Chapter Five

Natural Law Theory and John Finnis

We take it for granted that the laws and legal system under which we live can be criticised on moral grounds, that there are standards against which legal norms can be compared and sometimes found wanting. The standards against which law is judged have sometimes been described as "a (the) higher law".[1] For some, this is meant literally: that there are law-like standards that have been stated in or can be derived from divine revelation, religious texts, a careful study of human nature, or consideration of the natural world. For others, the reference to "higher law" is meant metaphorically, in which case it at least reflects our mixed intuitions about the moral status of law: on one hand, that not everything properly enacted as law is binding morally; on the other hand, that the law, as law, does have moral weight—it should not be simply ignored in determining what is the right thing to do.[2] (To clarify this last point: if the law had no intrinsic moral weight, we would feel no need to point to a "higher law" as a justification for ignoring the requirements of our society's laws.) **5–01**

TRADITIONAL NATURAL LAW THEORY

The approach traditionally associated with the title "natural law," historically has focused on arguments for the existence of a "higher law", elaborations of its content, and analyses of what should follow from the existence of a "higher law" (in particular, what response citizens should have to situations where the positive law—the law enacted within particular societies—conflicts with the "higher law").[3] **5–02**

[1] See Franz Wieacker, *A History of Private Law in Europe* (Tony Weir trans., Clarendon Press, Oxford, 1995), p. 205.

[2] For more on the possible meanings, and significance, of "higher law", see Connie S. Rosati, "Is there a 'Higher Law'? Does it Matter?", 36 *Pepperdine Law Review* 615 (2009).

[3] Some of the modern writers who are sometimes associated with natural law, like Lon Fuller and Ronald Dworkin, have approaches far outside the tradition described in this

While one can locate a number of passages in the classical Greek writers that express what appear to be natural law positions,[4] the best known ancient formulation of a natural law position was offered by the Roman orator, Cicero (106 BC–43 BC). Cicero was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say that Cicero merely offered an elegant restatement of already established Stoic views). In this brief paragraph from Cicero, one comes across most of the themes traditionally associated with natural law theory:

"True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment."[5]

As noted, most of the themes of traditional natural law are already present in Cicero (though, as might be expected in the first major treatment of a subject, some of the analysis is not always as systematic or as precise as one might want): natural law is unchanging over time and does not differ in different societies; every person has access to the standards of this higher law by use of reason; and (as Cicero stated elsewhere) only just laws "really deserve [the] name" law, and "in the very definition of

chapter. Both Fuller (Ch. 6) and Dworkin (Ch. 7) are discussed in greater detail later in the book.

[4] These include passages in Plato, "Laws", Book IV, 715b, in E. Hamilton and H. Cairns eds., *Plato: The Collected Dialogues* (Princeton University Press, Princeton, 1961), p. 1306 ("enactments, so far as they are not for the common interest of the whole community, are no true laws"); and Aristotle, "Nicomachean Ethics", Book V, 7:1134b18–1135a5, in Jonathan Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, pp. 1790–1791; as well as Sophocles, "Antigone", in *The Oedipus Plays of Sophocles* (Paul Roche trans., Mentor, New York, 1958), p. 210: "I never thought your mortal edicts had such force [that] they nullified the laws of heaven, which unwritten, not proclaimed, can boast a currency that everlastingly is valid".

[5] Cicero, *Republic* III.xxii.33, in *De Re Publica; De Legibus* (C. W. Keyes, trans. Harvard University Press, Cambridge, Mass., 1928), p. 211.

the term 'law' there inheres the idea and principle of choosing what is just and true."[6]

Within Cicero's work, and the related remarks of earlier Greek and Roman writers,[7] there was often a certain ambiguity regarding the reference of "natural" in "natural law": it was not always clear whether the standards were "natural" because they derived from "human nature" (our "essence" or "purpose"), because they were accessible by our natural faculties (that is, by human reason or conscience), because they derived from or were expressed in nature, that is, in the physical world about us, or some combination of all three.[8]

As one moves from the classical writers on natural law to the early Church writers, aspects of the theory necessarily change, and raise different issues in relation to morality and law. For example, with classical writers, the source of the higher standards is said to be (or implied as being) inherent in the nature of things. For the early Church writers, there is a divine being who actively intervenes in human affairs and lays down express commands for all mankind.[9] To the extent that the natural law theorists of the early Church continued to speak of higher standards inherent in human nature or in the nature of things, they also had to face the question of the connection between these standards and divine commands: for example, whether God can change natural law or order something that is contrary to it, a question considered by Ambrose and Augustine (among others) in the time of the early Church, and by Francisco Suárez and Hugo Grotius hundreds of years later.

