PHILOSOPHERS AND LAW

ARISTOTLE AND MODERN LAW

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Aristotle and Modern Law

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Series Preface

The series *Philosophers and Law* selects and makes accessible the most important essays in English that deal with the application to law of the work of major philosophers for whom law was not a main concern. The series encompasses not only what these philosophers had to say about law but also brings together essays which consider those aspects of the work of major philosophers which bear on our interpretation and assessment of current law and legal theory. The essays are based on scholarly study of particular philosophers and deal with both the nature and role of law and the application of philosophy to specific areas of law.

Some philosophers, such as Hans Kelsen, Roscoe Pound and Herbert Hart are known principally as philosophers of law. Others, whose names are not primarily or immediately associated with law, such as Aristotle, Kant and Hegel, have, nevertheless, had a profound influence on legal thought. It is with the significance for law of this second group of philosophers that this series is concerned.

Each volume in the series deals with a major philosopher whose work has been taken up and applied to the study and critique of law and legal systems. The essays, which have all been previously published in law, philosophy and politics journals and books, are selected and introduced by an editor with a special interest in the philosopher in question and an engagement in contemporary legal studies. The essays chosen represent the most important and influential contributions to the interpretation of the philosophers concerned and the continuing relevance of their work to current legal issues.

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Introduction[1]

James Bernard Murphy and Richard Oliver Brooks

1) Philosophy and Law

What does philosophy have to do with law? Or law with philosophy? Isn't philosophy a theoretical enterprise, concerned with what we can know? And isn't law a practical enterprise, concerned with what we do or ought to do? We often associate philosophy with the quest for truth and law with the quest for justice. These contrasts come into sharper focus when we consider the striking differences between the virtues of philosophers and lawyers. The virtues of a philosopher involve the relentless examination and testing of first principles while the virtues of a lawyer involve the application of given principles and rules to concrete circumstances. In short, lawyers accept their premises by reason of their authority whereas philosophers accept only the authority of reason. And while good philosophers learn to accept with some equanimity the fact that all their theories are inconclusive and that none of their debates will be fully resolved, good lawyers are impatient with anything short of resolution and conclusion. For these and other reasons, philosophers almost always find legal reasoning to be shallow and muddled, while lawyers generally find philosophical reasoning to be abstruse, inconclusive, or irrelevant.

These fundamental, if overly simplified, contrasts between philosophical and legal reasoning and between the contrasting virtues of a philosopher and a lawyer, help to explain why philosophy and legal science have historically had little to do with each other. Philosophy is the glory that was Greece, while law is the grandeur that was Rome. While philosophers and philosophy flourished in fifth- and fourth-century Athens, there were as yet no body of jurists or of legal science; Athenian legislation and adjudication was lay-dominated. Conversely, while Roman legal science and the first professional body of jurisconsults flourished during the late Republic and Principate, there were scarcely any native Roman philosophers. Philosophy was to the distinctively Greek genius what law was to the Roman.

As Harold Berman argues,[2] although the ancient Roman jurists imported a few Aristotelian techniques of logical analysis and dialectic into the classification and teaching of law, Greek philosophy and Roman law first came together in the newly founded universities of Western Europe during the eleventh and twelfth centuries. In the wake of the Crusades, a large body of ancient Roman law and of ancient Greek philosophy were simultaneously rediscovered and revived in the shared context of the great Western European universities. Here the teaching of law was 'philosophized', in the sense that Aristotelian logic and dialectic were employed in the analysis, definition, classification, and teaching of a modern Roman law; and the teaching of philosophy was 'legalized', in the sense that philosophical argument was cast in a method of quasi-legal formal 'disputation'. In the medieval university, both philosophers and lawyers developed their arguments in a strikingly similar way: by beginning with a clash of two or more authoritative texts, the philosopher or lawyer would deploy his dialectical skill in making

the necessary distinctions to resolve the apparent contradiction. In both law and philosophy, as Maitland observed, the Middle Ages was the age not of authority but of conflicting authorities.

Still, these broad similarities of intellectual method certainly did not mean a marriage or convergence of law and philosophy. Even during the courtship between law and philosophy in the high Middle Ages, no one would mistake Gratian's treatise on law for Aquinas's treatise on law. Gratian, like all lawyers, wants to develop a useful body of coherent principles and rules for the guidance of expectation and the resolution of disputes; Aquinas, by contrast, wants to understand the relation of law to practical reason and to the providential governance of the cosmos.

