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There is no real consensus upon the point of social development at which "law" as a formal institution may be said to have appeared. To some extent the question is one of form rather than substance in that the answer obviously depends upon the selection of definition of positive law. A customary society evidently has a system of prescription which may well be mandatory and can be very elaborate. The suggested distinction between a "customary" and a "legal" society made by many commentators is that the former is necessarily static whereas the latter is, at least potentially, dynamic — the functional distinction being that in a "legal" as opposed to customary society new rules can be made and old ones changed or abrogated as developing social needs may dictate, the new or altered rules having immediately effective authority. Upon this view it is the making of rules which defines a "legal" society and not the mere existence of prescriptive rules. This question of "authority" is of supreme importance. A prescriptive or prescriptive rule which has authority imposes an obligation upon those to whom it is addressed which exists irrespective of the application of, or even potential for, coercion. Coercive mechanisms may, and almost certainly will, exist but they reinforce an independently existing obligation in appropriate cases of derogation; they are not the source of the obligation in the first place.

This is essentially the distinction drawn by the positivist theorist M. L. A. Hart between being "obliged" and being "under obligation". A person may be "obliged", in the sense of being compelled, by anyone possessing superior force (Hart takes the example of a gunman) whereas he can be put under obligation only by someone having known authority.
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Obligation of course exists outside the formal framework of law. Religious and ethical belief creates obligation, so too does tradition. On a more personal level people feel obligation generated by ties of family and friendship. Law is not the only social prescription by any means; it is, however, the most formal and in terms of social cohesion a very important one.

There have been many attempts to define 'law'. It is doubtful whether this could ever be done satisfactorily since the range of factors to be included or considered is vast. The question of the moral component, if any, in law goes to the root of the issue under consideration, yet some description of the phenomenon of law in general must be essayed — if only to delimit as a preliminary exercise that which is not under consideration. There may be no consensus upon the point of social development at which law may be said to have come into existence but there are certain generally accepted points which may be made. It seems to be generally agreed that some form of 'constitutional' structure is required for 'law' to be said to exist, even if this is no more than the enunciation of the will of a known autocrat. This basic idea can be found in various definitions of law which are otherwise very different in both form and intention. Thus, St Thomas Aquinas defined 'law' in the following terms: '... nihil est aliud quaedam rationis ordinario ad bonum commune, ab eo qui curam communis habet promulgata', that is to say, that law is a rational ordinance made for the good of the community and promulgated. In the Thomist view 'law' encompasses the laws of God as well as those of men and, bearing this in mind, the immediate constitutional point should not perhaps here be pushed too closely. H. L. A. Hart, unsurprisingly, emphasised constitutionality much more strongly in his 'positivist' definition of 'law' as involving a union of primary (duty-imposing) rules with secondary (power-conferring) rules.

Whatever the view taken of detailed arguments upon the matter of definition, it may perhaps be accepted for purposes of discussion that 'law', at the minimum, involves the formal prescription of conduct for a given society which is communicated according to some known process, even if this be only the expression of the decisions of an autocrat. In general such prescription would be expected also to be mandatory rather than merely suggestive or exhortatory. In practice, 'legal' ideas, and with them legal theory, seem to develop when custom, the enshrined practice of the community, ceases to be adequate for the regulation of a more complex society and the need is felt for mechanisms for the creation of new rules and the amendment of old ones as the circumstances may from time to time require.

The origins of law lie in the more static customary prescription which preceded it. It is modern jurisprudence custom is regarded more as a possible source material for legal rules than as a source of law per se. Thus it may be argued that a customary practice may attain recognition by the courts and thus become law through enshrinement in precedent. Moreover, in the formative years of English law, custom was very much a primary source of law. In societies of a 'primitive' type custom is indeed often the principal, if not the only, form of prescription. It would thus appear that 'rules' in the form which may fairly be called 'proto-law' predate the formal mechanisms of a legal system in the historical pattern of social development. The authority of such rules is not derived from legal institutions, there being none at the time, nor is it actually derived from coercion. 'Primitive' societies are not necessarily without coercive mechanisms, but the level and effect of such mechanisms vary enormously. Often 'enforcement' occurs through social pressure more than coercion per se. The operation of such customary rules necessarily depends upon the sense of obligation of their subjects and that sense of obligation is essentially the product of long habit. The custom of a 'primitive' society in fact commands obedience by virtue of the awe with which it becomes invested through years of practice. When formal law-making processes develop, the new rules must somehow take on something of the same mantle if they are to command the same respect and obedience.

Contrary to popular impression, rulers in 'primitive' societies were not usually unrestricted despots in the manner of some modern totalitarian dictators. On the contrary, such rulers tended to be seen as living embodiments of the tradition of the tribe or, later, the nation. Within that tradition their power might, although it was not so of necessity, be absolute but it was difficult, if not impossible, for them to step outside that tradition. The tradition might evolve, but to change it by order was very difficult even if possible at all. As societies become more complex and develop to a 'civilised' state, more formal and sophisticated legal techniques become necessary in order to facilitate adequate responses to new questions and problems. Amendment of enshrined customary norms needs association with the same or a similar perceived higher order with which the customary order
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itself has become associated.

This need to associate new 'laws' with the semi-divine ascription of custom is the basis of the idea that laws 'ought' to accord with moral precept. This may in fact be seen as an inherited idea of limitation upon government traceable back to the inability of 'primitive' rules to defy tribal mores. The ancient association of law-making with moral authority lies at the root of subsequent naturalist thought and can indeed be said to be as old as legal theory itself. Perhaps as a result of this very ambiguity, such ideas have of course been worked out in many different ways in different cultures.

In most ancient civilisations religion, morality and positive law were not really seen as separate phenomena with some coincidence of action as they tend to be today, but rather as different aspects of the same thing. Even if the ruler was not regarded as personally divine, as was for example the Pharaoh of Egypt, law-making itself was generally felt to be a sacred or quasi-sacred function. This can be seen in the common ascription of law-making power to some divine conference of authority. With the increasing sophistication of secular law-making, this tended progressively to develop into something more closely approaching the modern idea of a relationship between human law and a higher moral order.

This process may readily be observed. In the Louvre in Paris there may be seen a carved and inscribed pillar of black diorite, standing some seven feet and four inches high and two feet in diameter. This monument was discovered in a fragmented state at Susa in modern Iran by French archaeologists in December 1901. It is transcribed, however, that it had been removed there by an Elamite conqueror from its original location in a temple at Sippara (near Baghdad) in present-day Iraq. Upon translation the inscription is discovered to be a code of laws promulgated by the Babylonian King Hammurabi who reigned approximately 1790 - 1750 BC. The code itself appears to consist of a series of judgements and orders made by the King. Hammurabi seems, upon the available evidence, actually to have taken a personal interest in such matters rather than merely having the outcome formally ascribed to his wisdom. It is very clear, however, that these laws were seen as depending upon something more than the power of the king himself and were in fact related both to moral duty and to religious command. At the top of the front face of the pillar is a carving which appears to show the king standing before the enthroned god of Justice, Shamash. The apparent, and presumably intended, implication of this is that Hammurabi's laws have at least the approval of the gods. This impression is confirmed by the preamble and concluding comments of the text of the code itself. The preamble states, inter alia, 'Then Anu and Bel delighted the flesh of mankind by calling me, the renowned prince, the god-feared Hammurabi, to establish justice in the earth.' This clearly suggests an idea of the derivation of the authority of law from the command of the gods and this motif is repeated in the final words of the preamble, as follows: 'When Marduk had instituted me governor of men, to conduct and to direct, Law and Justice I established in the land for the good of the people.'

It is clear from such statements as these that the authority of the Code Hammurabi was seen as deriving from the will, indeed the command, of the gods — what is more, a command set for a definite purpose going to the root of the nature of law-making. The idea of 'the good of the people' is highly significant in this context. Some commentators have argued from the evidence of the text of the code itself that these laws are devoid of metaphysical implication and were in fact seen by their maker and subjects as simply a set of positive regulations. This appears to be quite true, so far as it goes. Indeed the first words of the concluding section of the text appear to support this position in stating that the laws are 'The judgements of justice which Hammurabi, the mighty King has established.' This is, however, to ignore the point that the authority of the king to make these positive laws was seen as being derived from a higher authority than that of the king himself. This point is also made explicit in the text of the section that follows the description quoted above, in these terms: 'By command of Shamash, the great judge of heaven and earth, my justice shall glisten in the land.' The nature of this claim is made clear later in the text by the assertion that 'Hammurabi, the King of justice, an I, to whom Shamash has granted rectitude.' In some ways this is a surprisingly 'modern' conception of law-making. The king is presented as making laws in a modern positivist sense, not as a mere mouthpiece of the gods but upon his own rational volition. However, his power to do so is perceived as deriving from a divine mandate which imposes a clear purpose upon law-making, which is essentially one of public benefit.