The most influential writer within the traditional approach to natural law is undoubtedly Thomas Aquinas (1224–1274). However, the context of Aquinas' approach to law—that the theory of law appears as a small piece or application of a larger theological-moral system—should be kept in mind when comparing his work with contemporary theorists.

Aquinas identified four different kinds of law: eternal law, natural law, divine law, and human (positive) law.[10] For present purposes, the important categories are natural law and positive law.

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[6] Cicero, *Law* II.v.11–12, in *De Re Publica; De Legibus*, pp. 383, 385.

[7] For a discussion of the influence of Natural Law on the development of Roman Law, see John R. Kroger, "The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law", 2004 *Wisconsin Law Review* 905.

[8] See John Finnis, "Natural Law Theory: Its Past and Its Present", 57 *American Journal of Jurisprudence* 81 at 84–85 (2012), reprinted in Andrei Marmor ed., *The Routledge Companion to Philosophy of Law* (Routledge, London, 2012), pp. 16–30, at pp. 18–19.

[9] This contrast may overstate matters somewhat, as the classical writers referred to a (relatively passive) God, and the early Church writers would sometimes refer to the rules of nature as expressing divine will.

[10] Thomas Aquinas, *Summa Theologiae*, I–II, Question 91, in R. J. Henle trans. and ed., *The Treatise on Law* (University of Notre Dame Press, Notre Dame, 1993), pp. 148–184. Many portions of Aquinas's text relevant to legal theory are available (in another translation) at *http://www.fordham.edu/halsall/source/aquinas2.html*.

According to Aquinas, positive law is derived from natural law. This derivation has different aspects. Sometimes the natural law dictates what the positive law should be: for example, natural law requires that there be a prohibition of murder. At other times, the natural law leaves room for human choice (based on local customs or policy choices)[11]: thus while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 or 65 miles per hour, are probably matters for which either choice would be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second Aquinas refers to as the "determination" of general principles.[12]

As for citizens, the question is what their obligations are regarding just laws and unjust laws. According to Aquinas, positive laws which are just "have the power of binding in conscience"[13]—roughly, this means that it creates a moral obligation to obey. A just law is one which is consistent with the requirements of natural law—that is, it is "ordered to the common good", the law-giver has not exceeded its authority, and the law's burdens are imposed on citizens fairly. Failure with respect to any of those three criteria, Aquinas asserts, makes a law unjust[14]; but what is the citizen's obligation in regard to an unjust law? The short answer is that there is no obligation to obey that law. However, a longer answer is warranted, given the amount of attention this question usually is given in discussions of natural law theory in general, and Aquinas in particular.

The phrase *lex iniusta non est lex* ("an unjust law is not law") is often ascribed to Aquinas, and is frequently given as a summation of his position and the natural law position in general.[15] This view is somewhat misleading, on several counts. Aquinas never used the exact phrase above, though one can find similar expressions: "every human positive law has the nature of law to the extent that it is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law"[16]; and "[unjust laws] are acts of

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[11] Aquinas, *Summa Theologiae*, I–II, Question 95, Art. 2, corpus, in *The Treatise on Law*, p. 288.

[12] Aquinas, *Summa Theologiae*, I–II, p. 288. A similar distinction is drawn in Aristotle, "Nicomachean Ethics", Book V, 7:1134b18–1135a5, in Jonathan Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, pp. 1790–1791.

[13] Aquinas, *Summa Theologiae*, I–II, Question 96, Art. 4, corpus, in *The Treatise on Law*, p. 324.

[14] Aquinas, *Summa Theologiae*, I–II, pp. 325–326.

[15] A good discussion of "*lex iniusta non est lex*", its meaning in general and its significance in Aquinas' work, can be found in Norman Kretzmann, "Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience", 33 *American Journal of Jurisprudence* 99 (1988).

[16] Aquinas, *Summa Theologiae*, I–II, Question 95, Art. 2, corpus, in *The Treatise on Law*, p. 288.

violence rather than laws; as Augustine says, 'A law that is unjust seems not to be a law'".[17] (One also finds similar statements by Plato, Aristotle, Cicero and Augustine—though, with the exception of Cicero's, these statements are not part of a systematic discussion of the nature of law.)