Despite, or perhaps because of, these profound contrasts between law and philosophy, over the ages a few lawyers have studied some philosophy and a few philosophers have studied some law. The great Roman jurists ornamented their treatises with Greek philosophical concepts, such as 'natural law', 'unwritten law', and 'equity'; how deeply these forays into philosophy actually shaped Roman law is frequently disputed. And the great ancient philosophers, Plato, Aristotle, and Cicero, have written about law and justice – though how deeply they understood their own legal systems is also frequently disputed. Indeed, just as it is not at all clear that greater philosophical depth would have made for better Roman law, so it is not at all clear that greater legal depth would have improved the classical philosophy of law. The gulf between philosophers and lawyers is even reflected in their respective terms for the object of inquiry. Philosophers, like all laymen, tend to refer to 'the laws' in the plural: thus Plato's treatise is titled *Nomoi* (The Laws); Cicero, Aquinas, and Suarez write *De Legibus* (Concerning the Laws), and Hobbes titles his work 'Dialogue On the Common Laws of England'. These philosophers share the lay view that 'the Law' is an aggregate of laws, usually understood as statutes. Jurists, by contrast, whether the ancient Ulpian, Gaius, Paulus or the modern Grotius, Pufendorf, Vattel, Wolff speak of 'The Law' (*De Jure*), just as modern lawyers speak of 'the common law' or 'the law of contract', rather than of 'common laws' or 'laws of contract'. The various 'sources of law' (*fontes iuris*) must be harmonized into a coherent body of law by legal 'science'.[3] In short, for lawyers, laws are merely the raw material for the Law.

Although our Western legal tradition was born in a medieval consortium of Greek philosophy and Roman law, what is most characteristic of that legal tradition is the assertion of both a practical autonomy of jurists from political control and theoretical autonomy of legal science from any other discipline. For many centuries, the peoples of continental Europe possessed a common law (*ius commune*), a modern Roman law, built up by the international community of jurists; the rise of the nation state led to national codes of law and the explosion of national legislation, subjecting many parts of law to direct political control. But now, with the waning of national sovereignty, European jurists are again developing a common law against the background of broad European conventions, treaties, and decrees. The practical autonomy of jurists was formerly combined with the disciplinary autonomy of legal science, which culminated in the Leibniz–Savigny thesis that modern Roman law was a wholly self-contained, complete, and logically coherent system of principles that could generate a determinate solution to any concrete legal problem.

Throughout the twentieth century, scholars have questioned whether jurists are or ought to be independent of political, social, and economic power and whether legal science is or ought to be wholly self-contained. Legal realists, critical legal theorists, and increasingly, the law and economics movement have aggressively challenged the claims of both law and legal studies to

autonomy. Harold Berman says that the Western legal tradition faces its most far-reaching challenge as law increasingly becomes subordinated to state regulatory power and as legal studies increasingly becomes colonized by other disciplines. Certainly the relation of law to philosophy and other disciplines varies with the institutional diversity of the legal profession. In the academy we now increasingly see hybrid lawyer–philosophers, such as H.L.A. Hart, Joseph Raz, Ronald Dworkin, and John Finnis, along with lawyer sociologists, economists, biologists, and literary theorists. But even at the bar and on the bench, we find lawyers increasingly appealing to the findings of other disciplines, including philosophy, to shore up the eroding faith in their own legal materials. Judges, for example, appear more willing than ever to cite philosophers, social scientists, and literary authors in their decisions.

Still, we must not underestimate the continuing importance of legal treatises, restatements, doctrinal analysis, and other traditional legal materials in the growth of law. Nor must we overestimate the direct influence of philosophers on law: on the one hand, when lawyers do turn to other disciplines, they are much more likely to turn to economics than to philosophy; and on the other, when philosophers court lawyers in expert testimony or in *amicus* briefs, they are quite likely to be spurned. The Federal District Court Judge in Colorado in *Evans* v. *Romer* simply ignored the philosophical pyrotechnics of the Finnis–Nussbaum testimony, while the U.S. Supreme Court in *Vacco* v. *Quill* pointedly chose not to follow the counsel of The Philosophers' Brief, despite its being authored by a veritable dream team of American philosophers.