The idea of laws made by men for men, albeit upon a divine authorisation, is supported by the relative absence of legal 'magic' in the Code Hammurabi. It is clear that in general legal issues and disputes were determined by a more or less rational judicial
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process, including rules of evidence. Resort to the 'magic' of oaths and ordeals seems to have been made only in cases not amenable to rational modes of proof. The picture of Babylonian legal ideas which emerges from the Code of Hammurabi is that of a king and a legal system which operated as a structure of human prescription but none the less upon a commission attributed to the gods. The code, in common with many other early legal codes, concludes with a lengthy curse upon any subsequent ruler who might seek to derogate from the code. This type of curse attached to persons defacing or abrogating Royal edicts is commonly met with in ancient examples, and in part they emphasize the high nature of the legal authority but they are also admitted assertions of pre-eminence on the part of the ruler concerned. Such ancient injunctions should not be overemphasized or taken too seriously. It would be an unsafe proceeding to attempt to impose modern jurisprudential concepts upon so ancient a text which was moreover conceived in a cultural and intellectual climate vastly different from our own. However, certain conclusions may fairly be drawn from the text itself. The outline given above is at least strongly suggestive of a fairly sophisticated perception of law-making, or more accurately rule-making through dispute resolution, as, in itself, a rational human action satisfying positivist criteria of identification but also as the exercise of a power limited in its proper usage by a clear moral framework defined by justice and the public good.

The Code of Hammurabi is not the earliest code which has come down to us in whole or part from Babylonia and Sumeria but it is one of the most complete and important. These early legal codes are of great interest in their own right. They are also of significance in the very considerable influence they appear to have upon the development of Judaic legal theory, which remains vital to the present time and has wielded an immense influence upon the development of the wide spectrum of modern legal thought.

Jewish law has existed and developed for the best part of 3,000 years. Its survival not merely as a theory but also as an operative prescription, over such a long period, is the more remarkable when it is considered that for substantial parts of that time there was no Jewish national state. There are, and have been, other systems of law which have functioned without national bases. The canon law of the Roman Catholic Church and the Islamic Sha'ria spring to mind in this context. These examples, however, were and are spiritually-based systems conceived as supra-national structures applicable to the whole body of the faithful. Admittedly, both at present and in the past many Islamic states have adopted Islamic law as their national law but none the less the Sha'ria is not actually set out as a national law. The unique feature of Jewish law is its combination of religious and national characteristics and its survival in both capacities even in the absence of a supporting national state. It is this combination of characteristics which have enabled Jewish law to remain and survive as a living system of law. The significance of this is concisely summarised in the words of the Encyclopedia Judaica:

Notwithstanding its dispersion, the Jewish people continued to exist as a nation — not only as a religious sect — and constantly sought recourse to Jewish law, which it regarded as a part of its national asset through which to give expression to its essential being.

The early origins of Judaic law lie in the period of nomadic wandering reflected in Exodus. In the Biblical description of the evolution of the law some evidence can be seen of the type of kin-based system of legal obligation commonly encountered in such societies. Such a system emphasizes kin and clan cohesion, joint obligation, the importance of tradition and, often, group liability expressed through the medium of blood-feud. This may be seen in some of the more sanguinary assertions to be found in Exodus. The best-known instance is the statement that God will visit ‘... the iniquity of the fathers upon the children, and upon the children's children, unto the third and to the fourth generation’. Even here, however, this vengeful pronouncement is qualified by a preceding statement that God is ‘The LORD God, merciful and gracious ... keeping mercy for thousands, forgiving iniquity and transgression, and that will by no means clear the guilty’. 'Guilty' must here be taken to refer to obduracy in sin rather than necessarily the commission of sin per se.

The main statement of law in the Old Testament, however, reflects a later stage of development in main part. The basic statement of this law is to be found in the first five books of the Old Testament, that is to say the Pentateuch. The law, the Torah, commences with the Ten Commandments in Exodus 20. The Commandments themselves include matters of both religious and secular significance. Broadly speaking the first four Commandments are 'religious' in nature whereas the latter six are 'secular'.

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Thus the Third Commandment provides that ‘Thou shalt not take the name of the LORD thy God in vain’ which is obviously a ‘religious’ provision, whereas the Ninth Commandment provides that ‘Thou shalt not bear false witness against thy neighbour’ which, while clearly a moral ordinance, has much more secular implications. The immediately following chapters contain a mass of detailed prescription covering secular provisions of civil and criminal law as well as matters of ritual and religious regulation. In particular Exodus 21:1 to 22:17 may fairly be seen as a code of laws in a thoroughly secular sense which is directly comparable to such texts as the Code Hammurabi. Indeed the Semitic legal tradition in which the Code Hammurabi stands had a clear formative influence upon the Pentateuch code. Quite obviously the legal provisions of the Pentateuch, both religious and secular, have not come down to us in their present form as a result of a single act of enunciation, but have rather been relayed to us through a lengthy process of transmission and development. The extent to which the appearance of the rules has been affected by the process of transmission, and in particular through their recording by the priesthood, is difficult to say but may well have been considerable.

The authority upon which this elaborate structure of prescription rests is perceived as being absolute in nature and Divine in origin. Jewish law is seen as being in the most direct sense a Holy Law which to a considerable extent was not merely formulated upon a Divine authorisation but actually ordained in content by God Himself. The Mosaic law is expressly stated to be the word and command of God, thus in connection with the enunciation of the law it is written: ‘And God spake all these words, saying, I am the LORD thy God, which . . . brought thee out of the land of Egypt, out of the house of bondage.’

The provisions of the Judaic code are clearly set out as the product of a Divine ordinance for the benefit of the people and vested with moral authority and imposing a moral obligation. At the same time the establishment of the law is described in the following highly significant terms: ‘And Moses came and told the people all the words of the LORD, and all the judgments: and all the people answered with one voice, and said, All the words which the LORD hath said will do.’ This is an interesting formulation. The moral and legal order is perceived not only as a unitary Divine prescription but also as one chosen by its subjects. It may, in this sense, be said that the Jews consider themselves to be a people who have themselves chosen as well as one which has been chosen.

Judaeo-Jewish theory necessarily sees the law as sanctioned by the command of God and thus perceives a fundamental linkage between the categories of religious, moral and legal obligation. This is implied by the statement in the Encyclopedia Judaica that ‘. . . both the laws applicable between man and man the precepts concerning man and God have a single and common source, namely the written and oral law.’ Jewish theory firmly enjoins obedience to the law as a matter both of social and religious duty, but this proceeds from a perception of the law as derived from Divine ordinance and therefore necessarily just and true. In making this very point Stone quotes Isaiah 33:22 in which it is written that: ‘The LORD is our judge; the LORD is our lawgiver, the LORD is our king . . .’

Human law is thus seen in Jewish thought as deriving its ultimate authority from Divine ordinance. It was not claimed, however, that the two were contemporaneous. Logically this could not be so. The Divine will is necessarily seen as both higher and wider than human needs and so the Divine prescription in respect of law is understood to be a partial revelation only. A passage from Deuteronomy makes this clear in stating that

The secret things belong unto the LORD our God, but those things which are revealed belong unto us and to our children for ever, that we may do all the words of this law.’

The passage continues to evaluate the Divine intention in the following terms:

For this commandment which I command thee this day, it is not hidden from thee, neither is it far off. It is not in heaven, that thou shouldest say, Who shall go up for us to heaven, and bring it unto us, that we may hear it and do it? But the word is very nigh unto thee, in thy mouth, and in thy heart, that thou mayest do it.’

Thus the law is presented as a code grounded in Divinely prescribed moral ordinance and covering matters pertinent to the social needs of its subjects. It is not, and is not represented to be, a codification of total morality. It is seen as a moral law and thus one which imposes a moral obligation to obey upon its subjects. The
claims of morality in general may nevertheless be both wider and less specific than those of legal prescription.

The ascension of the source of law-making power, and even the specific content of laws, to Divine authority is by no means uncommon and is certainly not limited to the Jewish example. However, whatever the source of moral authority for law-making, human institutions, which may have less than Divine standards of operation, are needed for the practical implementation and working of legal rules. It is in the maintenance of the relationship between a claimed moral source of law-making authority and the behaviour of human law-makers and administrators that the practical value of any theory of naturalism lies. The issue is simply that of the ways in which institutions of state can be restrained from acting in a manner which goes beyond their moral or ethical authority when formal positive definitions of the scope of their power would not suffice to that end. The solution to this problem cannot lie simply in the provisions of a code ascribed to Divine intervention, since the inherent rigidity of such a code can in time become a fertile source of injustice in application other than in the case of the simplest and most basic commands and prohibitions. However, once the need for an interpretative and/or adaptive mechanism is admitted it might seem that the original claim to transcendent authority must be lost. Upon such gloomy reasoning it might be considered to follow that such a theory of law is bound to fail through processes of social change and the effusion of time. A simple but effective answer to these problems was found in Judaic legal theory. The basic danger of fossilisation and consequent redundancy of the code has been avoided through a system of rational interpretation and adaption. The Written Law, the Torah, has come to be supplemented and developed by a formally unwritten tradition, the Halakah. This is not perceived as an accretion to the Written Law but rather as having been given by God to Moses upon Mount Sinai at the same time as the giving of the Torah. Granted that the Halakah is the work of scholars, there is here on the face of it a contradiction. How could subsequent scholarly elucidation possibly have been given at the same time as the Torah in the remote past at Mount Sinai? Again the Judaic solution is both simple and elegant. It is found in the idea that the scholarly interpretation of the Torah, which is found in the Halakah, is necessarily rooted in the Torah itself and was therefore inherent in the Written Law as originally given — and thus partakes of the same Divine authority. In effect the Halakah is

presented as being ‘discovered’ rather than made. Notwithstanding this perception, the discovery of the Oral Law is a rational and scholarly process and is seen as such.