Another question goes to the significance of the phrase. What does it mean to say that an apparently valid law is "not law", "a perversion of law" or "an act of violence rather than a law"? Statements of this form have been offered and interpreted in one of two ways. First, it might mean that an immoral law is not valid law at all. The nineteenth century English jurist, John Austin, interpreted statements by the English commentator, Sir William Blackstone (e.g. "no human laws are of any validity, if contrary to [the law of nature]"[18]) in this manner, and pointed out that such analyses of validity are of little value. Austin wrote:

> "Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God . . . the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity."[19]

Though one should not too quickly conflate questions of power with questions of validity—for a corrupt legal system might punish someone even if it were shown that the putative law was invalid under the system's own procedural requirements—we understand the distinction between validity under the system's rules and the moral worth of the enactment in question.

A more reasonable interpretation of statements like "an unjust law is no law at all" is that unjust laws are not laws "in the fullest sense".[20] As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "she's no lawyer" or "he's no doctor". This only indicates that we do not think that the title in this case carries with it all the laudatory

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[17] Aquinas, *Summa Theologiae*, I–II, at Question 96, Art. 4, corpus, in *The Treatise on Law*, p. 327.

[18] William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765–1769), I:41.

[19] John Austin, *The Province of Jurisprudence Determined* (W. E. Rumble ed., Cambridge University Press, Cambridge, 1995), Lecture V, p. 158, quoted in Hart, "Positivism and the Separation of Law and Morals", p. 616.

[20] John Finnis traces the notion to Aristotle's idea of "focal meaning" and Max Weber's concept of "ideal types". See Max Weber, *The Methodology of the Social Sciences* (E. Shils and H. Finch eds., Free Press, New York, 1949), pp. 90–106; Aristotle, "Nicomachean Ethics", Book VIII, 4:1157a (different kinds of friendship): "Eudemian Ethics", Book VII, 2:1236a (different kinds of friendship); "Politics", Book III, 1:1275a–1276b (different kinds of citizen), in Jonathan Barnes ed., *The Complete Works of Aristotle* (Princeton University Press, Princeton, 1984), vol. 2, pp. 1829, 1958, 2023–2024; John Finnis, *Natural Law and Natural Rights* (2nd ed., Clarendon Press, Oxford, 2011), pp. 9–11, 20.

implications that it usually has. It may well be that, for our purposes, knowing that this doctor is not competent is the most important fact; however, the fact that she does have the required certification is not thereby negated or made entirely irrelevant. Similarly, to say that unjust laws are "not really laws" may only be to point out that they do not carry the same moral force or offer the same reasons for action that come from laws consistent with "higher law". This is most likely the sense in which Aquinas made his remarks,[21] and the probable interpretation for nearly all proponents of the position.

To say that an unjust law is not law in the fullest sense is usually intended not as a simple declaration, but as the first step of a further argument. For example: "this law is unjust; it is not law in the fullest sense, and therefore citizens can in good conscience act as if it were never enacted; that is, they should feel free to disobey it." This is a common understanding of the idea that an unjust law is no law at all, but it expresses a conclusion that is controversial. There are often moral reasons for obeying even an unjust law: for example, if the law is part of a generally just legal system, and public disobedience of the law might undermine the system, there is a moral reason for at least minimal public compliance with the unjust law. There is a hint of this position in Aquinas (he stated that a citizen is not bound to obey "a law which imposes an unjust burden on its subjects" if the law "can be resisted without scandal or greater harm"[22]), and it has been articulated at greater length by later natural law theorists, including John Finnis,[23] as discussed below.

There remain theorists who understand Aquinas's perspective as requiring a moral test for legal validity, or who reach that substantive conclusion independently, without purporting to be interpreting Aquinas. Among the prominent exponents of this position are Gustav Radbruch, Mark Murphy, and Philip Soper.[24]

Aquinas' natural law theory is in some ways more the structure of an ethical system rather than the full ethical system itself. For most of us,

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[21] Elsewhere, Aquinas wrote: "But even an unjust law retains some semblance of the nature of law, since it was made by one in power and in this respect it is derived from the Eternal Law". Aquinas, *Summa Theologiae*, I-II, Question 93, Art. 3, reply 2, in *The Treatise on Law*, p. 212.

[22] Aquinas, *Summa Theologiae*, I-II, Question 96, Art. 4, corpus, in *The Treatise on Law*, p. 327. In John M. Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, Oxford, 1998), p. 273 and n. 112, Finnis suggests that the Latin word Aquinas used, *turbationem*, which is commonly translated as "disorders" (and in the Henle translation I am using, "disturbances") might also be translated as "demoralisation".

[23] Finnis, *Natural Law and Natural Rights*, pp. 359–362.