2) The Revival of Aristotelianism

With its new openness to non-legal intellectual perspectives, many intellectual fashions have come to legal studies during the past century, often just in time for a decent burial: from historicism, Marxism, and Darwinism, to neo-classical economics, hermeneutics, critical legal studies, deconstruction, feminism, utiltarianism, Kantianism, and now, of all things, Aristotelianism. Few recent movements in scholarship have been more pronounced and perhaps surprising than the widespread revival of interest in the philosophy of Aristotle.[4] After all, much of modern philosophy and science has been explicitly aimed at destroying the man whom Thomas Aquinas called 'The Philosopher'. The one thing that might be said to unite the founders of modernity, including, but not limited to, More, Bacon, Ramus, Spinoza, Machiavelli, Galileo, Newton, Hobbes, and Descartes, is their determination to destroy the philosophical and scientific prestige of Aristotle and his whole school. Modernity understood itself largely by its ruthless rejection of Aristotle, who was associated with a discredited physics, a decadent logic, and an aristocratic ethics and politics.

Despite this massive frontal assault, Aristotelianism never wholly disappeared – though it was forced to take up lodging in largely Thomistic precincts for quite some time. Eventually, of course, the limitations of the classic modern understandings of reason, language, ethics, politics, and law became evident and Aristotle has now become a prominent post-modern thinker. The semiotic revolution of C.S. Peirce, the hermeneutics of H.-G. Gadamer, the virtue ethics of Alasdair MacIntyre, the republican political theory of Michael Sandel, the moral economy of Karl Polanyi, the moral particularism of Martha Nussbaum, the new rhetoric of Chaim Perelman, the revival of casuistry of Stephen Toulmin and Cass Sunstein, the defense of political judgment

in Ronald Beiner – all of these recent developments take their starting point in a reappraisal of the philosopher from Stagira or a borrowing of a key Aristotelian principle, acknowledged or not. From formal logic to psychology, rhetoric, ethics, politics and now legal studies, Aristotle's thought has moved from the dustbin to the cutting edge.

What accounts for the recent success of what seems to be rightly called 'the perennial philosophy'? The reasons vary with every field, but in ethical theory there was a growing dissatisfaction with the Humean subordination of reason to desire as well as with the abstract and deductive character of Kantian ethics. Modern ethics, whether deontological or teleological, was focused on the goodness of acts rather than the goodness of agents; the revival of a virtue ethics reflected the growing interest in the question, not so much 'what shall I do?' as 'what kind of person do I want to become?'. Aristotle's ethics seemed to avoid the twin dangers of an unprincipled particularism and an unhelpfully abstract universalism. Aristotle says that practical wisdom (*phronesis*) involves at once skill in reflective deliberation and the trained ability to grasp universal principles in concrete particulars – a kind of moral perceptiveness. And Aristotle's politics, with its emphasis on the intrinsic value of active political participation, has led many of our contemporaries to worry about the loss of civic virtue in a context of a degraded politics of interest-group pluralism and the growing dominance of the administrative state, of corporate capitalism, and of global structures of governance.

In one sense there is nothing surprising about the renewed interest in Aristotle's thought in legal studies: Aristotle, after all, is built into our legal system. A number of our key legal concepts, such as equity and justice (both distributive and corrective), and a number of our key constitutional ideals, such as mixed government and the rule of law, can be traced back to Aristotle. In other words, since Aristotle played a role in creating our Western legal tradition, his thought will be of permanent relevance to it. Nonetheless, most contemporary legal scholars are not concerned with Aristotle's historical role in shaping our modern legal system, but rather with the resources of Aristotle's thought in addressing perceived shortcomings in contemporary legal debates.