Within this perception no conflict between the God-given law, the Torah, and the humanly discovered elucidation, the Halakah, is possible. The Torah and the Halakah act from and share the same authority and can therefore hardly diverge. It must of course be conceded that in practice and inevitably some Rabbinical law-explanation was in fact quite clearly law-making in the normal sense which significantly changed former practices, albeit within a continuing tradition of moral authority. Interestingly a similar pattern can be seen in the case of the Islamic Hadith. Quite distinct from the Halakah, Jewish Courts also reserved and exercised a power to vary the effects of the law where justice in a particular case demanded it. However, all these means of balancing the implementation of the law hark back to a definition of ‘law’ which depends upon a perception of the Divine authorisation of the Torah and the inherency of the Halakah.

There remains the problem posed by a ruler who attempts to make positive rules contrary to the spirit of the Torah or the Halakah. The Old Testament supplies a simple answer to this question. The first King of Israel was Saul, who appears to have been appointed as a response to popular demand in succession to various more or less charismatic forms of leadership. The account in Samuel makes it clear that this was an appointment upon terms with an answerability to God for the exercise of the kingship. Thus it is written: ‘Then Samuel told the people the manner of the kingdom, and wrote it in a book, and laid it up before the LORD . . .’ This is as clear a formulation of the Judaic attitude as one could wish for. What was in effect a ‘constitution’ is enunciated and preserved in a thoroughly ‘positivist’ manner, but is derived from and referred back to Divine precept. Unfortunately these ‘constitutional’ provisions did not wait long to be put to the test, for Saul himself defied the Divine precept. In consequence it was predicted that Saul would forfeit the kingship which would then vest not in his descendent but in one more worthy. Thus Samuel is described as warning Saul that

... the LORD [would] have established thy kingdom upon Israel for ever. But now thy kingdom shall not continue: the LORD hath sought ... a man after his own heart, and the LORD hath commended him to be captain over his people,
because thou hast not kept that which the LORD commanded thee. 30

In due course indeed Saul and his sons died in battle and were replaced by the House of David. It is significant, however, that this is not presented as a precedent for the overthrow of erring kings, rather the replacement of Saul is put down to Divine agency. Indeed human action against Saul is specifically denounced as sinful. 31 The operation and effect of the higher order in the Judaic perception thus appears as an autonomous consequence of Divine wrath without human intervention. To put this in more neutral terms, the image is one of backsliding from 'natural' order, leading to its own nemesis. This is not to say by any means, however, that naturalism was conceived as an entirely passive system from the human viewpoint in Judaic theory. The Old Testament is replete with accounts of the denunciation of kings and rulers by prophets and other charismatic leaders such as Samuel and Elijah; in the New Testament John the Baptist stands in much the same tradition in his denunciation of Herod. A notable example of this can be seen in Nathan's criticism and warning of David for his guilty passion for Bathsheba, the wife of Uriah the Hittite. 32 Elijah's denunciation of Ahab is a yet more powerful example 33 and it is significant that here, as in the case of David, the urging to improvement was, to an extent, successful.

The theory of ancient Judaic naturalism may be seen as one of a legal order which rests upon a perception of Divine ordinance but within which human interpretation and rule-making have a proper and important role to play. In this perception 'law' as such means the Divinely given or inspired prescription. Attempts to move fundamentally away from this received moral law, as opposed to its adaption to new circumstances, are thus seen as abominations which are 'naturally' doomed to failure by their inherent moral defects. The attempts of Ahab to introduce the worship of Baal into Israel fell very much into this category. The notion of a rigorous and wholly inflexible code revolving around concepts of the lex talionis which some Christian thinkers impute to Jewish legal theory is very far from the truth, however. Judaic legal theory was and is a great deal more subtle than that. In fact the absence of any real perceived distinction between natural and positive law in Judaic theory essentially avoided the issue of the 'bad' law since such an enactment could not be part of the Jewish conception of 'law' in the sense of a prescription imposing a moral obligation to

obey upon its addresses. A purported 'law' contrary to the perceived will of God, such as a command to commit adultery or to worship a false God, would be seen as a temptation involving both the commander and the obedient in sin for their disavowal of the true law. Of course rulers might seek to impose iniquitous rules but such an attempt would be an exercise not of authority but of power.

Such a naturalism is absolute. The application of the prescription may make allowance for changing needs and for humanity but the dangers of rigidity remain. It is precisely this point that is brought out in Christ's attack upon the inflexibility of the Pharisaic outlook. It must of course be conceded that Christian naturalism has proved far from immune from the same danger in the hands of some of its exponents. 34

Judaic naturalism has proved to be a singularly fertile source of development in legal theory. Jewish law itself of course continues as a living system. In modern Israel the legal system is secular and the influence of Jewish law is therefore indirect but significant as a moral overview. This leads to a certain tension between the secular and religious aspects of modern Israel. In this context it must be wondered whether the centuries of preservation of Judaic tradition have not been attained at the price of loss of flexibility in practice which has brought about a modern separation between religious and secular law in modern Israel of a type which would have been far outside the legal or social concepts of ancient Israel.

The impact of Judaic legal theory upon the development of Christian legal thought was inevitably massive. However, it has often been much misunderstood. It is frequently asserted that Christian doctrine represents the abrogation of the law of the Old Testament through the operation of Divine grace. If this were so, Judaic legal theory could not be more than an interesting precursor from the viewpoint of a Christian legal theory. Actually such a view is a gross oversimplification taking little account of either doctrine or history. The early Church certainly saw the law as being ultimately superseded when all had reached a state of grace. However, in the meantime the law was perceived as necessary for those who might otherwise tend to err and stray. The linkage of law with sin was much ameliorated with the subsequent development of theory. 35 When in due course the rationalist Hellenistic theories of law and obligation were joined into the later development of theory as the other basic tradition of Western naturalism, further elaboration took place but the Judaic tradition
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of an absolute and Divinely ordained natural law remains one of the
streams of thought which has contributed fundamentally to the
development of modern Western jurisprudence. A similarly close
relationship to the Judaic idea of law can also be found in Islamic
jurisprudence.

In the consideration of the origins of naturalist legal theory there
remains an important distinction to be made: that is the separation
of ideas about the moral nature and authority of law from what
may crudely be called legal 'magic'. These two may be confused
upon superficial inspection but are in fact readily separable. By
legal 'magic' is meant that ritual of legal practice which is used to
clothe what are in fact perfectly mundane transactions with the
solemnity considered appropriate in the light of their social signifi-
cance. It may also be that such ritual has a real importance in
imparting psychological efficacy to rules of law. These issues are
the particular field of interest of the Scandinavian Realist school of
jurisprudence. The founding father of this school of thought, Axel
Hägerström (1868–1959), devoted a considerable amount of
attention to this question of legal 'magic'. He was Hägerström's
thesis that law, religion and magic were originally closely related
and that for law to act as an effective prescription it must elicit the
appropriate psychological responses in its subjects. He argued that
these responses are secured largely through the practice of quasi-
'magical' rituals. Hägerström chose Roman Law as his principal
field of study in the making of this point. He pointed out that
much legal ritual is designed to impress upon the minds of its par-
ticipants the special solemnity of the transaction entered into in
order to give it an efficacy in the minds of those directly concerned
with it and also the community at large which it might otherwise
lack. Thus the solemn rituals involved in the transfer of land from
one owner to another in Roman (or indeed English) law are,
according to Hägerström, intended to suggest that a transfer of
some 'real' power over the land is taking place — the point being
that law operates through psychological effects which depend in
considerable measure upon rituals and formal procedures which
generate belief in the efficacy of the system.

Whatever the merits or demerits of this idea, the 'magical'
elements in law can take two basic forms. One is the procedural
ritual which Hägerström considered. The other is the resort to
'magical' means of operation within the prescription itself, such as
trials by ordeal. This element varies enormously as between dif-
frent times and places. Ordeal was almost absent in the ancient

Senitic codes; it was, in contrast, very prevalent in Europe during
the Dark Ages. Rather to everyone's surprise it was found that
trial by battle remained a legal possibility in England in 181817 and
indeed the procedure was formally abolished by statute only in the
following year, 1819 although it had long been in practical desuetude.
In this form legal 'magic' is virtually a negation of law since it
seeks to throw decision-making onto entirely random and arbi-
trary processes which are by their nature quite incapable of acting
as a uniform or reasonably ordered prescription.