[24] Gustav Radbruch, "Statutory Lawlessness and Supra-Statutory Law", 26 *Oxford Journal of Legal Studies* 1 (2006) (Bonnie L. Paulson and Stanley L. Paulson trans.); Mark C. Murphy, "Natural Law Jurisprudence", 9 *Legal Theory* 241 at 243–254 (2003); Philip Soper, "In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All", 20 *Canadian Journal of Law and Jurisprudence* 201 (2007).

little practical guidance for difficult moral questions can be found from the advice, "good should be done and sought and evil is to be avoided"[25]; however, Aquinas offers few prescriptions on specific moral issues more precise than that. The assumption may have been that the teachings of the Church and the holy books, combined with the reflections of a wise person,[26] would be sufficient to fill in the content of the moral system.

MEDIEVAL AND RENAISSANCE THEORISTS

5–03 In later centuries, discussions about natural law were tied in with other issues: assertions about natural law were often the basis of or part of the argument for individual rights and limitations on government; and such discussions were also the groundwork offered for the principles of what would become known as "international law".

Francisco Suárez (1548–1617) is regarded as the greatest scholastic thinker other than Aquinas.[27] Suárez's work on natural law theory breaks with Aquinas on at least two important matters. Suárez emphasises "will" when analysing natural (moral) law, while Aquinas had emphasised "reason"[28] (the extent to which moral standards are best understood as equivalent to the will of a lawmaker, here God, or the extent to which moral standards are best understood as derived from foundational axioms of reason)[29]; and Suárez's understanding of the "nature" in "natural law" was that knowledge of the good derived from knowledge of human nature, in contrast to Aquinas, who had advocated the converse position (that what is "natural" for human beings is what is reasonable, i.e. what is consistent with their nature as *reasonable creatures*).[30]

Suárez's writings strongly influenced Hugo Grotius (1583–1645), whose work on natural law theory established the foundations of modern international law, though Grotius did not share Suárez's focus on "will". Grotius wrote of the rules based on Reason that constrain what governments can legitimately do, and how nations can legitimately act towards

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[25] Aquinas, *Summa Theologiae*, I–II, Question 94, Art. 2, corpus, in *The Treatise on Law*, p. 247.

[26] Cf. Aquinas, *Summa Theologiae*, I–II, pp. 245–246, where Aquinas distinguishes propositions which are self-evident to all and those that are self-evident only to the wise.

[27] See generally Sean Coyle, "Natural Law in Aquinas and Suarez", 8 *Jurisprudence* 319 (2017).

[28] I discuss the issues of "will" versus "reason" in Ch. 11.

[29] To explain the different views in other terms: are actions right or good because God commands them, or is rightness and goodness a property one could deduce rationally from first principles?

[30] See, e.g. Finnis, *Natural Law and Natural Rights*, pp. 45–46; Robert P. George, "Natural Law Ethics", in P. L. Quinn and C. Taliaferro eds., *A Companion to Philosophy of Religion* (Blackwell, Oxford, 1997), p. 462.

one another.[31] As based on Reason, this was a natural law, as Grotius himself wrote, that would exist and bind us even if there were no God. By speaking of constraints on government based on individual rights, and by offering the possibility of a secular natural law theory, Grotius opened the path for the later liberal natural rights theories of, e.g. John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778).[32]

The eventual repercussions of natural law and natural rights thinking in political theory were far-reaching.[33] To choose one well-known example, the American Declaration of Independence (1776) claims authority from "the Laws of Nature" and refers to the "unalienable rights" of "Life, Liberty, and the pursuit of Happiness" (this phrase itself is a pleasantly hedonistic revision of John Locke's list of the natural rights of life, liberty, and property).[34]

To return to natural law theory and to summarise: it is normally a mistake to try to evaluate the discussions of writers from distant times with the perspective of modern analytical jurisprudence. Cicero, Aquinas, and Suárez were not concerned with a social-scientific-style analysis of law, as the modern advocates of legal positivism, and their critics, could be said to be. The early natural law theorists were concerned with what legislators, citizens and governments ought to do, or could do in good conscience. It is not that these writers (and their followers) never asked questions like "What is Law?" However, they were asking the questions as a starting point for an ethical or political inquiry, and therefore one should not be too quick in comparing their answers with those in similar-sounding discussions by recent writers, who see themselves as participating in a conceptual or sociological task.

One further point: while the natural law tradition, at least since Aquinas, has been associated with the Christian Church in general,

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[31] See, e.g. Wieacker, *A History of Private Law in Europe*, pp. 227–238; J. M. Kelly, *A Short History of Western Legal Theory* (Clarendon Press, Oxford, 1992), pp. 224–227, 241–243.

[32] This is of course a simplification, and a lot of intellectual history to condense into a single short paragraph. At a minimum, one should also note the early social contract theory of Thomas Hobbes, and the great systematiser of natural law, Samuel Pufendorf (1632–1694). See, e.g. Wieacker, *A History of Private Law in Europe*, pp. 239–248.

