is expected to be infused, or with the spirit of equity, which is to say that it can be contrasted either with a system of law that is indifferent to the requirements of justice, or with a rule-obsessed conception of justice that produces a repressively literalistic legal system. These are clearly two quite different senses in which 'the spirit of the law' can be interpreted.

Natural law theory and legal positivism

Despite these and other conceptual difficulties, the belief that justice is integral to law has been the guiding light of natural law theory since its inception. Firmly rooted in ancient philosophy and having undergone several significant revivals in the twentieth century, the evidence suggests that,

despite its prescientific character and lingering religious connotations, the theory of natural law is not likely to disappear. In contemporary legal theory, however, legal positivism – the antithesis to natural law – is still in the ascendancy. It is the heart of this dispute that we need first to identify clearly.

The heart of the dispute with legal positivism

The exact nature of the conflict between natural law theory and legal positivism has always been, and remains, very difficult to pin down. While it is agreed on all sides that the dispute revolves around the question identified already, whether the concept of law must include the concept of justice, there is no general agreement as to the meaning of this conceptual inclusion. What does it mean to claim that justice is integral to law? There are two initial mistakes to be avoided here. The first common misconception is the drawing of a sharp practical contrast between a natural lawyer's concern with justice and human rights, and a positivist's supposed disregard of such matters. A further dimension of this mistake is the belief that positivists insist on obedience to the law, irrespective of how unjust it might be. The second, equally common, mistake is the assumption that the dispute is a purely theoretical one, with ultimately nothing substantive at stake at all. The truth of the matter is that there are substantive differences that cannot be resolved in a simplistic argument about which side values justice more highly.

The important point to note is that, given certain assumptions, each perspective appears to be wholly convincing. The two outlooks represent radically different ways of thinking, not only about the law, but also about the full range of ethical problems experienced in any kind of society. At the heart of the matter lies a conflict in intuition about the origin or source of law. Each confronts the question, 'What is law?' and each answers it in terms of where law comes from. Consider first the positivist answer to this question.

The legal positivist finds at the basis of law *a human convention*, something decided or stipulated at a determinate time, by flesh-and-blood individuals, for a particular purpose, with a specific function in mind. Law thus interpreted is an agreement in the sense that it is an outcome of decisions, rather than the issue of something beyond human control. The makers of these laws are people in a position of power sufficient to impose their will on the whole community, and the rules and sanctions thus put into effect might be implemented with or without consultation or consent. Either way, this is how laws are made; individual and collective decisions are the origin of law, and what law is can be explained in terms of what has been decided and laid down as law. These decisions or stipulations are essentially free creations. The laws thus created might reflect any interest or none, they may be steeped in wisdom and justice, or they might be widely regarded as tyrannical. Such considerations are irrelevant at the stage of definition of law; the question as to how good or bad the laws are has no bearing on their status as laws. This is a 'conventionalist' view of law.

Consider now the natural law answer to the same question. 'What is law?' is again answered in terms of where it comes from. At the end of all analysis, the natural lawyer finds at the basis of law something beyond human control or arbitrary decision. It is something that binds human lawmakers quite irrespective of what any individual or group wishes or decides; it is a force we feel impressed upon us whether we like it or not. Law is the outcome, not of human agreement, but of first principles or natural foundations, the value of which runs deeper than the usefulness or expedience of conventions. This is a 'foundationalist' conception of law, according to which laws are discovered rather than made. The actual human makers of positive law are constrained by objective considerations relating to the intrinsic nature of the laws, considerations of justice that are external to the will of the legislators. If they ignore these constraints, they are not making law at all.

Although these are two incompatible answers to the same question, there is a certain discordance here, which suggests that the disagreement could be accounted for if it could be shown that they are in fact answering subtly different questions. While question and answer both follow the form of a definition, the first appears to be descriptive, the second stipulative. The first answer focuses on authority and the mechanisms of power, while the second focuses on authority and legitimacy. This might suggest that positivists are talking about the actual nature of the law, while natural lawyers are speaking of reasons for law being binding. This suggestion, however, leads to a serious misconstrual of the significance of the dispute; it implies that when the argument is clarified, the positivist and natural law approaches can be understood to complement one another, with the one concentrating on analysis of law as it actually exists, and the other addressing questions about the ideal standards to which law should aspire. This misses the heart of the dispute, because the leading exponents of each tradition are undoubtedly at odds over the definition of law as it actually exists. For natural lawyers, the legal principles revealed by a purely descriptive account of law are inherently moral; for positivists, the law in its actuality is the practical expression of a political decision, the moral content of which is quite irrelevant.

Traditional natural law theory

The main difficulty in forming a concrete assessment of the merits and contemporary relevance of natural law theory lies in the sheer magnitude of its historical scope. Why, then, is it relevant today? The main reason lies in the strength and enduring appeal of the idea that the law is there to be found, which implies that there are natural limitations on what can be enacted or enforced as positive law, and still properly be regarded as law. This idea has persisted through all natural law's permutations from its early origins in ancient Greece and Rome, through to the present day. It is expressed today in the not uncommon belief that legal officials, councils and governments

cannot act in a way that is contrary to natural justice or reasonableness. The idea takes a stronger hold when it is realised that, when they do in fact act in such ways, it is within the power of judges of the higher courts to rule them illegal, or – for example, in the USA – unconstitutional. On the face of it, then, there do appear to be natural constraints upon lawmakers. Let us consider now the origins and development of this idea.