These are not aspects of legal development germane to the
origins of naturalism. Naturalist legal theory has deep roots in
religious thought, as indeed do most moral concepts, but it is not
tied to the aberration of 'magical' irrationality. On the contrary,
the central concern of naturalism is to define the moral framework
within which a rational prescriptive order can operate and to
define the moral limitations of its proper exercise. This character
of naturalist thought can be seen from the earliest elaborated legal
ideas, which is the particular interest of ancient Babylonian and
Jewish legal thought in this context. The roots of naturalism are
ancient in the extreme but the development of ideas in this context
has been wide ranging and highly various. The Judaic tradition is
an absolute naturalism referring to Divine sanction. The obvious
alternative is an overtly rationalist type of theory and it is to such
theory that the discussion must now turn.

Notes

1. H. L. A. Hart, The Concept of Law, Chs I and II.
2. Aquinas, Summa Theologiae, 1 Div. Quaesitio 90, Art. 4-
3. H. L. A. Hart, The Concept of Law. It is worth adding that Bentham
and Austin, in the notion of Sovereignty as a coercive power derived from
a habit of obedience, did not deny constitutionality, they merely chose to
define it as falling in large part into a sphere other than that of 'positive
law'.
4. See, for example, the discussion of the late developing role of the
'Warrior Societies' in The Chosen Way, Llewellyn and Hoebel.
5. See, for example, S. Roberts, Order and Dispute, for example.
6. Perhaps in the very narrow sense of developing an urban-based
economy.
7. In early stages of development this tended to be seen more as 'law-
discovering'.
8. The first translation was made into French by Father V. Schell, and
published as 'Les Origines-Semiristiques de la Obligation en Persie' (Paris, 1902). The first English translation was published
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9. Code Hammurabi, Preamble (Front, col. 1). This and other sections are taken from the translations set out by Chalperic Edwards in The World's Earliest Law (London, 1934).
10. Ibid., Preamble (Front, col. V).
11. Code Hammurabi, Conclusion (Front, col. XXIV).
12. Ibid.
13. Ibid. (Rear, col. XXV).
14. See, for example, Code Hammurabi, arts. 9–13 (Front, cols. VI–VIII).
15. Ordeal generally took the form of putting a suspect into the river to see if he floated or not, thus submitting the case to the river god. See, for example, Code Hammurabi, art. 2 (Front, col. V) in relation to charges of sorcery.
16. Examples may be seen in the British Museum in London.
22. Exodus 24:3.
25. The implications of this same point are elaborated in detail in the context of Christian thought by St Thomas Aquinas, see Ch. 3, this volume.
29. 1 Samuel 26:8–17.
30. 1 Kings 12:17–18.
31. St Thomas Aquinas made careful provision for the absolute nature of Divine ordinance and the mutability of human society in his theory of law. See Ch. 3, this volume.
32. The later view linked the coercive form of law to sin rather than the existence of law as a system of prescription. See Ch. 3, this volume.
33. Hagströmer’s principal written work was Der Römische Obligationsbegriff. However, the best approach to Scandinavian Realist thought for the English reader is Oliveron’s Law as Fact (2nd ed).
34. See Ashbee’s Thrasym (1818), 1 B. & Ald. 400.
35. 59 Geo. 3, c. 46.

2

Classical Hellenistic Theory

Developed Western naturalism is the fruit of the fusion of two quite different jurisprudential traditions — one of the absolute naturalism of the Judaic tradition, the other the rationalistic tradition which originated in ancient Greece. In the fifth century BC Greece was divided up into a number of small city-states, the political structure of which ranged from the democratic and military state of Athens to the ‘democracy’, in the limited context of the free male citizenry, of Athens, with many intermediate positions in other states. This diversity of political background naturally engendered a relativist tendency in political thought. This was furthered by the fact that Greek and, later, Roman religion was an elaborate pagan polytheism which was inevitably taken in a rather allegorical spirit by the educated and cannot be said to have contained much in the way of high ethical teaching. The consequence was that spirit of scepticism and enquiry which generated the wide spectrum of Greek thought which has so much influenced the development of Western civilization.

The fifth and fourth centuries BC in Greece were times of intense philosophical and political debate against a troubled political background. The defeat of the Persian invasion was followed by a time of Athenian ascendency particularly associated with the name of Pericles, the principal political figure in the city for a period of some 30 years and the architect of a political confederation which was in all but an Athenian empire. Athenian ascendency was brought to an end by the prolonged Peloponnesian war, the turmoil of which formed the significant background to the later years of Socrates and the youth and young manhood of Plato. Pericles died in 429 BC and the leaders of the citizen-democracy
which succeeded him made serious misjudgments, in part at least due to a need to placate uninformed mob pressure. Following a disastrous military expedition to Sicily there was a revolution in Athens in 411 BC in which an oligarchic faction seized power. This, too, was shortly overthrown in a violent uprising by the democratic faction who instituted a reign of terror over their opponents. Athens was finally defeated by Sparta in 404 BC and, with Spartan aid, a restoration of oligarchy followed in the form of the rule of the Thirty Tyrants. They themselves were overthrown, however, after less than a year to be replaced by a more moderate and longer-lasting democracy which besmirched its reputation, however, by the judicial murder of Socrates in 399 BC in circumstances partly derived from the political instability of the time.

The dominant thinkers of the earlier part of this era were the Sophists. Sophist theory was highly relativist and saw no necessary connection between nature or morality and law-making. Law was seen as a pragmatic expression of power embodying the interest of the law-makers, and obedience to law was seen as being secured through the self-interest of the subject, if only through the avoidance of coercive measures. As a theory this was not so much immoral as amoral in that the relevance of morality to practical human affairs was in effect denied. In modern terms Sophism was a theory concerned with the successful use of power which denied any limiting idea of a moral ‘authority’ in law-making. This type of theory was countered by a classical naturalism with the development of which the names of Socrates, Plato and Aristotle are especially associated.

Socrates (469–399 BC) was a controversial Athenian philosopher and teacher. His career is known only in outline although some scattered matters of detail have come down to us. He clearly believed that there exists a settled moral order, but at the same time it may reasonably be assumed that the fanciful mythology of the Greek gods did not attract his literal adherence. It may be that, like many classical thinkers, he treated Hellenistic religion as an allegory of greater truths. There is certainly some support in accounts of his thought and teaching for the idea that he may in practice have tended towards some form of monotheistic perception. As a thinker and a moralist he attracted a great many followers and disciples and this ultimately proved to be his downfall. His doctrines proved uncomfortable to the Athenian establishment and his questioning of attitudes and practices came to be considered subversive in influential circles. Finally, his influence among the young men of the upper classes in Athens led his enemies to bring charges against him of sedition and impiety upon which he was convicted and executed, although the real aim may have been to drive Socrates into exile and thus relieve the Athenians of their embarrassment.

Our knowledge of Socrates's teaching comes to us mainly through the writing of his greatest follower, Plato (c. 429–347 BC), since Socrates himself was a teacher and lecturer rather than a writer. Socratic thought about the authority of law is set out by Plato in the four conversations comprising The Last Days of Socrates, particularly in The Apology and Crito. The work is set out as an account of Socrates's trial and death but is not so much a description simpliciter as conclusions of Socratic thought presented in the context of those events. The trial resulted from charges of heresy or impiety and corruption of youth amounting to sedition brought against Socrates by three leading members of the Athenian establishment, Meletus, Lycon and Anytus. The trial procedure involved debate between prosecutor and defendant before a 'jury' of 501 free citizens which then reached a majority verdict. In the event of a finding of 'guilty', sentence was then similarly determined by a process of debate followed by majority vote. In The Last Days, The Apology is a representation of Socrates's arguments to the Court, although it is in no sense a transcript of anything like a speech per se, and the Crito is an argument between Socrates and his friend Crito upon the nature of Socrates's duty to accept the death penalty imposed upon him, which Socrates asserts and Crito denies.

In the course of his counter to the accusations brought against him, Socrates makes the point that the exercise of power by the state is not necessarily 'right' nor morally justified; he cites examples from the period of the rule of the Thirty Tyrants in Athens to support this proposition and indeed goes so far as to assert that a just man can hardly expect to survive in public life. Socrates was in the end condemned to death, mainly perhaps because he refused to concede the propriety of the jury decision or to plead for mercy in circumstances in which he sought not the 'mercy' of the corrupt but the justice of the wise. Sentence was not carried out immediately as would normally have been the practice in Athens because the annual ceremony of the 'Mission to Delos' was in progress during which capital penalties could not be carried out. It may have been the desire of the Athenian authorities that Socrates should rid them of obloquy by escaping during the period
of delay; certainly his friends urged him to do so. Socrates refused and was in due course executed by the process of drinking a cup of hemlock. The reasons for his refusal to escape are examined in the most jurisprudentially significant of the four conversations of *The Last Days*, Crito. The form of Crito is an argument between Socrates and Crito upon the necessity for Socrates's death which Crito denies. Crito argues that the condemnation was unjust and that Socrates ought to escape its implementation if only for the benefit of his friends and family by fleeing to some other city while he has the opportunity to do so. This is an issue which goes to the root of the question of legal obligation. Socrates argues that the existence of the state rests upon its laws and although a citizen should argue for changes where laws are bad he is none the less bound to accept the laws so long as he remains a citizen. For Socrates not to effect an escape would be a denial of the Athenian legal order and a subversion of the state more harmful in its general consequences than any individual injustice suffered by Socrates.