[33] The influence of Natural Law thinking on State law developments is more uncertain. For a fascinating overview of the Natural Law references in England, elsewhere in Europe, and in the United States, see R. H. Helmholz, *Natural Law in Court* (Harvard University Press, Cambridge, Mass., 2015); see also R. H. Helmholz, "Natural Law and Human Rights in English Law: From Bracton to Blackstone", 3 *Ave Maria Law Review* 1 (2005).

[34] See John Locke, *Two Treatises on Government*, II, § 6 (Student Ed., Peter Laslett ed., Cambridge University Press, Cambridge, 1988), pp. 270–271. On the transformation of Locke's ideas and language into the language of the American Declaration, see Pauline Maier, *American Scripture: Making the Declaration of Independence* (Knopf, New York, 1997), pp. 123–143, 160–170.

and (later) the Catholic Church in particular,[35] there are natural law traditions (or comparable schools of thought) associated with other faith traditions.[36]

JOHN FINNIS

John Finnis (1940–) is the most influential legal theorist of his generation working in the natural law tradition (with work that extends far beyond legal theory, into moral philosophy and many other fields[37]). Finnis's work is an explication and application of Aquinas' views[38]: with special attention to the problems of social theory in general and analytical jurisprudence in particular. **5–04**

For Finnis, the basic questions include the ethical one, "How should one live?" and the meta-ethical one, "How (by what procedure or analysis) can we discover the answer to ethical questions?" These ethical and meta-ethical questions are primary; legal theory for Finnis is best understood as a small, if integral part of the larger project.[39]

Finnis's response to these basic questions involves, among other things, the claim that there are a number of separate but equally valuable intrinsic goods (that is, things one values for their own sake), which he called "basic goods". In *Natural Law and Natural Rights*, Finnis lists the following basic goods: life (and health), knowledge, play, aesthetic experience,

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[35] A connection that continues to this day. See, e.g. Pope John Paul II's Encyclical, "*Fides et Ratio*," September 14, 1998, available at *http://w2.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091998_fides-et-ratio.html*.

[36] See, e.g. Knud Haakonssen, "Protestant Natural Law Theory: A General Interpretation", in Natalie Brender and Larry Krasnoff eds., *New Essays on the History of Autonomy* (Cambridge University Press, Cambridge, 2004), pp 92–109; David Novak, *Natural Law in Judaism* (Cambridge University Press, Cambridge, 1998); Anver M. Emon, *Islamic Natural Law Theories* (Oxford University Press, Oxford, 2010).

[37] The range of Finnis's work and influence can be seen in John Keown and Robert P. George eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, Oxford, 2013).

[38] Finnis largely follows the interpretation of Aquinas and the approach to natural law theory proposed by Germain Grisez. See Germain C. Grisez, "The First Principle of Practical Reason: A Commentary on the *Summa theologiae*, 1–2, Question 94, Article 2", 10 *Natural Law Forum* 168 (1965). There are other commentators who put forward distinctly different interpretations and approaches. See, e.g. Russell Hittinger, *A Critique of the New Natural Law Theory* (University of Notre Dame Press, Notre Dame, 1987) (offering a critique of the "Grisez-Finnis" view of Aquinas and natural law theory). A detailed explication of Finnis's view of Aquinas can be found in Finnis, *Aquinas*.

[39] For a clear overview of natural law that could serve as a concise restatement of Finnis's theory, see Robert P. George, "Natural Law and Positive Law", in Robert P. George ed., *The Autonomy of Law: Essays on Legal Positivism* (Clarendon Press, Oxford, 1996), pp. 321–334.

sociability (friendship), practical reasonableness and religion.[40] These are "intrinsic" goods in the sense that one can value, e.g. health for its own sake, but medicine only as a means to health. If someone stated that she was buying medicine, not because she or someone she knew was sick or might become sick, and not because it was part of some study or some business, but simply because she liked having a lot of medicine around, one might rightly begin to question her sanity.

At this level, we can only distinguish the intelligible from the unintelligible. We *understand* the person who is materialistic and greedy however much we disapprove of that approach to life. The greedy person is seeking the same basic goods we are. Much of what is conventionally considered morality occurs in Finnis's theory at the second level of discussion: the principles for how we should deal with and combine the quest for various intrinsic goods.