In this latter sense, Aristotle's philosophy has become of widespread interest for a variety of reasons, perhaps beginning with the fact that Aristotle recognizes the deep contrast between the theoretical orientation of philosophy and the practical orientation of law. Of course, Aristotle does see the need for a 'practical philosophy', that is, for disciplined reflection upon the principles and aims of practical pursuits, such as law; this 'practical philosophy' creates a bridge between philosophy and law. But Aristotle also wants to protect the integrity and rightful autonomy of both the theoretical and practical enterprises. Philosophy must be protected from any subordination to practical goals lest it become mere sophistry or, as we would say, ideology; and practical reasoning in law and ethics must be protected from any aspiration to the precision and completeness of theoretical achievement in science and philosophy. In Aristotle's view, there will never be a true science of law because the ever-changing circumstances of human life make theoretical rigour and precision impossible in the realm of human affairs. Yet Aristotle does not condemn the practical pursuits of law or ethics to rank particularism or to mere habits of thumb: he strongly defends the need for practical reason to be informed by philosophy so that lawyers can be, if not philosophers, at least reflective practitioners. Aristotle's rejection of both 'legal science' and of unprincipled sophistry makes him an attractive alternative to many contemporary lawyers and legal scholars.

Aristotle is also attractive to contemporary legal theorists because his understanding of the relation of law to morality and of law to custom defies the stale categories of 'natural law' or 'legal positivism'. Like the natural lawyers, he certainly sees an essential relation between law and morality; but like the legal positivists, he strongly emphasizes the need for specific legal determinations ('better settled than settled right') and he strongly distinguishes legal justice from justice and morality more generally. Finally, like the jurists of the historical school and the modern legal anthropologists, Aristotle places great weight on the informal customary law. His legal thought thus represents a fresh new perspective on these old debates.

In the recent past the debates between natural law and legal positivism had become debates about the abstract relation of legal concepts to moral concepts; with the rise of clinical legal education and concerns with the professional responsibility of lawyers, interest has shifted from questions of the relation of law to morality in the abstract to questions of what it means to be a good practical lawyer. Here, Aristotle's virtue ethics in general and his analysis of the virtues specific to the good lawyer – virtues such as justice and equity – are of pressing contemporary relevance.

Aristotle's legal thought has also provoked widespread interest in many different quarters of legal studies because of its non-systematic and multidisciplinary character. Since Aristotle is writing before the rise of an autonomous legal profession or legal science, he approaches law, not as a self-contained discipline, but from the perspective of other disciplines, including ethics, politics (including what we would call anthropology and sociology), rhetoric, and logic. Unlike Plato, who wrote a separate dialogue on law, Aristotle's legal thought is scattered across, and hence, embedded in, his treatments of other disciplines and sciences such as dialectic, ethics, politics and rhetoric. What this means is that his legal thought is inevitably open-textured, multifaceted, and open to many competing interpretations – all of which makes it very attractive to contemporary scholars. In the wake of the decline of an autonomous legal science and the consequent rise of interdisciplinary legal studies, we find ourselves paradoxically closer to Aristotle's approach to law than to the purely juristic analyses of lawyers in our immediate past.

At the same time, Aristotle's legal thought can serve as an important corrective to some tendencies in the contemporary interdisciplinary approach to law. When the legal realists brought the modern policy sciences to bear on law, many were tempted to simply reduce law to an instrument of public policy in the pursuit of maximizing some collective good; as economics has become the policy science *par excellence*, many have attempted to reduce law to an instrument of wealth-maximization. And yet Aristotle reminds us that there is a variety of goods not reducible to a single metric and hence a variety of kinds of legal justice. He recognizes that one function of law is precisely to constrain and limit the state's pursuit of public goods so as to protect individual initiative as well as to limit the pursuit of private wealth so as to protect the common good. Similarly, advocates of varieties of critical legal studies tend to see reduced law as an instrument of economic and political power politics; Aristotle is certainly aware of the tendency of social classes to use the law to promote their hegemony, but he argues that, although law will always to some extent serve the interests of the dominant constitutional class, law can also serve precisely to limit and constrain the brutal exercises of power politics. In short, Aristotle offers us a model of an interdisciplinary approach to law that nonetheless respects the integrity of law and legal practice; he views law from several disciplinary perspectives but never reduces law to a non-legal discipline.

Thus Aristotle avoids the danger of these reductions of law to economics or to power politics which tend to breed a cynical contempt for the goods and the virtues distinctive to a proper legal practice. An Aristotelian lawyer will seek to understand legal matters from a variety of disciplinary perspectives, but he or she will be guided in the use of those perspectives by the uniquely legal virtues of justice and equity. An Aristotelian lawyer will want to understand what other disciplines can teach us about law and justice while still being able to enjoy, in the words of one modern Aristotelian, 'the unique goods internal to the practice of law', namely, the exercise of the intellectual virtue of practical wisdom – especially the distinctly legal kind of practical wisdom, namely, justice and equity – in the creation of an ordering of human transactions and affairs. In short, for an Aristotelian, what gives law its integrity is not the purity or autonomy of legal science or even legal education; it is rather the acquisition of those virtues that enable a lawyer to enjoy the goods internal to the practice of law.