In Socrates's view a citizen who objects to a law has alternative options; he may quit the state for one with a more congenial prescription or he may seek to persuade his fellows to change the laws. If he neither pursues nor leaves he has no option but obedience because otherwise he will subvert the state by setting its laws at naught. Socrates sees his duty to obey the law upon three grounds which are, that he would in escaping act in an unphilosophic manner by refusing obedience to the state which raised and nurtured him, secondly that he would subvert the social order of the state by denying the validity of its prescription, and thirdly that he would break an agreement to obey the laws of the city implied by his continued residence when he had been free to leave and dwell elsewhere. There is thus advanced an argument that obedience rests upon the benefits of quasi-parental protection given by the state and upon the assumption that a person who remains in the state must be taken to agree to abide by its laws because if he does not and cannot change the opinion of the state he has the option of going elsewhere. This is an approach with obvious 'social contractarian' elements but it does not in fact lead to the conclusions which might be anticipated. But Socrates's argument is capable of dangerous over-simplification. Socrates does not advance the sweeping proposition that all positive demands of the state must be complied with unless it can be persuaded to amend the prescription concerned. Such an argument would imply a duty to do evil where the state so demands; unless the state can be persuaded by the citizen to alter or abrogate its demands. One could then reasonably ask what would be the position of the moral individual confronted with the demands of the Nazi genocide laws; should he merely seek to persuade the Nazis to change their minds and if, as seems likely, he fails to aid them in the implementation of persecution? Such a conclusion would be extraordinary and is not in fact that reached by Socrates. On the contrary he is represented as asserting that no man should ever do such a thing and that unjust which means that no one is ever justified in doing evil at the behest of the state. Socrates argues that wrongdoing must always be avoided even if, as in his own case, the result might be escape from an unjust infliction.

In *The Apology* a number of specific examples is given from Socrates's own career in which on a number of occasions he refused to undergo oaths of state which would involve him in injustice — indeed he argues that his principles would have led him to condemnation long before had he not by and large eschewed public office. He describes an occasion when as a member of the executive council, his only holding of public office, he opposed the illegal mass trial of certain naval commanders for their conduct in the Athenian victory atArginusae in 406 B.C. under the democracy. Later under the rule of the Thirty Tyrants he and three others were instructed to bring Leon of Salamis to an unjust execution. The three complied but Socrates did not, escaping condemnation himself only through the fall of the oligarchy. Socrates is here displaying active compliance with 'bad' laws and at the end of *The Apology* he turns the argument back upon the court in his assertion that no evil can occur to a just man upon the premise that evil is a quality of the wrongdoer and not of the victim.

Thus Socrates considered that a man should never do wrong, even at the behest of the state, whatever the personal consequences of such a course might be and cited his own behaviour and general eschewal of office as examples. His own immediate case, however, differed in that he was not being pressed to do wrong but was himself the victim of wrongdoing by the state. He had sought to persuade the Athenians and had failed; he had remained in Athens when he could have left and in so doing he had submitted himself to Athenian law which had now reached an adverse conclusion. To refuse obedience at that stage, by escape, would not be to avoid evildoing, for the victim of injustice does no evil, but to deny the obligation impliedly accepted by continued residence under the aegis of Athenian law.
The duty to obey set forth by Socrates is thus neither the caricature of blind obedience as it is sometimes represented, nor the charter for civil disobedience which it is sometimes claimed to be. His view was that a citizen cannot be placed under a duty to do evil by the state, and indeed in doing evil the citizen would be as much a wrongdoer as the state which caused his action. To this extent Socratic theory forces the citizen to make a moral judgement upon what is demanded of him; thus the citizen in Nazi Germany who betrayed others to persecution in accordance with the laws of the time may be seen as one who shared in the evildoing of the Nazi regime. This is readily comprehensible in a modern context. The difficulty with the Socratic position arises precisely in the immediate context of the Crito. What happens where the individual, possibly through refusal to comply with an unjust demand of the state, is himself made the victim of wrongdoing? Here Socrates is uncompromising and once the options of departure or persuasion have been exhausted, as an hypothesis here they have, no alternative to obedience is admitted. The basis for this is partly one of social obligation derived from voluntary residence and partly a pragmatic dictum for the avoidance of social disruption and anarchy. In the modern world such a view would prevent resistance to unjust infliction although, paradoxically, not refusal to inflict injustice. It must be borne in mind, however, that Socrates’s duty of obedience rests upon the prior options of departure or persuasion and the relative availability of these options must be considered before Socratic thought can be translated into a modern context.

The possibility of persuasion varies widely in modern states and the more iniquitous the state the less it is likely to be. The same applies also to departure to a more congenial place: in a world of large nations this is by no means to open an option as it might be, for a free citizen, in an agglomeration of small city-states. What then if the options of departure or persuasion are to a greater or lesser extent denied? It must seem that the arguments of voluntarily accepted obligation through residence advanced by the personified laws of Athens to Socrates in the Crito must be weakened to an appropriate extent. Although Socrates takes no account of such a view, the relevant circumstances being outside his consideration, it is perhaps arguable that, granted the denial to the state of the capacity to demand evildoing, the denial of the posited options of departure or persuasion might justify moral resistance to unjust inflictions since the root of obligation, the voluntary acceptance of order, is cut away. This form of argument must seem to be applicable to modern totalitarianism where otherwise the Socratic prescription leads simply to a dumb obedience of a type directly condemned by Socrates himself in The Apology.

It has been remarked that our knowledge of Socrates’s thought comes to us through the writings of his most brilliant pupil, Plato. Plato (c. 427–347 BC) was a son of an ancient and aristocratic Athenian family and a pupil of Socrates. As a young man he was disgusted both by the tyranny of the Athenian oligarchs and what he saw as the undue susceptibility to the mob mentality of the Athenian democracy. He was, naturally, in particular revolted by the trial and execution of Socrates in 399 BC. Plato himself made detailed consideration of the nature of the state and its laws in order that they might be relieved of the defects which he perceived all too abundantly in the practical realities of his time. The answers which he gave to these problems were rooted in a philosophy of idealism.

Plato considered that the physical realities of the actual world are a poor reflection of a ‘true’ reality which is perfect and morally pure. The Platonic ideal is essentially an apprehension of this ‘true reality’, the provision of which is an absolute formulation of the ‘good’ life of man. Plato considered his ideal as a philosophical insight accessible through reason to the suitably trained human intellect. That he may have considered the grand design itself to be the product of an agency higher than man is likely but for purposes of discussion the Platonic ideal is in essence perceived as a creature of reason accessible to the higher human rationality. Plato was not especially optimistic about the general propitious of human nature, in part a reflection of what he perceived as the tendency of democracy to degenerate into mob rule. He believed that mankind must be led to the ‘good’ life rather than merely afforded the opportunity of finding it. There is thus undeniably a strong authoritarian element in Platonic thought but that is not to concede that Plato was in any sense an apologist for naked totalitarianism or tyranny as some of his less charitable critics have suggested that he might be.

Like Socrates, and indeed in a tradition going back to Solon (c. 638–558 BC), Plato believed that the health of a practical state rests upon the provision of and compliance with good laws. This indeed is the basis of the practical Platonic prescription to be found in his late work, the Laws. However, he did not consider laws as such to be the best possible form of prescription for the ‘good’
life and in his more famous work, The Republic, he set out the form of his ideal society. The Republic is an Utopia in which the ideal form of a social order is discussed in the context of Socratic conversations. The work has little to say about law per se since it is essentially anti-egalitarian in nature.