The seeds of the fully developed classical natural law theory, which flourished in medieval Europe under the influence of St Thomas Aquinas (1225–74), were already clearly visible in the ancient world, in particular in the philosophies of Aristotle and of Cicero (106–43 BC). The idea that all legislation and judicial decisions are constrained by natural limitations, which are discoverable by reason, found expression in their postulation of a timeless 'higher law' governing all human transactions. What we have to consider is what sense can be made of this higher law, a law that is said to have greater authority than the laws that happen to be posited as the laws of the land.

As we have seen in the context of the equitable modification of law in the interests of particularised justice, Aristotle affirms the higher authority of equity. In a famous passage in which he uses as illustration Antigone's defiance of the tyrant Creon's law that her dead brother shall remain unburied, Aristotle writes of the higher law as by definition one that does not change, in contrast to the decrees of positive law, which are constantly changing:

> If the written law tells against our case, clearly we must appeal to the universal law, and insist on its greater equity and justice.• We must urge that the principles of equity are permanent and changeless, and that the universal law does not change either, for it is the law of nature, whereas written laws often do change.
>
> (Aristotle 1924: 1.18.2)

The assumption here is that there is a permanent idea of law that continues through a succession of generations and civilised societies, and survives any given manifestation or distortion of it. The edict at issue (the king commanding the non-burial of a dead brother) was one that excited a sharply focused abhorrence; it was in a peculiarly literal sense an *unnatural* law. This is why Aristotle chose it to dramatise the manifest injustice – and illegality in the light of natural law – of positive laws that are not in conformity with the laws of nature. Creon is deemed to have broken one of the natural limits that constrain the kind of laws which can be passed. This does not mean that it is not within his power to use the law to enforce his will but it does mean that his apparently legal proclamation is devoid of legal as well as moral authority. What makes it legally void is the higher law of nature.

This Greek idea that the laying down of the law by a properly constituted authority is not sufficient to establish its legality was echoed and reinforced by Roman natural lawyers. For Cicero, law is the highest product of the rational human mind, in tune with the elemental forces of nature. The

validity of human law depends upon its harmonising with these forces. It was this blending of the ideas of reason and law with *nature* that contrived to suggest that, while it was possible for rulers to ignore the constraints of natural law, such actions ran against the grain of the natural order of things in a way that was unholy and blasphemous. In Cicero's uncompromising words:

> law is the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. True law is right reason in agreement with nature. To curtail this law is unholy, to amend it illicit, to repeal it impossible.
>
> (Cicero 1928: Book 1)

This natural law idea, which is primarily negative in the sense that its purpose is to invalidate extreme abuses of legal power, became more powerful in the hands of the Christian theologians, who were able to ground the authority of human law and natural reason ultimately in the will of the one true God. For St Augustine (354–430), referring to extreme abuses of power, 'an unjust law is no law at all'. In similar vein, Aquinas asserted that a deviation from the law of nature is 'no longer a law, but the perversion of law'. It is in this negative sense that justice is understood to be integral to law; when the connection between law and justice is broken, the law is held to be invalid.

It should not be imagined, though, that the only moral authority behind the Christian natural law perspective is the unconstrained will of God. The idea that God is free to decree anything, good or bad, was in fact the basis of the positivistic challenge to natural law theory by the rival theological tradition headed by William of Ockham (*c*. 1285–1349). For the natural lawyer Aquinas, as much as for modern secular thinkers, reason is central to natural law; the will of God is constrained by the independent essences of good and justice.

In contrast to this negative idea that lays down the limits to what may be validly legislated, the equally important feature of Christian natural law theory lies in the binding together of the virtues of positive lawmaking with the moral precepts of Christianity. The essential purpose of the law is to promote and protect justice and just transactions between people. It is in this positive sense also that the connection between law and justice is held to be a necessary, conceptual one. Laws that conform with nature are inherently just laws, because they embody moral principles and prohibit actions that are unjust in the sense that they are contrary to the enjoyment of natural human goods. Thus, for Aquinas, the highest moral precept, 'to do good and avoid evil', is the source from which all the primary and secondary precepts are derived. Secondary precepts such as norms governing fair trade or the exchange of contracts are derived from the more fundamental precepts relating to the natural value of self-preservation. In this way the

entire body of positive law, enforcing sanctions against actions such as violent assault, theft and fraud, can be justified by reference to first principles that are self-evident to reason. In short, the meaning of law and the meaning of justice are completely interwoven.

Study questions

General question: What connections and overlaps are there between morality and the law?

Further study questions: Which sense of connection between morality and law is required for natural law theory? What does the separation thesis separate? What is the difference between the ideas of justice and equity? Are either of them indispensable to the concept of law? Is the spirit of the law more important than the letter of the law? What is the heart of the traditional dispute between natural law theory and positivism? Is the pursuit of justice an essential feature of law?

Suggestions for further reading

For a general historical treatment of traditional theories of law, see Kelly (1992) and Lloyd (1964). For histories of English common law, see Baker (1990), Fleming (1994) and Harding (1966).

On the relation between law and morality generally, see Lloyd (1964: ch. 3), Lyons (1984) and Fletcher (1996: III). For general introductions to the natural law–positivist dispute, see Rommen (1947), D'Entreves (1951), Golding (1975: ch. 2), Lyons (1984: ch. 3), Golding and Edmundson (2005: ch.1), and Harris (1997: ch. 2). For more advanced studies, see further reading in Chapter 4 below.

Aristotle's writings on justice and equity are mostly contained in the *Nicomachean Ethics* (1985) and *Politics* (1948). The relevant writings of Cicero on law and justice can be found in the first book of *De Legibus* (1928). For Aquinas on natural law, see Aquinas (1948) and (1988a) or (1988b).

A good general book on justice is Campbell (1988).