Epilogue

THE LEGACY OF ANCIENT AND MEDIEVAL LEGAL THOUGHT FOR MODERN LEGAL PHILOSOPHY

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Many currents from ancient and medieval legal thought still direct the flow of conversation in modern legal philosophy. Recent centuries have deepened and developed in more sophisticated ways legal concepts and controversies that had their origins in ancient Greece, Rome, and the Near East and became transmuted during the medieval period through the influence of the Abrahamic faiths. A brief survey of some central legal concepts discussed in this volume—such as natural or divine law versus positive law, reason and rule of law, equity, and cosmopolitan universal law—reveals a historical current that has continued through modern and contemporary legal philosophy.

The dramatically depicted tension between Antigone's higher law and Creon's positive law (see Chapter 1 of this volume) that only sharpened in the repeated confrontations between Socrates and various Sophists (see Chapters 2 and 3 of this volume), continued to play out most prominently in twentieth-century debates between legal positivists and moral realists. Located at the heart of the decades-long exchange between preeminent legal positivists H. L. A. Hart (1907–1992), Hans Kelsen (1881–1973), and Joseph Raz (b. 1939) and their critics—such as John Finnis (b. 1940), Lon Fuller (1902–1978), and Ronald Dworkin (1931–2013)—are the "separability thesis" and the source of law's authority.

The separability thesis separates claims about the moral evaluation of law from claims about its legal validity. Laws are valid if they "were enacted in proper form, clear in meaning, and satisfied all the acknowledged criteria of validity of a system," and as valid they must be obeyed, even if they are judged by individuals to be "morally iniquitous" (Hart 1961, 203). Picking and choosing which laws to obey or reject on moral grounds—which is how positivists view the implications of natural law theory—would create enormous social and political upheaval. Hart is influenced here by Thomas Hobbes (1588–1679), Jeremy Bentham (1748–1832), and John Austin (1790–1859), who all share a deep fear of anarchy. Glimmers of legal positivism are present throughout the history of legal thought, but it did not garner a strong intellectual foothold until modern legal philosophy, when prominent and influential thinkers theorized about the modern state. Legal positivism thus grew apace with the rise and crystallization of the Westphalian state system and the dominance of territorially large, multicultural states.[1]

[1] See Volume 8, Chapter 6 of this Treatise, esp. 174.

Carving out a morally tolerant legal space in these political entities facilitated the popularity of John Stuart Mill's (1806–1873) "harm principle" that requires individuals to be left alone unless their actions would cause harm to others (see Mill 1985, chap. 1). The harm principle, famously explored in Joel Feinberg's landmark *Harm to Others* (Feinberg 1984), has been a linchpin of Western legal and political thought for over 150 years.[2]

The source of legal authority also divides legal positivists and their moralist critics. Positivists anchor authority in the sovereignty of law *per se*, while moralists locate it in some higher-level normative principles, be it universal morality, abstract principles of political morality, or religious ethics. This issue is deeply connected to the medieval conflict between Thomas Aquinas's (ca. 1226–1274) intellectualism and William of Ockham's (1280–1347) voluntarist critique of Aquinas, which later influenced Jean Bodin (1530–1546) (see Chapter 13 of this volume). Intellectualism holds that the authority of law resides in its being consonant with a higher moral law, which is apprehended and justified by reason. Voluntarism holds, instead, that legal authority flows from a sovereign's will, whether that sovereign is God, a king, or the people. This debate arises prominently in sixteenth-century scholastic debates among Dominicans and Jesuits over the proper role of reason and will in law's authority (see Chapter 14 of this volume), and again in muted form in the rival political philosophies of Thomas Hobbes and John Locke (1632–1704) (see Chapter 8, 217–8, and Chapter 5, 130, respectively, in this volume). The positivist jurisprudence of John Austin follows directly on Hobbes's and Bentham's "command theory" of law, which explained that the commands issued by a sovereign correlatively oblige citizens to obey the law.[3] H. L. A. Hart criticizes but then develops Austin's insight about commands in the direction of authority as distinct from mere power.[4] Raz (1986, chap. 2) further develops the will theory by introducing "content-independent reasons" and explains how law as such provides "authoritative reasons" (Raz 1979) for obedience.[5]