The main concept of the scheme is that the best form of society would be one which most closely conformed to the perfect reality of Ideas. This is not to be achieved through democracy or oligarchy, which are inclined by their nature towards perversity, nor by tyranny which is by definition a creature of whim. The theoretical answer given by Plato is a form of genuinely "beneficent" dictatorship. In fact the rule of "Philosopher-kings", who are to be persons selected by a rigorous, if arguably rather impractical, process of education and training as those with the greatest insight into "true" reality and who are therefore vested with power to direct society in such a way as to make the social reality apprehended by the senses, concords as closely as possible with the perfection of the "true" reality of Ideas. The consequence of such direction would necessarily be to make society "good" since true knowledge can never lead to wrongdoing or injustice. The rule of a philosopher-king would not be through the medium of laws but by orders made as might be necessary from time to time in accordance with his rational insight. This form of rule is presented as the social equivalent of "self-discipline" in that within the society the guidance of the wisest will cause the better elements of the human character to be developed just as personal self-discipline involves the subjection of the baser elements of character to the more elevated. Such a government of collective "self-discipline" naturally involves concordance upon who is in fact best fitted to rule and who is to be ruled. Within this conception 'justice' in the state is given a narrow definition as the final quality of the rationally "good" state in association with discipline, courage and wisdom and is seen as the keeping by all members of the ideal society to their own properly allotted role and their not interfering with the performance of the roles of others. The analogous definition of 'justice' in the individual is the subordination of personal appetites and inclinations to the dictates of reason.

The evident problem with such an Utopian vision is the difficulty in finding a philosopher-king. It may be doubted whether Plato actually expected the scheme of The Republic to achieve complete and literal implementation. To imagine that he did so would be to suppose Plato to be grossly naive. It is clear that he expected an improvement in political life to result from the philosophical training of statesmen. However, his experience was not by any means entirely fortunate. Plato visited Syracuse with a view to advising its ruler, Dionysius I. Unfortunately, Dionysius disliked Plato and, according to one account, may even have sold him into slavery from which condition he had to be redeemed by his associates. Following the death of this ruler, Plato's friend Dion, a member of the royal family, invited him back to Syracuse in 367 BC as an adviser to the young and newly enthroned Dionysius II, evidently with some view to elevating him into an approximation of philosopher-king. Unsurprisingly the king proved to have little time or aptitude for the academic exercises which Plato expected him to undertake. Dionysius seems actually to have had considerable regard for Plato but he was not by any means a philosopher-king and, from Plato's viewpoint, his association with Syracuse must be judged a signal failure. There is on the other hand some evidence that Hermias, the ruler of Atarneus, took some account of Platonist teaching and even modified his rule in accordance with it. On a more practical level, Plato founded an Academy in Athens, which was in essence a philosophical training school for statesmen, and which aimed to elevate the theory and practice of politics with a view to producing statesmen and politicians with enhanced philosophical insight.

Plato's ideas of a more practical social order and one which might in his view be sustainable, even if clearly a "second best", are to be found in the Laws. The discussion of the Laws occurs in relation to a hypothetical Athenian colony in Crete called Magnesia and the main part of the work is in effect a detailed code of positive laws for the city which is in large measure a form of Athenian practice improved upon rationalist lines. The laws are perceived as "second best" in that although they are intended to be reflections of the "true" reality they are not the direct insights of a philosopher-king but rigid positve prescriptions rooted in moral perception, a secondary statement in the form of a rigid code which may indeed call for amendment, although little if well drafted. Inevitably in the Platonic view a legal code is seen as a less moral and less sensitive instrument of government than the direct insight of a philosopher-ruler.

Although the laws of Plato are a rigid prescription which are in their way quite as utilitarian as the "benign autocracy" of The Republic, they were not in any sense conceived as a mere tyrannical imposition. The prescription in the Laws was in fact
conceived as being at least as much didactic as coercive, upon the assumption that appeal to the higher human motivations can only lead to the maximisation of the quantity of individual 'goodness'. since wrongdoing may be said to be the product of the baser appetites freed from constraint in consequence of moral ignorance. Thus it is stated that the legislators should seek to persuade through rational explanation and argument in preference to compulsion through force. Thus the better motivated people will be persuaded to obey law; coercion would be called for only in the case of the refractory who are creatures of baser motivation. It is for this reason that Plato insists that the code as a whole and also each individual provision must be preceded by a lengthy explanatory preamble which is purely didactic in intent. In the Platonic view all laws therefore should tend to make men 'good' even if they can only be a 'second best' means to that end. This leads one to the issue of Plato's conception of the nature of the duty to obey laws. In general it must be taken that his views approximate to those attributed to Socrates in The Last Days of Socrates, of which he was after all the author. However, further elaboration is to be found in particular in Minos. The Minos is a dialogue which was anciently regarded as being of indubitable Platonic authorship but its authenticity has been regarded as more debatable in modern times. Be that as it may, the work is Platonic in form and is clearly the product of Platonic thought even if not actually written by Plato himself. In Minos Socrates is represented as making enquiry into the basic nature of law. His companion responds with an answer which is in essence positivist in form, saying that law is anything which is recognised as being 'legal'. Socrates dismisses this on the basis that a phenomenon cannot be identified with a mere instance of itself. Thus if law is that which is recognised as 'legal', the question must be raised by what 'law' are laws recognised? This is not in fact an argument of formalism leading to a precursor of H. L. A. Hart's 'rule of recognition' but one which raises the basic issue of the moral authority of law upon which any non-coercive sanction must ultimately rest. The interroger's response to this is that 'law' is a formal enunciation of popular or communal opinion upon the subject in question. This enables Socrates to open the general issue of the 'authority' of law. He argues that the opinions enshrined in law must, to have sanction, be 'good' opinion which is to say an opinion which is an insight into 'true' or ideal reality. This is clearly the Platonic definition of 'good' law. There remains the problem that positive laws can and do differ widely in form and content, among ancient Greek city-states as elsewhere, and it seems unreasonable to suggest that one of these models should be treated as a clearer reflection of reality than all others. Plato conceded that particular laws, however, may indeed be variable according to time and place and yet still be 'good'.

The Platonic conception of law is thus ultimately that of a dictate of reason derived from an insight into a 'true' reality. Such a law has a persuasive and didactic role which should be sufficient in itself with coercion a secondary feature necessary only in the case of the morally ignorant and refractory. It obviously follows from this that the degree of required coercion will increase in direct proportion with the decreasing rationality and degree of explanation of laws. The Platonic idea of the 'good' law is clear, the 'bad' law is seen as in the Gitia. Laws may be 'bad', immoral and unjust but a duty to obey remains in so far as unjust infliction is concerned but not in so far as an injunction to act unjustly is concerned, all this upon the supposition that the options of persuasion or flight exist and have been exhausted or rejected. It is to be noticed that the Platonic idea of the 'good' law is essentially authoritarian. It explains and guides but at the end of the day it is an imposition upon the bulk of the populace which will certainly be coercive from the viewpoint of the more or less ignorant and uninformed majority.

This ideal of paternalism was rather ameliorated in the views of Plato's most famous pupil, Aristotle (384–322 BC). Aristotle was born in Stagira in the kingdom of Macedon in northern Greece but as a youth he moved to Athens. There, as a young man, he became a member of Plato's Academy. When Plato died in 347 BC he moved initially to Atarneus where the ruler, Hermias, was under strong Platonic influence. Hermias in fact encouraged Aristotle and other philosophers to form a sort of Platonic academy in exile in his territory, although Aristotle himself later moved on to Asias and to Mitylene. In 343 BC he returned to his native land to take up an appointment which was of major significance for the future development of Hellenistic philosophy. King Philip of Macedon invited him to become tutor to his son, the future Alexander the Great. Later Aristotle returned to Athens to set up his own school at the Lyceum where he taught from 334 BC. When Alexander the Great died at Babylon in 323 BC Aristotle left Athens fearing that he might suffer the fate of Socrates in an anti-Macedonian reaction, and fled to Chalke where he died a few months later.
Aristotle took a rather different view of law and society from that of his teacher Plato. Plato had taken an essentially pessimistic view of mankind whom he felt to need strict guidance from above for the avoidance of error, ideally in the form of the orders of a philosopher-king or, more realistically, through rationally prepared laws. Plato had admitted the importance of explanation in law but Aristotle emphasized the purely didactic function of law much more strongly. He taught that man has a natural potential for ‘good’, the development of which properly made laws should aim to facilitate. Not all of Aristotle’s works have survived, but for present purposes his most important thought is to be found in The Politics and the Nichomachean Ethics. He taught that the proper end of law is to make men ‘good’ which is to say not merely to coerce them into the avoidance of the appearance of vice. He based his argument upon the teleological approach, that is to say, an idea of progress from the potential to the actual. In the Aristotelian view all things have an inherent potential for development, the achievement of which is the ‘good’ of the phenomenon concerned. Thus the potential of an acorn is to become an oak tree and growth to a tree is the achievement of the ‘good’ of the acorn. The acorn may of course in some way fail or be prevented from attaining that end but it cannot select some other and improper end such as developing into a sycamore tree; that option does not exist for it. Animals also have a potential for development which is essentially to become a successful adult example of their species. An infant squirrel thus has a potential to become a successful adult squirrel; it may succeed or fail in this but it does not have the option to adopt the way of life of some other creature such as a tiger. In all cases progress from the potential to the actual may be impeded or frustrated but not, except in the case of man, diverted. The case of man is made especially complicated by possession of the faculty of reason. Aristotle argued that man is distinguished from the animals by reason, which is a capacity which can be either used or abused. One of the consequences of rationality according to Aristotelian thought is that man is a politikon zoain, that is to say, a political animal whose natural tendency is to combine in social organisations culminating in the state. It being the proper tendency of all things to develop their potential to their own particular ‘good’ upon the teleological principle, the state, which Aristotle saw as originating as a means of attaining security, becomes a means whereby its citizens may attain the ‘good’ life.