Finnis describes the list of basic goods, and other aspects of his moral theory, as "self-evident", but he does not mean this in the sense that the truth of these propositions would be immediately obvious to all competent thinkers. Part of what makes a proposition self-evident is that it cannot be derived from some more foundational proposition; thus, "self-evident" is here the opposite of "provable".[41] However, while self-evident propositions cannot be proven, they can be supported by consistent observational data and by dialectical arguments. Also, it is not the case that everyone will be equally adept at reaching these "self-evident" conclusions. Those of substantial experience, and who are able and willing to inquire deeply, may be better able to discover the self-evident truths than would others. (Aquinas, similarly, at one point wrote of propositions that are only self-evident to the wise.[42])

Because there are a variety of basic goods, with no hierarchy or priority among them, there must be principles for how to choose when the available options promote different goods. This is one basis for contrasting Finnis's position with utilitarian moral theories, under which all goods can be compared according to their value in a single unit, e.g. promoting utility (happiness or pleasure). On a simple level, we face choices among basic goods when we consider whether to spend the afternoon playing basketball (the value of play) or studying history (the value of knowledge). The choice is presented in a sharper form when we must choose whether to lie (choosing against the value of knowledge), in a situation where we believe that lying would lead to some significant

[40] Finnis provided a slightly different list in a later work. *See* John Finnis, *Reason in Action: Collected Essays Volume I* (Oxford University Press, Oxford, 2011), p. 244 n. 25.

[41] See Robert P. George, "Recent Criticism of Natural Law Theory", 55 *University of Chicago Law Review* 1371 at 1386–1393 (1988) (explaining and defending this aspect of Finnis's argument).

[42] Aquinas, *Summa Theologiae*, I–II, Question 94, Art. 2, corpus, in *The Treatise on Law*, p. 246.

benefit or avoid a greater evil. Morality offers a basis for rejecting certain available choices, but there will often remain more than one legitimate choice (again there is a contrast with utilitarian theories, under which there would always be a "best" choice).

For Finnis, the move from the basic goods to moral choices occurs through a series of intermediate principles, which Finnis calls "the basic requirements of practical reasonableness". Among the most significant, and most controversial, is the prescription that one may never act directly against a basic good (as lying is an action against knowledge or torture an action against life (and health)), regardless of the benefit one believes will come from taking that path.[43] In other words, the ends never justify the means where the chosen means entail a harming of a basic good. Other intermediate principles listed in Finnis's *Natural Law and Natural Rights* include that one should form a rational plan of life, have no arbitrary preferences among persons, foster the common good of the community, and have no arbitrary preferences among the basic goods.[44]

Law enters the picture as a way of effecting some goods—social goods which require the co-ordination of many people that could not be effected, easily or at all, without it, and as a way of making it easier to obtain other goods.[45] Thus, the suggestions Finnis makes about law and about legal theory are in a sense derivative of his primary concern with ethics. As to questions regarding the obligation to obey the law, Finnis follows Aquinas: one has an obligation to obey just laws; laws which are unjust are not "law" in the fullest sense of the term, and one has an obligation to comply with their requirements only to the extent that this is necessary to uphold otherwise just institutions.[46]

Finnis observes that law has, in a sense, a "double life": law is both a fact about what legal officials have done, and a reason for action, for both citizens and officials.[47]

NATURAL LAW THEORY VERSUS LEGAL POSITIVISM

5–05 Given that Finnis's starting point is so different from that of the legal positivists, it is surprising to discover some similarities or overlap in

[43] Predictably, within this approach, much turns on characterisation of an action. Harming another person in self-defence would likely be justified on the ground that the purpose of the action is to defend one's own life (the basic good of "life/health"); the harm to one's attacker would be characterised as only a side-effect, even if one that is foreseeable or even inevitable.

[44] Finnis, *Natural Law and Natural Rights*, pp. 100–127.

[45] Finnis, *Natural Law and Natural Rights*, pp. 260–264.

[46] Finnis, *Natural Law and Natural Rights*, pp. 354–362.

[47] John Finnis, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's 'Ideal Dimension'", 59 *American Journal of Jurisprudence* 85 at 95–96 (2014).

their theories.[48] These similarities occur because even though Finnis's theory might be seen as primarily a prescriptive account—a theory of how we should live our lives—certain descriptive elements are necessarily assumed.[49] First, if one is going to ask what implications morality has for law, one must first understand what "law" is. Secondly, it is part of Finnis's project to consider which proposals within various aspects of legal regulation are foreclosed and which are allowed by a general ethical theory.[50] Further, Finnis believes that a proper ethical theory is necessary for doing descriptive theory well, as valuation is a necessary and integral part of theory construction.[51]

