Lecture Notes – Mark Murphy, “Natural Law Jurisprudence”

- Murphy is concerned to defend the natural law thesis: “Necessarily, law is a rational standard for conduct.”
    - He aims to do this by clarifying exactly what the thesis holds and then demonstrating that his favored reading – the weak reading – is in fact supported by Finnis, Raz, and Moore’s arguments for natural law.
- He distinguishes between:
    - Strong Reading: Law that cannot be taken as a rational guide for conduct by a reasonable person (or that does not provide a set of standards that a rational person should take as a guide to conduct) is not law…or is not valid.
        - The thesis is often rendered as synonymous with the slogan: *lex iniusta non est lex (An unjust law is not law)*.
            - Even some natural law theorists reject this slogan as being patently self-contradictory or paradoxical, but Murphy aims to defend the slogan from these attacks. Whether law is law and whether law is unjust are separate questions for them.
                - One defense is to note that the first use of “law” in the slogan is non-evaluative while the second is evaluative: compare “That doctor is no doctor at all.”
                - A second defense is to note that “unjust” is an *alienans* for law in the way that “fake” (or “glass”) is an alienans for diamonds.
                - Also see the blog post on the “bliger” example.
        - The problem with the strong reading isn’t that it’s indefensible, according to Murphy, but that no good defense has ever been given.
    - Moral Reading
        - The moral reading (see Robert George) fails to distinguish natural law theory from legal positivism or any other position in the history of philosophy. It simply says the obligatoriness of law is conditional on its morality…but even the legal positivist thinks that we might not have an obligation to follow unjust laws.
    - Weak Reading
        - “For all x, if x is claimed to be a law but could not be a rational standard for conduct, then x is defective *as law*.”
            - The strong reading takes “Necessarily, a law is a rational standard for conduct” to be a claim like, “Necessarily, a triangle has three sides.”
                - Anything that doesn’t have three sides is not a triangle, and anything that could not be a rational standard for conduct is not law.
            - But the Weak reading takes this claim to be more like, “Necessarily, the duck is a skillful swimmer.”
                - A duck that cannot swim does not fail to be a duck but it *defective as a duck*.
                - The necessity attaches not to individual ducks but to the kind duck.

        - Similarly, the necessity attaches to the kind "law". It is part of the kind "law" that it is a rational standard for conduct, but some laws fail to be this and so are defective *as law.*
- Recall the weak reading of the natural law thesis: "Necessarily, law is a rational standard for conduct" means that "For all x, if x is claimed to be a law but could not be a rational standard for conduct, then x is defective *as law*."
    - Begin: thinking about how to defend this thesis.
        - Murphy canvasses accounts from
            - Finnis: Internal Point of View – the central legal viewpoint is that of "those who not only appeal to practical reasonableness but also are practically reasonable." Those whose views are, in the details, more reasonable than others. Law that fails to appear as morally obligatory from this viewpoint will be defective as law.
            - Raz: Self-Image Argument – "Law's self-image it is authoritative." This means that law must provide people to whom the law applies with a reason to act in some way that blocks reasons to act in a contrary way. It's authority as a reason must overrule other sorts of reasons one might have. Providing this sort of reason is an internal standard of the kind *law*, and, so, failure to provide this sort of reason is a failure *as law*.
            - Moore: Functional-Kind Argument –
                - Functional-Kinds vs. Structural-Kinds
                    1. Descriptive Functional-Kinds vs. **Normative Functional-Kinds**
                - Whatever the purpose (or end) of law is, "if it can be shown that law must be moral-obligation-imposing in order to promote this goal, we have a basis to say that there is a necessary dependence of law on moral obligation: law must be morally obligator, and any norm that cannot be morally obligatory cannot be law."
                - POTENTIAL PROBLEM: Definition in terms of functional kind requires us to identify an end that is *distinctive* of law, i.e., it can only be served by law. So this end can't be identical with the end of morality: "everything that is worth pursuing or promoting." BUT how can anything short of this impose moral obligations? Won't there always be some other end that overrides it if it's not this?
                - Murphy argues two things in response to this:
                    1. It need not be the case that the end of law is what grounds its moral obligatoriness. It might be that moral obligation follows not from the distinctive end of law alone but from something about the way that law pursues that end. So it might be that the end of law is the common good or social coordination, and that law must be morally obligatory to serve that end because it

does so by way of providing a set of rules to which *all consent* or which *treat everyone fairly*. In which cases, the obligatoriness arises from the consent or the fairness.

- I have a worry about this sort of move, as it seems to be a distinction without a difference. The obligations that flow from consent and fairness are ultimately grounded in morality in two ways:
    - 1) the NL would think that any system of laws that is not fair or does not garner consent is unjust, and the requirements of fairness and consent just arise out of the end that the law aims for.
    - 2) A system that was fair, etc., that aimed at some unjust ends wouldn't be morally obligatory.

2. We need not think of functional-kinds merely in terms of their ends but also in terms of the characteristic activity by which they pursue those ends.
    - Boomerang – drone example.
    - The claim would then be that the law cannot achieve its end (carry out its function) in its characteristic way without providing decisive reasons for action.
    - Here's how I understand Murphy's claim:
        - Law aims at some end (say, coordination of social cooperation or the common good), that itself generates moral obligations (so we take the first horn of the dilemma), but law aims to bring about this end is a distinctive and characteristic way: it imposes sanctions.
        - But that it does so is what makes it the case that law must provide rational constraints on actions, for if it did not, we would find ourselves without good reason to sanction those who violate the law…we'd have overriding moral reason not to sanction if we didn't think that what they did was a violation of a moral requirement.