In the thought of the fourth century BC there were two broad ways of organising a state, through the rule of man, meaning some form of personal or oligarchic rule, or through the rule of law. Plato had accepted law as second best, Aristotle argued strongly for the rule of law as a more efficient means of attaining the reasonable conduct which would lead mankind to the ‘good’ life than any likely form of despoticism. He agreed, however, that in the unlikely event of the actual appearance of a Platonic philosopher-king, his rule would be superior to that of the laws. The correct aim of laws is thus in the Aristotelian perception the guidance of the natural human potential for virtue into the achievement of the ‘good’ life through the inculcation of virtuous habits. How is this to be done? Aristotle did not regard law as primarily a coercive imposition, any more than had Plato, but as a means of educating for virtue and thus for the facilitation of the attainment of the ‘good’ life. The process of legislation is thus perceived as primarily one of moral education and the induction of ‘good’ habits of life. The makers of such law would obviously be required themselves to be trained in the framing of moral legislation through philosophical training. Once the laws had been made Aristotle saw obedience to them as itself a matter of habit which should be encouraged by the education of the citizenry in the principles of the state constitution. Upon the same principle, frequent changes in the law are deprecated as tending to weaken that habit of obedience. Aristotelian emphasis upon the importance of habit in forming the pattern of obedience to law in some ways prefigures Bentham, but mere habit cannot as such account for obligation. It is clear that Aristotle saw law as invested with moral quality in so far as it facilitated the attainment of the ‘good’ life among the citizens of the state. It would seem also that he admitted the existence of a morality higher than the laws made even by a ‘good’ legislator. The essence of his argument is that ‘justice’ takes two forms which are neither functionally identical nor generically different. The one is justice in a particular instance, the other is universal justice. These may be taken as roughly analogous to the modern categories of positive and natural law in that the first is man-made and variable, the second is universal and eternal. Aristotle assumes that the positive laws will be made in a moral framework but argues that ‘equity’ may rectify the application of the law where a legal provision, due to its necessary generality, fails adequately to cover a particular case.

Aristotle has thus made his case for the making of moral laws which may vary according to time and circumstances but which have the aim of inculcating habits which will enable men to be
'good'. The question of the law which may be erroneous or even consciously 'bad' is not given much consideration, unsurprisingly in a work mainly concerned with the description of 'good' legislation. In that Aristotle refers mainly to the development of the 'habit' of obedience and counsels against much change in the law even if such change would be morally beneficial, because of the greater deleteriousness of the effect of weakening the habit of obedience, he may be taken to share the view of Socrates and Plato upon the nature of the obligation to obey law. He seems to accept that citizens should be educated in the constitutional principles of their state even if those principles should prove to be 'bad' and this can only lead the moral citizen back to the Socratic options of departure, persuasion or obedience when faced with 'bad' law.

The thought of Socrates, Plato and Aristotle is of fundamental importance but is set against a background of small city-states in which political power and civil rights were the possession of relatively small numbers of male citizens. Slavery was justified upon the basis of inequality of moral capacity, although Aristotle's handling of the matter seems to betray some contemporary unease about this convenient conclusion. More importantly in contemporary terms these theories presuppose a small citizen body in which legislation can play an individually didactic role and the legislator's relation to subjects is much more direct than is the case in any modern state. This allows of a realistic role for rational insight and persuasion or departure to a more congenial legal regime. In short this permits of a diversity which militates against consideration of the major problems of regulation upon a larger and more impersonal scale in a modern state, of which account must be taken in considering the continuing importance of Hellenistic legal theory.

Hellenistic legal theory was compelled to take account of the wider world by the meteoric career of Athenian's pupil, Alexander the Great. The idea of universal political structures and the widening of cultural horizons which followed upon Alexander's conquests were of fundamental significance for future development of thought. It became necessary for a philosophy rooted in small city-states and supposing the superiority of the Hellenic citizen within his own state as against foreigners, barbarians and slaves to take account of very much broader horizons. At Opis in 332 BC Alexander declared that Macedonians and Persians were kinmen and this moment symbolises the lasting effect of his conquests in the arena of thought which set the scene for later Hellenistic theory and established the base for the later development of the legal theory of the Roman Empire. The most important fruit of this widening of perspective in the immediate context was the development of Stoicism, a school of thought originated by Zeno (285–260 BC). The Stoics taught that there is a universal and rational order (cosmopolis as compared to the polis of the city-state) which governed all men and was not merely the privileged insight of Greek citizens. Thus, by virtue of the faculty of reason, all men might have insight into the rational order which may be called 'natural law' and which embodies principles of universal application of a higher order than the positive laws of any particular state. In Stoic opinion the harmony which follows from this cosmic reason is disrupted by human perversity and 'good' law thus has as its purpose the rectification of this situation so that mankind may live 'naturally' according to his inner moral sense which is itself an insight into cosmic reason. To this end Stoicism counsels the avoidance of irrational impulses in favour of a 'proper' mode of living moulded by the dictates of right reason. This idea of a general rationality which imposed universal standards to which particular prescriptions could be referred was to provide an appropriate intellectual setting for the development of the legal theory of the Roman Empire.

Roman law was an admirably structured example of positive prescription which was to have a major formative influence upon the legal tradition of Continental Europe. It is commonly asserted, however, that despite the conceptual excellence of their positive law, the Romans were not great legal theorists and in fact took over their ideas in the field of theory from the Greeks more or less unreflectively. It is certainly true that the Romans produced little truly innovative jurisprudential thought but Roman work in this field was none the less important and here, as elsewhere, was one of major systematisation. The principal legal theorist of the pre-Christian Empire was Cicero (106–43 BC). He was both a statesman and a lawyer as well as a philosopher, and was already a highly successful 'practical' lawyer when he set out to produce a systematic theory of the nature of law related to the reality which he knew. His thought was in many ways much closer to our own age than was earlier Hellenistic theory in that he was writing in the context of a developed and systematic structure of positive law professionally administered in a way in which that of the Greek city-states was not and which dealt in more or less 'modern' legal categories. Cicero was a Stoic and this is manifest in his legal
theory. His method was one of categorization. He shared the general Stoic belief in a cosmic reason which acted as a universal law applicable to all mankind. He sought, however, to relate cosmic reason to human prescription in a much more concrete way than the idealistic approach of earlier thinkers would have permitted. This he did in a manner which was vastly significant for the future development of jurisprudential thought.

Cicero regarded law as an emanation of reason which sought ultimately to be a reflection of Divine or cosmic reason in the human sphere. In the light of this approach he considered 'law' to exist upon three distinct levels. The *Lex Caesestis*, Heavenly Law, is the supreme cosmic reason which Cicero saw as a Divine law and as one having a higher authority than any human prescription. This is obviously a perception of the higher morality, being in fact the 'logos' or highest reason of Stoic philosophy. Cicero, however, saw Lex Caesestis in a much more concrete form than the logos of the earlier Stoics, seeing it in fact not as an ultimate ideal but as a clear supreme moral prescription prescribing virtue and proscribing vice in a direct manner. The *Lex Naturae* or Law of Nature was differentiated from the Lex Caesestis in Cicero's thought and was perceived as the reflection in the mind of man of the cosmic rationality of the higher law. Thus the Lex Naturae is the means whereby prescription may be drafted to enable mankind in a political society to live a 'good' and natural life. This introduces the significant idea that it is an inherent quality of law-making that it should accord with a higher rationality in the interest of the moral good of those subject to it. This is a much closer tie than is to be found in Platonic or even Aristotelian thought in that it does not merely suggest a more or Utopian model for law-making or government but suggests that an ordinance which does not accord with the moral law is in some sense defective and lacking in an essential aspect of 'true' law quality. This is a central concept of naturalist thought and one which calls for immediate clarification. The claim is not that an immoral 'law' has no effect but rather that it is an ordinance which lacks the inherent moral quality of 'good' law and being thus defective does not merit as a matter of theoretical appreciation the full appellation of 'law' but some other and lesser term. This distinction between 'law' and morally defective ordinances goes to the root of the naturalist conception of the obligation to obey 'law' as distinguished from mere coercive prescriptions. Cicero's final category of law in general was the *Lex Vulgar* or law as commonly understood, by which he meant any positive legal or quasi-legal ordinance irrespective of its moral quality. Such law might be morally good or bad without losing its basic categorisation. This Ciceroian scheme of relationships may be crudely illustrated as follows:

\[ \text{LEX CAESESTIS} \]

*Divine or cosmic reason*

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\[ \text{LEX NATURAE} \]

Reflected in human perception as

---

\[ \text{LEX VULGAR} \]

May be translated into

(*which may also be derived from other and potentially 'bad' sources in which case it is 'lex' only in the debased and 'vulgar' sense of any formal prescription)*

In so far as the Lex Vulgar conforms to the perception embodied in the Lex Naturae it will thus be 'good' law; in so far as it does not it will be morally defective law or rather pseudo-'law'.