Various moral (especially natural law) theorists have responded to the positivists' emphasis on legal validity and the authority of law *per se* with a call for legal legitimacy on grounds of justice and morality apprehended through reason. Broadly speaking, there are two types of natural law theory in conflict with legal positivism: substantive natural law (held by Aquinas and Finnis; see Chapter 12 of this volume) and procedural natural law (held by John Duns

[2] See Riley in Volume 10, Chapter 15 of this Treatise for further discussion of Mill's philosophy of law, and Feinberg (1984, 5) for the compatibility of his theory with legal positivism.

[3] See Austin 1967. See Riley in Volume 10, Chapter 3 of this Treatise on the legal philosophy of Hobbes; and Lobban in Volume 8, Chapter 6 of this Treatise on the legal theories of Bentham and Austin.

[4] See Hart 1961. See Postema in Volume 11, Chapter 7 of this Treatise on Hart's critical positivism.

[5] See Postema in Volume 11, Chapter 8 of this Treatise on Raz's theory of law.

Scotus [1266–1308] and Fuller; see Chapter 13 of this volume). Substantive theories aim directly at promoting certain values and guiding a citizenry toward the good in relation to a specific set of moral principles, while procedural natural law theories aim at devising morally just legal processes consistently with natural law. As a procedural natural law theorist, Fuller maintains that for something to count as law, it must meet eight "desiderata" (e.g., being publicly promulgated, not retroactive, etc.), which comprise "the internal morality of law" limiting "the kinds of substantive aims that may be achieved through legal rules" (Fuller 1964, 4, 38–9).[6] These eight desiderata are compatible with various different substantive moral theories, such as Thomism or Aristotelian eudaimonism. Substantive types of natural law can be sub-divided further between theistic and naturalistic theories, though most modern natural law theories have been naturalistic rather than theistic (with the exception of neo-scholastic theories, such as those of Jacques Maritain [1882–1973] and Yves Simon [1903–1961]). Aquinas deliberately fuses Aristotelian natural teleology with Catholic theology (see Chapter 12 of this volume), and both Aristotle and Aquinas have inspired many early modern natural law theorists, including Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), Gottfried Leibniz (1646–1716), and Christian Wolff (1769–1754).[7] The influence is even more direct in recent natural law theorists such as John Finnis (1980).[8] According to Finnis, we must look to what is good for human beings in order to create a legal system that addresses law's genuine purpose. Among the "basic goods" of human life that law should facilitate are life, knowledge, play, aesthetic experience, friendship/sociability, practical reasonableness, and "religion" (Finnis 1980, chaps. 1 and 4). Natural law theorists of all varieties appeal to moral principles in order to drive a wedge between immoral positive laws and obligation, citing a "higher" moral authority as the justification for civil disobedience. They thus resist Bentham's dictum "to obey punctually; to censure freely" (Bentham 1838, 230)—they censure freely, to be sure, but obey punctually only if the injustice falls beneath a morally specified threshold. It should be noted that the legal validity/legitimacy split is a somewhat exaggerated dichotomy. Many of the legal philosophers discussed here wrestle (with varying degrees of success) with integrating concerns of stability and justice in legal systems.

While not a self-identified natural law theorist, Dworkin has been one of legal positivism's sharpest critics. His distinctive "interpretivist" approach to adjudication calls in "hard cases" for judges to draw upon the "best interpreta-

[6] See Postema in Volume 11, Chapter 4 of this Treatise for Fuller's theory of law.

[7] See Scattola in Volume 9, Chapter 1, 15–41 of this Treatise for an overview of modern European natural law philosophers; and see also Riley in Volume 10, Chapters. 2, 5, and 6 of this Treatise for fuller discussion of Grotius, Pufendorf, and Leibniz.