Like Hart, Finnis emphasises the need to use an "internal point of view" in analysing a legal system[52], and, like Joseph Raz, Finnis believes that our understanding of legal systems should centre on the fact that law affects our reasons for action.[53] As noted earlier (in Ch. 3) regarding the "internal point of view", Finnis makes an important amendment to Hart's approach. He argues that in doing legal theory, one should not take the perspective of those who merely accept the law as valid (Hart appears to include even those who accept the law for prudential reasons[54]). Rather, the theory should assume the perspective of those who accept the law *because* they (in a just legal system) believe that valid legal rules create (prima facie) moral obligations. The difference may seem minor, but it means crossing a theoretically significant dividing line: between the legal positivist's insistence on doing theory in a morally neutral way and the natural law theorist's assertion that moral evaluation is an integral part of proper description and analysis. Finnis's approach to descriptive theory, unlike Hart's, requires that the theorist evaluate the moral merits of the legal system(s) being described, and it is the issue

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[48] Finnis elsewhere discussed the ways in which a natural law theorist can affirm, more or less on the terms offered, nearly every "dogma" associated with modern legal positivism. See John Finnis, "The Truth in Legal Positivism", in Robert P. George ed., *The Autonomy of Law* (Clarendon Press, Oxford, 1996), pp. 195–214, at pp. 203–205.

[49] One could also offer historical reasons for the similarities. Finnis was H. L. A. Hart's student at Oxford, and Joseph Raz was first a classmate and later, for many years, a colleague.

[50] See, e.g. Finnis, *Natural Law and Natural Rights*, pp. 169–173 (property law), pp. 188–192 (bankruptcy).

[51] Finnis, *Natural Law and Natural Rights*, pp. 6–18.

[52] Finnis, *Natural Law and Natural Rights*, pp. 3–13.

[53] Finnis, *Natural Law and Natural Rights*, pp. 12–13. Also like Raz, Finnis believes that values (and value choices) are incommensurable, and that this has important consequences for legal and moral theory. See Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986), pp. 321–366; John M. Finnis, "On Reason and Authority in *Law's Empire*", 6 *Law and Philosophy* 357 at 370–376 (1987); John M. Finnis, "Natural Law and Legal Reasoning", 38 *Cleveland State Law Review* 1 at 7–9 (1990); John Finnis, "Concluding Reflections", 38 *Cleveland State Law Review* 231 at 234–241 (1990).

[54] See H. L. A. Hart, *The Concept of Law* (3rd ed., Clarendon Press, Oxford, 2012), p. 203 ("their allegiance to the system may be based on . . . calculations of long-term interest").

of whether such moral evaluations in the process of theory-construction are proper or necessary that has been one boundary line in recent times between legal positivism and natural law theory.

A similar difference or change can be seen in comparing Joseph Raz's approach to law and Finnis's approach. For Raz, what is central is that law *purports to* create moral reasons for action[55]; for Finnis, what is central is that under certain conditions law *does* create moral reasons for action. The difference may seem slight, but it is also significant.

In the context of Finnis's approach, one can locate three related differences between natural law theory and legal positivism. First, natural law theory asserts that a morally neutral theory of law is not possible, or, at least, not valuable.[56] Second, natural law theory focuses on how, whether, and when positive law adds to our set of moral obligations (roughly—it does so only when the rules enacted are consistent with moral principles and promulgated by a party acting within its authority)[57]; this is a question that legal positivism, by its basic principles, avoids trying to answer (and when it does try to answer the question, it tends either to make assertions contrary to its foundational claims, or to make a clumsy effort to elide the "is/ought" distinction[58]). The contrast between natural law theory and legal positivism may be characterised in another way: that natural law theory sees law primarily as a kind of reason for action (potentially adding to our moral reasons for action), and therefore argues that law cannot be understood except in the context of what would make for *good* (moral) reasons for action. One obviously could not, or should not, approach law, understood in this manner, in a morally neutral way. Legal positivism, instead, focuses on the law as a type of social institution, and, within that focus, a morally neutral theory seems both possible and valuable. Whether there is any theory that can persuasively portray both the practical reasoning aspect of law and the social practice/institution aspect of law remains to be seen. Third, natural law theory (at least in Finnis's version) focuses less on the question of "*what* is law?" (the boundaries of the concept, "law"), and more on the question, "*why* is law?"—the moral reasons for having law.[59]

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[55] See Raz, *Ethics in the Public Domain*, p. 199.

[56] See Brian H. Bix, "On the Dividing Line Between Natural Law Theory and Legal Positivism", 75 *Notre Dame Law Review* 1613 (2000).

[57] See, e.g. John Finnis, "On the Incoherence of Legal Positivism", 75 *Notre Dame Law Review* 1597 at 1607–1608 (2000).