3) Approaches to Aristotle

Precisely because Aristotle gives no sustained or systematic treatment of law, figuring out what he thinks presents some major interpretive challenges. Fred Miller usefully distinguishes three distinct approaches to the reading of Aristotle.[5] The first method is one of literal exegesis: 'to try as far as possible to explicate this thought in his own terms and within his own context . . . one tries to state the problems as Aristotle understood them'. What counts as Aristotle's 'own context' might vary from the context of this thought as a whole (as in Schroeder's essay in Chapter 2) to the context of the Athenian legal practice of his time (as in Maio's essay in Chapter 1). The goal of exegesis is to understand Aristotle as he understood himself.

The second approach begins with literal exegesis but aims at something quite different. This method 'which may be called "reconstruction" (also called "philosophical scholarship" or "doxography"), is to try to understand the text not only on its own terms but also by applying external concepts, theories, and techniques. This often includes a comparative methodology, exploring similarities or differences with other modes of thought, such as modern viewpoints'. This method of reconstruction predominates in contemporary appropriations of Aristotle's legal thought: typically, the interpreter attempts to illuminate a concept from modern law by considering what Aristotle might or would say about it. Thus, Eric Zahnd (Chapter 3) takes modern notions of the interpretation and application of law and asks to what extent Aristotle's notion of 'equity' anticipates them. James Gordley (Chapter 4) begins with a modern notion of 'contract' and asks to what extent Aristotle's analysis of exchange can make sense of contracts. Kyron Huigens (Chapter 5) and L.A. Zaibert (Chapter 6) begin with modern notions of deterrence, criminal negligence and criminal intent and ask how Aristotle might ground criminal culpability. Fred Miller (Chapter 7) begins with the Hofeldian analysis of rights and asks to what extent Aristotle at least implicitly recognizes such rights in his analysis of law and justice. Roderick Long (Chapter 9) takes modern notions of freedom and autonomy and considers what place they might have in Aristotle's thought. Ernest Weinrib (Chapter 11) asks to what extent Aristotle's notion of corrective justice corresponds to the modern notion of private law in general and tort law in particular. Michael Frost (Chapter 15) considers to what extent contemporary legal rhetoric conforms to Aristotle's view that effective rhetoric must inspire confidence in the moral character of the speaker.

The third approach to Aristotle is 'to philosophize in the tradition, more or less broadly understood, of a given philosopher. One adopts certain distinctive principles or methods and treats them as points of departure, not concerning oneself overly with issues of accurate exegesis or anachronism'. In this way a scholar develops a generally 'Aristotelian' or 'neoAristotelian' perspective in order to analyse issues that either were not or could not have been discussed by Aristotle himself, as a way of developing the resources of his thought in an ongoing tradition. Good examples of such broadly neoAristotelian theorizing can be found in Martha Nussbaum's attempt (Chapter 10) to ground human rights in an Aristotelian account of human capabilities; in Lorie Graham's discussion (Chapter 13) of practical wisdom in legal education; in Anthony Kronman's discussion (Chapter 14) of empathy and detachment in legal practice; and in Miriam Galston's discussion (Chapter 16) of civic virtue and law.

Most interpreters of Aristotle do not explicitly distinguish these three approaches; often the same essay will blend all three approaches. Yet each interpretive approach has its own strengths and weaknesses. From the point of view of strict exegesis, reconstructing Aristotle in light of modern concepts leads almost inevitably to anachronism and to a distortion of his views.[6] Malcolm Schofield (Chapter 8) accuses Fred Miller, and Steven Heyman (Chapter 12) accuses Ernest Weinrib of precisely such anachronism and distortion; indeed, all of our authors engaged in reconstruction are plausibly guilty of the same accusation. Because legal science is a Roman and not a Greek achievement, most of our modern legal concepts are derived in some way from the categories of ancient Roman legal thought, while our legal concepts are at best only analogous to concepts in Aristotle's thought.