[8] See Postema in Volume 11, Chapter 12, 547–62 of this Treatise on the legal theory of Finnis.

tion" of "principles of political morality," which he argues constitute an important part of a state's legal system that is wider than positive law (Dworkin 1977, 1986). Dworkin holds that law properly embodies integrity as a substantive value of political morality, which explains why governmental directives have normative force. What Dworkin shares with natural law theorists is their dissatisfaction with settling for the authority of the positive law by itself, as well as their reliance on reason to make moral determinations that ensure that legal systems move toward moral goodness and satisfy the requirements of justice.[9]

The role of reason in law as a bulwark against majoritarian prejudices or the whims of dictators derives from the "rational order" or "right reason" of ancient Greek thought (see Chapters 2–5 of this volume). Historically, this "appeal to reason" arose in resurgent form in late scholastic and early modern resistance to royal absolutism (see Chapters 11–14 of this volume). To have a "government of laws rather than men" has thus been a long-standing beacon of hope, pervading modern legal thought from John Locke's *Second Treatise of Government* (Locke 1980) to James Madison's *Federalist* 49 (Hamilton et al. 1961) to John Rawls's (1921–2002) repeated insistence on "public reason" (Rawls 1993, 1999). Although Locke has a relatively sanguine view of man in the "state of nature," like Aristotle, he acknowledges that even rational beings require law, for "men being biassed by their interest, as well as ignorant for want of study of [the law of nature], are not apt to allow of it as a law binding to them in the application of it to their particular cases" (Locke 1980, 66). Hence, there is a need for an established and impartially administered rule of law. The kinds of rules that can be adopted, Rawls (1993, xv–xvii) argues, are those that meet the conditions of "public reason" by being found fair and reasonable to "free and equal" citizens who hold various "comprehensive doctrines" of the good. Regardless of the type of constraint on the actions of fellow citizens and ruling politicians alike—whether structural checks and balances or rules concerning reason-giving—the aim of mitigating the pernicious effects of private "passions" through a government of "reason" (Hamilton et al. 1961, 317) remains a perennial one.[10]

Whereas the rule of law captures the generalities that largely hold for the great majority of human social life, it takes a combination of reason, experience, and wisdom for a judge or other legal adjudicator to be equitable when unusual circumstances require it. Aristotle's virtue of equity (*epieikeia*) (see Chapter 4 of this volume), which allows a judge to make a just determination contrary to the letter of the law so as to compensate for the defect of law's necessary universality, reappears later in the work of John Fortescue (ca. 1395–

[9] See Postema in Volume 11, Chapter 9 of this Treatise on Dworkin's theory of law.

[10] See Lobban in Volume 8, Chapter 5 of this Treatise on the Federalist theory of law and its influence on early American jurisprudence and judicial practice.

1479) and Christopher St. German (1460–1541). Fortescue argues on natural law grounds that the king must render equity if his legislation is fully to live up to the principles of natural justice. St. German defends the existence of British courts of equity known as the Court of Chancery, which developed in order to handle unusual and pressing circumstances in a flexible and just way (see Lobban in Volume 8, Chapter 1 of this Treatise). In his procedural natural law theory, Fuller (1964, 64, 94) harks back to Aristotle's appreciation for the need for both general rules in law and to context-sensitive judgment for cases in which justice would not best be served by too rigid or mechanical an adherence to rule of law.[11]

Many legal theorists—both ancient and modern—have argued in terms of *legal systems*. Even those defending some version of natural or divine law typically see universalistic moral law as allowing for the sovereignty of distinct states with their own systems of positive law. This is the "law of nations" or "law of peoples" (*ius gentium*) systematized in Roman law (see Chapters 6 and 10 of this volume) and developed further by later scholastics (see Chapter 14 of this volume). The law of nations is what all people observe regardless of citizenship and is compatible with natural law, regulating practices concerning property, treaties, and warfare.[12] Such practices became the backbone of the relatively recent field of "international law," whose origin is attributed to Bentham's introduction of the phrase in his 1789 *The Introduction to the Principles of Morals and Legislation* (Bobbitt 1996, 96). Shortly thereafter in 1795, Immanuel Kant (1724–1804) published *Perpetual Peace* (Kant 1983), in which he defended the state sovereignty aspect of the law of nations, maintaining that each state is independent from all others and hence accountable only to its own citizens and that states are not justified in interfering in other states' internal affairs. He did so on the ground that a world government would lead to "a universal monarchy" and cause a "peace that despotism (in the graveyard of freedom) brings about by vitiating all powers" (ibid., 125). Although there exists war between states in a Westphalian system, this is far preferable to a world where one power could dominate in the absence of a structure of international checks and balances that can stave off such despotism. Rawls (1999, 36, 86–87) echoes Kant's call for strong international cooperation for rational mutual benefit and also resists the lure of world government so as to achieve that aim.