In any such scheme it is obviously fundamentally important to devise some means of identifying the knowable portion of the Lex Caesestis applicable to human life. How then does Cicero propose that this be done? In part this is of course a matter of moral insight and teaching based upon an inherent human sense of rectitude. There was also in Roman jurisprudence, however, a more 'practical' approach to the discovery of at least some of the general principles of higher law. The Lex Naturae as a partial insight into the relevant aspects of the cosmic provision of the Lex Caesestis was seen as the common heritage of mankind and not a privileged insight of the Greek and Roman world. However, it was conceded as evident that different states and peoples have differing positive laws all of which might, in their various ways, be particular
applications of the Lex Naturae. The consequence of this idea was a belief in a common fund of general legal principle which might be found among all peoples within the context of their own specific positive legal provision. The particular positive law of a given state, especially in relation to the Roman Empire, was termed the Ius Civile. The common fund of legal principle shared by all peoples was termed the Ius Gentium. In Roman practice the Ius Gentium was taken to be a sort of universal "common law" which could be applied in cases in which either or both parties were not citizens subject to the particular provisions of the Ius Civile. This was in many ways a most enlightened concept although its actual application in the Roman Empire was no doubt the cause of some puzzlement to benumbed "barbarian" or other non-citizen litigants.

These concepts of Cicero's legal theory were part of the general currency of Roman jurisprudence and can be found explicitly stated in the introduction to the Institutes of Gaius, a classical textbook of Roman law compiled in the second century AD, wherein it is stated that "Omnes populi qui legibus et moribus reguntur suo proprio, partim communis omnium hominum naturae utuntur," meaning that all peoples governed by law are subject to their own particular law and partly to the common law of all mankind. Gaius goes on specifically to name the particular law of a people the Ius Civile and the common law of mankind the Ius Gentium. 10

The same point repeating the basic statement is made at greater length with borrowings from Ulpian as well as Gaius, in the Institutes of Justinian. These were compiled in 533 AD well into the Christian era upon the orders of the Emperor Justinian (527-65), but drew widely upon earlier scholarship. The compilers appointed by Justinian assert that: 'Ius naturale est, quod natura omnia animalia docuit. Nam ius iudicis non solum hunc hennis proprium est, sed omnium animalium...'. Videmus etiam cetera quoque animalia iuris iuris periti censeri 12 which is to say that natural law is taught by nature to all creatures and is not peculiar to mankind since all creatures perceive it. This obviously reflects the Stoic idea of cosmic reason, the Ciceroian Lex Caesaris as perceived, by man, in the Lex Naturae. The Institutes then proceed to make the distinction between Ius Civile and Ius Gentium indicated above and in particular distinguish the Ius Gentium by stating that 'Ius autem gentium omni humano generi commune est. Nam usus exiguus et humanis necessitatis, gentes humanae quaedam sibi consecuturunt', which is to say that the Ius

Gentium is common to all mankind because exigency and human necessity have led mankind to the development of certain basic rules. The Institutes explicitly provide also that

... quod quiaque populus ipse sibi ius constituit, id ipsius proprium civitatis est, vocaturque ius civile, quasi ius proprium iuris civitatis; quod vero naturalis inter omnes homines constituit, ipse omnes populos per seue custodire vocaturque ius gentium, quasi quo iure omnes genera utuntur. 24

This is to say what a people established for its law is peculiar to that state and is called its Ius Civile, its particular law, whereas what natural reason dictates for all peoples is common to all states and called the Ius Gentium, the law of all nations. Thus again a natural reason, which is in effect the Ciceroian Lex Naturae is admitted as the common heritage of mankind and as something which stands separately from the particular local provisions of a Ius Civile.

It is clear also that practical Roman jurisprudence made the assumption that law served a moral purpose and indeed there is overt reference to the didacticism of this legal theory to be found in the opening words of the Preface to the Institutes of Justinian, the Christian background of which should not however be forgotten which is of passing interest as an Imperial address to law students. It commences as follows:

IN NOMINE DOMINI NOSTRI IESU CHRISTI.
IMPERATOR CAESAR FLAVIUS JUSTINIANUS.
CUPIDAE LEGUM IUVENTUTI.

Imperatorum majestatum non solen armis decoratum, sed in armis legibus operis esse armatum, ut utrumque tempus et bellorum et pacis recte positi gubennari... 50

The above may be rendered as: In the name of Our Lord Jesus Christ. The Emperor Caesar Flavius Justinian... etc. to students of the law. The Imperial Majesty should not only be glorified by arms but also armed with laws in order that times of both war and peace should be properly ruled.

It may be fair to say that the practical application of theory by Roman lawyers was in some ways almost painfully literal but the theoretical groundwork of Ciceroian thought cannot simply be
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dissolved as a debased reworking of Hellenistic theory. On the contrary, Ciceronian legal theory, building upon the heritage of Hellenistic rationalism, provided a framework of reference within which a developed system of positive legal rules could be related by the perception of human reason to a general moral order. In this was the moral purpose of law-making to receive a formal concrete shape as an inherent and necessary aspect of the concept of law itself, so that an immoral 'law' failed to manifest the whole quality of the phenomenon. This was a rational conception of the moral nature of law which opened the door to the linkage of legal obligation with the idea of the proper purposes of law-making. This form of legal theory contributed the rational and systematic element to the development of Western legal theory. The arguments of obligation were to be strengthened with the Christianisation of the Roman Empire under Constantine the Great (306–37), converted AD 512), when the Hellenistic jurisprudence of the pagan Empire with its emphasis upon the proper purpose and manner of moulding obligation was fused with the Judaic-Christian emphasis upon the role of absolute moral standards in the generation of obligation so that the unreasonable or morally repugnant law came to be seen in a stronger sense as functionally defective. To this stage of development we must now turn.

Notes

1. At least in the view of Thucydides.
3. The Apology, 51D–53B.
4. The arguments of the dialogue are considered in detail by A. D. Woodyeley in Law and Order. The Apologies of Plato's Crito.
5. Crito, 50A to end.
6. Ibid., 49B to 50B.
7. See Ch. 4, this volume.
8. Crito, 48D.
9. See The Apology, 31D to 33B. There is here a parallel with the rejection by Xenophon of a disciple, Jan Ch., who returned office when required to collect unjust taxes.
10. The Apology, 41D.
11. See Crito, 49B.
12. This view somewhat resembles the juristic opinion reached in some of the post-war 'grudge cases', see Ch. 7, this volume.
13. Crito, 50B, at 301.
16. See The Republic, 4306 to 432A.
17. Ibid., 4348E.
18. Ibid., 4348D.
20. There are some clear parallels to be observed between Plato's ideal of a philosopher-king and the Confucian concept of the moral validation of rule by the abstract 'mandate of heaven'.
21. Plato's Academy was not the only Athenian philosophical academy; its principal rival was that of Isocrates who was of a different persuasion and taught rhetoric rather than philosophy per se.
22. Plato, Laws, 627D–E.
23. See ibid., 718–19.
24. See ibid., 630C and 570E.
25. Ibid., 875D.
26. See Ch. 5, this volume.
28. See, for example, Plato, Laws, 714A where law is stated to be a 'distribution of reason' (translation by T. J. Saunders, Penguin Classics edn).
29. Cairns, Legal Philosophy from Plato to Hegel, p. 18 usefully describes this as a distinction between 'principles' and 'rules'.
30. A point taken by St Thomas Aquinas, see Ch. 3, this volume.
31. See earlier.
36. It is in this aspect of his thought that Aristotle relates to St Thomas Aquinas as does Plato to St Augustine; see Ch. 3, this volume.
38. See Aristotle, Ethics, 1108b 35.
40. See ibid., 1209a 23.
41. See Ch. 5, this volume.
42. The matter is discussed in detail in Ethics, Book V.
43. Aristotle, Ethics, Book V, 14.
44. Roman law had also a considerable influence upon the development of Scots law. There was a 'Reception' of Roman law in much of Europe and even after the codifications of the late eighteenth and the nineteenth centuries the Roman influence remained obvious. In England the native common law rooted traditions were much more strongly rooted at the time of the European 'Reception' to admit of more than a peripheral Roman influence.
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46. That is, 'word'.
47. See Cicero, De Legibus, 1:56.
48. 'Vulgar Law' actually conveys the Ciceronian nuance rather well.
49. Of the structure advanced by St Thomas Aquinas, see Ch. 3, this volume.
50. The Institutes of Justinian, 1:1.
51. Ibid.
52. Institutes of Justinian, 1:2.
53. Ibid., 1:2,ii.
54. Ibid., 1:2,i.
55. Institutes of Justinian, Preface.