Nonetheless, from the point of view of the reconstruction of Aristotle, mere exegesis is of antiquarian interest only, unless it serves as the first step toward the goal of creating a mutually illuminating dialogue between Aristotle and us. Contemporary legal scholars are drawn to the reconstruction of Aristotle because of pressing practical and theoretical concerns; they look to Aristotle to reorient contemporary discussions and practice in a more fruitful direction. They are often quite willing, perhaps too willing, to risk anachronism in their appropriation of Aristotle's thought; they often have little interest in pure exegesis or even in the integrity of Aristotle's thought. Finally, neoAristotelian theorizing, because it emancipates itself from Aristotle's texts almost entirely, requires a very good ear for Aristotle's deepest principles and concerns, lest it degenerate into wholly nonAristotelian theorizing.

4) Themes in Aristotelian Jurisprudence

Even though he wrote no extant dialogues, Aristotle's thought is nonetheless highly dialectical: in treating a topic, he usually identifies a problem and then considers two or more opposing arguments in regard to the problem. He then tries to resolve and overcome the opposition by weaving the insights of each side into a more adequate account in order to resolve the problem. For example, many thinkers in his day, as in ours, argued about whether social and political institutions, including ethics and law, are natural or conventional: some championed nature and others championed convention. Aristotle sought to explore this problem, seeking to answer the question of how the legislator can produce a happy state. He dialectically transcended the sharp dichotomy between nature and convention by developing a nested hierarchy of concepts by which to understand the emergence and promulgation of ethical and legal norms. He says:

'In order to become good and wise, requires three things; these are nature, habit, and reason.'[7] Aristotle resists the temptation to set nature and convention in opposition; rather, he insists we are by nature conventional animals. Moral and intellectual self-realization require all three: we must begin with the right natural powers and dispositions, we must cultivate these powers and dispositions into the right habits of character, and we must reflectively adjust our habits in light of our stipulated moral ideals. In this model of human self-realization, our habits presuppose human nature but cannot be reduced to it, just as our stipulated rational ideals presuppose our habits but cannot be reduced to them.

Aristotle extended his triad beyond individual self-realization to the actualization of the political community. Thus, he says in many places, the legislator, in the deliberate rational stipulation of law, must take into account the natural capacities of his citizens (for example, not lay the same burdens on men, women, and children) as well as their social customs (written law must take into account the force of unwritten law). Thus, nature, custom, and law form a nested hierarchy for the political community just as nature, habit, and reason relate to the individual. Aristotle's triadic conceptualization of law has inspired a long history of jurisprudential discussions of the relations among natural law, customary law, and stipulated or positive law. Cicero follows Aristotle closely at least when he writes: 'Law (*ius*) initially proceeds from nature, then certain rules of conduct become customary by reason of their advantage; later still both the principles that proceeded from nature and those that had been approved by custom received the support of religion and the fear of the law (*lex*).'[8]

We cannot here develop or defend Aristotle's triadic model of legal development; our point is rather to illustrate how he transcends the sharply opposed positions of those who defend nature and those who defend convention. In the contemporary debates between those who say that law and morality can be reduced to natural selection and those who say that law and morality are merely arbitrary conventions, Aristotle's dialectic saves us from what may well be a false dilemma. There are a number of such theoretical polarities in contemporary discussions of law, and Aristotle's dialectical problem solving approach helps to explain why he has become surprisingly attractive of late. For example, among those who attempt to theorize about law from the perspective of moral philosophy, some take a rights-based approach derived from Kant while others take a consequentialist approach derived from Bentham. The Kantians tend to champion legal principles protecting the inherent dignity of individual human persons while the consequentialists tend to champion legal policies that generate the highest aggregate good for the community. Ronald Dworkin, for example, has described courts as the forum of principle and legislatures as the forum for policies. Aristotle's dialectical approach to law and morality seems to provide an attractive alternative to these sharp dichotomies, since his understanding of the political context of individual self-realization avoids setting individual rights and collective goods in conflict. For an Aristotelian, both courts and legislatures would have to balance rights and goods, moral principles and political policies. Obviously, all of this is easier said than done, as our volume illustrates.