There is a fine line, though, between the law of peoples and universal principles, as anyone who is familiar with the fragile workings of the United Na-

[11] Roger Shiner (1994) has a lucid discussion of Aristotelian equity, which he subtly applies to the heated contemporary debate between Hart and Dworkin in an effort to avoid the drawbacks of both approaches.

[12] The origin of modern international law is usually traced back to Grotius, for which see Riley in Volume 10, Chapter 2, 12, of this Treatise, where he describes international law as "a modernized version of the Roman *ius gentium*."

tions can attest to. Theorists like Kant and Rawls may hold the line against a global state, but others have pressed universalistic principles of morality or justice in the direction of cosmopolitanism as first envisioned by the Cynics (see Chapter 5 of this volume). From various nineteenth-century labor movements to contemporary transnational global justice movements, groups now exist that fight for the recognition and enforcement of universal human dignity or rights through humanitarian intervention and an international criminal court and who challenge the state sovereignty principle that lies at the center of the law of nations.[13] Zeno of Citium (ca. 334–ca. 262 B.C.), who followed Diogenes of Sinope (ca. 412–ca. 324 B.C.) in regarding himself as a "citizen of the world," might very well feel at home in this most contemporary of conversations about international law (see Chapter 2 of this volume).

Ancient and medieval legal thought clearly have had a lasting impact on modern and contemporary philosophy of law. Whether the influence is by means of direct inspiration, such as natural law or the Aristotelian virtue of equity, or through more indirect and general concerns with the nature and normativity of law and with the role of the rule of law in keeping human passions in check, historical sources in legal thought remain relevant to the theory and practice of the legal, political, and social institutions of the present day.

Further Reading

Dennis Patterson provides a valuable and concise series of chapters on various areas of law, schools of thought, and specific issues in contemporary philosophy of law that are also historically informed (see Coleman and Leiter 1996). See also generally Lobban in Volume 8, Riley in Volume 10, and Postema in Volume 11 of this Treatise for extensive discussions of how ancient through scholastic legal thought influenced modern and contemporary Western legal philosophy.

One of the touchstones of contemporary natural law theory is Finnis 1980, but see also Fuller 1964, Ralph McInerny 1992, Germain Grisez 1965, Henry Veatch 1985 and 1990, and Jacques Maritain 1951. See Brian Bix 1996 for an excellent survey of historical and contemporary natural law theory; Bix also places Dworkin's interpretivist theory on the natural law side of the natural law/legal positivism debate.

Hart 1961 looms as the towering figure in contemporary legal positivism. Coleman and Leiter 1996 provide a concise summary of the tenets of positivism, situate Hart within the historical trajectory of this school of legal thought, and compare and contrast Hart's theory with the legal positivism of thinkers such as Kelsen 1967 and Raz 1979 and 1986. Postema, in Volume 11, Chapters 7–9, 12 of this Treatise, offers nuanced expositions of Hart's legal positivism,

[13] See Osiander 2001 for discussion of resistance to the state sovereignty principle.

its extension and application, and significant critiques raised against his approach by various natural law and moral realist theorists.

Bentham 1988 introduced the phrase "international law" as a way of theorizing what historically has been called "the law of nations," and Kant 1983 developed it in a more sophisticated philosophical way. Since then, work in the field of international law has grown tremendously, especially since the founding of the United Nations in 1945 in replacement of the League of Nations. Steiner and Alston 2000 collect together in nearly 1,500 pages a vast amount of material pertaining to the history, documents, issues, and controversies involved in international law with a special focus on human rights.

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