Unfortunately the highly abstract character of the debates between Kantians and consequentialists has led many lawyers to reject any role for philosophy in law at all and to seek guidance solely in the concrete historical materials. So the recent rise of an abstract philosophical jurisprudence has triggered a revival of a concrete strict constructivism, constitutional originalism, and historicism. When it comes to interpreting the constitution, Ronald Dworkin insists that we must join either the 'party of principle' or the 'party of

history'. But many lawyers, we think, instinctively reject both of these alternatives: they feel vertigo at the prospect of open-ended theorizing from principles just as they feel severely cramped by the artificial confines of a strict constuctivism. Aristotle's understanding of the nested hierarchy of nature, custom, and reason suggests that lawyers must find a way to integrate both rational principle and historical custom in their reasoning about law. Indeed, an Aristotelian would not sharply contrast principle and history but would seek to elucidate the moral principles immanent in human nature and historical custom – principles, to be sure, that must be reflectively refined by reason.

Finally, both modern ethics and modern jurisprudence have deflected attention from any concern for the character of agents, and in particular, for the professional character of lawyers. Modern ethics, both Kantian and utilitarian are concerned chiefly with the moral evaluation of acts, not of agents. Only with the recent revival of a neoAristotelian virtue ethics have questions of the goodness and character of agents returned to ethical theory. In retrospect, the modern obsession with evaluating acts rather than with evaluating persons seems odd, since a person seems more important than, and prior to, his or her acts. Modern ethical theory lost touch with our everyday moral language, which has a fantastically rich vocabulary for evaluating the character of agents.

We find a similar deflection of attention from the character of agents in the long jurisprudential debates between natural lawyers and legal positivists about the relation of law to morality. This debate now focuses on highly technical logical analyses of the relation between moral propositions and legal propositions. Such debates might be more important if law were a theoretical enterprise in which rigour and precision in concept and theory were the chief aim. The relation between logical and mathematical propositions, for example, is rightly central to purely philosophical inquiry. But Aristotle would remind us that law is essentially a practical enterprise, which is not fundamentally concerned with the question of what we can know but rather with the question of what we should do. Aristotle, in short, would be much more concerned in understanding what makes a good lawyer than in understanding what is law; more precisely, he would orient discussions about what is law to the aim of educating good lawyers.

Aristotle's resolutely practical orientation in his legal thought makes him very attractive to contemporary legal scholars concerned with the reform of legal education, of clinical legal training, and of the ideals of professional responsibility. Our existing legal education, both formal and clinical, usually amounts to a thorough and ruthlessly amoral acquisition of legal knowledge and skill to be placed at the service of any legally permitted end – to which might be added a purely ancillary course on professional responsibility, reminding students not to break the law in the course of practising it. As Anthony Kronman (Chapter 14) argues, this kind of legal education fosters a conception of law as merely a weapon to be wielded for any given end, from corporate profit to social change. By contrast, Aristotle would see legal education, not just in terms of acquiring knowledge or skill, but in terms of developing intellectual and moral virtues; these virtues include knowledge and skill, but they combine that knowledge and that skill with a motivation to seek justice in the legal ordering of human affairs. The virtues of a good lawyer, such as practical wisdom, justice, and equity, are not merely tools we use; they are aspects of who we are. The Aristotelian lawyer enjoys the practice of law itself, because that practice enables him to exercise skilful judgment in the just disposition of human relations. For Aristotle, we do not seek education, legal or otherwise, in order to find new and

better means to pursue our existing aspirations; instead, we seek legal education in order to become substantially different and better persons – persons who place their new knowledge and skills at the service of new aspirations.

5) The Challenges of an Aristotelian Jurisprudence

Aristotelian jurisprudence poses a significant challenge to contemporary legal studies. For, by his resolutely practical orientation, Aristotle insists that we cease to aspire to a value–neutral science of law, and focus instead on understanding law in terms of the goods and virtues it variously realizes or ruins. In this view, we cannot escape the realm of practical conflict over goods and virtues by a strategic retreat to a purely theoretical or scientific perspective; law and legal argument will always be rhetorical and practical rather than demonstrative and theoretical. But, though law is a form of practical reason in Aristotle's account, it is a distinctive kind of practical reason, which can best be defined by what it seeks to avoid. Legal reasoning, in Aristotle's view, is neither the open-ended practical reason of a moral philosopher or even of a moral agent; rather, legal reasoning is highly structured and delimited by the constraints of constitutional history and customary expectations. Aristotle does not rule out, of course, deliberate change of constitution and custom; rather, he insists on presumptive respect for them as key sources of respect for the rule of law. The sheer existence of constitutions and custom have a special moral weight, he thinks, in legal reasoning. His concern to avoid purely abstract and open-ended practical reason, however, does not lead him to reduce legal reasoning to the unprincipled rationalization of particular desires or interests. Rather, for Aristotle, desires and interests must themselves be justified by a principled account of individual and political human good that is in turn contextualized by the unique institutional and customary setting. There is, of course, no abstract procedure for generating this elusive mix of justification and fit in legal reasoning; we must look to practical wisdom in our legislators, judges, and advocates.

Aristotelian jurisprudence also challenges the split in legal studies between normative and empirical research. Because of the importance Aristotle places on the concrete circumstances of individual and political choice, Aristotelian jurisprudence requires us to avoid both the non-empirical normative theorizing found among followers of Rawls and the purely instrumental empirical research found among the followers of Lasswell. Instead, Aristotelian jurisprudence would encourage detailed empirical studies of legal policy designed within the context of normative problems to illuminate and resolve normative debates, on the model of William Bowen and Derek Bok's recent study of affirmative action, *The Shape of the River*. Aristotle's own legal thought powerfully combines a deep normative orientation toward human flourishing with an empirical study of over a hundred and fifty Greek constitutions and myriad Greek legislation. Aristotle's own example presents a striking challenge to the contemporary tendency to split the normative from the empirical study of law.

An agenda for contemporary Aristotelian legal studies, following the leads provided by the contributors of this volume, would include: first, articulating the precise relation between Aristotelian practical reason and modern legal reasoning, including, not only common law case reasoning, but also the interpretation of statutes and administrative regulations. We have some excellent accounts of Aristotelian practical reasoning in the domain of case-law, but

fewer attempts to understand how executive agencies formulate rules and regulations to enforce broad statutory directives or how courts should interpret statutes that have arguably fallen into desuetude. Second, despite the efforts of civic republicans, we need more Aristotelian analysis of the prospects for democratic lawmaking and political participation in the new global capitalist order. Third, amidst the strong pressures to make the practice of law a mere weapon for the pursuit of money or power and amidst the deep cynicism about the duties and ideals of the legal profession, we need more Aristotelian accounts of the goods internal to the practice of law. We need to be reminded that the practice of law can itself be a unique source of human fulfilment. Fourth, an Aristotelian pedagogy must be developed for legal education, so that legal scholarship responds to the demands of legal practice, and clinical training is informed by legal scholarship. We must learn from Aristotle how to transform our legal knowledge and skills into the virtue of a good lawyer. Fifth, and finally, any effort to recover the thought of Aristotle and to make it applicable to contemporary law will require a demonstration of its power of analysis in the array of doctrinal fields of law: not only tort, criminal, contract, and constitutional law (which our volume includes) but also corporations, commercial, property, estates, and the many other fields of law. Our volume includes a bibliography that illustrates the great scope and range of contemporary Aristotelian jurisprudence.

Notes

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2 Berman (1983), *Law and Revolution*, Cambridge: Harvard University Press, p. 135.

3 True, Blackstone's treatise is titled, following the Greek tradition, *Commentaries on the Laws of England*, but Blackstone was certainly too much of a lawyer ever to have adopted Hobbes' phrase 'the common laws of England'.

4 The scope of this revival in law and related disciplines is evident in our Bibliography; the depth of the revival is evident in the contributions to this volume.

5 Miller (1995), *Nature, Justice, and Rights in Aristotle's 'Politics'*, Oxford: Clarendon Press, pp. 21–2.

6 For an example of a critique of a modern formulation of Aristotle, see Richard Oliver Brooks (2001), 'The Many Busts of Aristotle on Display: A Review of Calnan's Justice and Tort Law', *Tort and Insurance Law Journal*, **36**, p. 1105.

7 Aristotle, *Politics*, 1332a 38. For one extended analysis of Aristotle's theory of social, political, and legal institutions, see James Bernard Murphy (1993), *The Moral Economy of Labor: Aristotelian Themes in Economic Theory*, New Haven: Yale University Press, chs. 2 and 4.

8 Cicero, *De Inventione*, **II**, 53.160.

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