[58] See Finnis, "On the Incoherence of Legal Positivism" at 1606–1611; Brian H. Bix, "Legal Positivism and 'Explaining' Normativity and Authority", 05 (2) *American Philosophical Association Newsletter* 5–9 (Spring 2006).

[59] John Finnis, "Law and What I Should Truly Decide", 48 *American Journal of Jurisprudence* 107 (2003).

OTHER DIRECTIONS

5–06 There are a wide variety of other modern theories which are self-described, or described by others, as being "natural law theories". Robert George has produced a series of works which have explained, developed, and applied the Aquinas/Grisez/Finnis approach to natural law.[60] Mark Murphy has offered a Natural Law theory of law within the Thomistic tradition that deviates from the view of Thomistic Natural Law one finds in the works of Finnis and George.[61] Deryck Beyleveld and Roger Brownsword offer a natural law theory based on Alan Gewirth's argument that moral principles are presupposed by practical reasoning.[62] Lloyd Weinreb has constructed a natural law theory he connects with the ancient Greek view that there is a normative natural order; within this order, Weinreb argues, legal and moral norms play an important role mediating questions of free will and responsibility.[63] And Michael Moore has constructed a natural law theory based on a metaphysically realist (Platonist) theory of morality and meaning.[64]

Suggested Further Reading

5–07 JOHN FINNIS

John M. Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, Oxford, 1998).
—, *Collected Essays*, five volumes (Oxford University Press, Oxford 2011).
—, *Fundamentals of Ethics* (Georgetown University Press, Washington, D.C., 1983).
—, *Moral Absolutes: Tradition, Revision, and Truth* (Catholic University of America Press, Washington, D.C., 1991).

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[60] See, e.g. Robert P. George, *In Defense of Natural Law* (Clarendon Press, Oxford, 1999).

[61] E.g. Mark C. Murphy, "Natural Law Jurisprudence", 9 *Legal Theory* 241 (2003); Mark C. Murphy, "Natural Law Theory", in Martin P. Golding and William A. Edmundson eds., *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, Oxford, 2005), pp. 15–28; Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, Cambridge, 2006); Mark C. Murphy, "Defect and Deviance in Natural Law Jurisprudence", in Matthias Klatt ed., *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012), pp. 45–60.

[62] See, e.g. Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London, 1986); Alan Gewirth, *Reason and Morality* (University of Chicago Press, Chicago, 1978).

[63] See, e.g. Lloyd L. Weinreb, *Natural Law and Justice* (Harvard University Press, Cambridge, Mass., 1987); Lloyd L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (Harvard University Press, Cambridge, Mass., 1994).

[64] See, e.g. Michael S. Moore, "A Natural Law Theory of Interpretation", 58 *Southern California Law Review* 277 (1985); Michael S. Moore, "Moral Reality Revisited", 90 *Michigan Law Review* 2424 (1992); Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* (Oxford University Press, Oxford, 2000).

—, "Natural Law and Legal Reasoning", in Robert P. George ed., *Natural Law Theory: Contemporary Essays* (Clarendon Press, Oxford, 1992), pp. 134–157.
—, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980, 2nd ed., 2011).
—, "Natural Law Theory: The Classical Tradition", in Jules Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2002), pp. 1–60.
—, "Natural Law Theory: Its Past and Its Present", 57 *American Journal of Jurisprudence* 81 (2012), reprinted in Andrei Marmor ed., *The Routledge Companion to Philosophy of Law* (Routledge, London, 2012), pp. 16–30.
John Keown and Robert P. George eds., *Reason, Morality, and Law: The Philosophy of John Finnis* (Oxford University Press, Oxford, 2013).
"Propter Honoris Respectum: John Finnis", 75 *Notre Dame Law Review* 1597–1892 (2000).
Robert P. George, "Recent Criticism of Natural Law Theory", 55 *University of Chicago Law Review* 1271 (1988) (contains a summary, explanation and defence of Finnis's theory).

NATURAL LAW THEORY

Thomas Aquinas, *The Treatise on Law* (R. J. Henle ed., University of Notre Dame Press, Notre Dame, 1993) (*Summa Theologiae*, *I–II*, Questions 90–97).
Brian H. Bix, "Natural Law Theory", in *A Companion to Philosophy of Law and Legal Theory* (2nd ed., Dennis Patterson ed., Blackwell, Oxford, 2010), pp. 211–227.
—, "Natural Law Theory: The Modern Tradition", in Jules Coleman and Scott Shapiro eds., *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press, 2002), pp. 61–103.
—, "On the Dividing Line Between Natural Law Theory and Legal Positivism", 75 *Notre Dame Law Review* 1613 (2000).
John Finnis, "Aquinas' Moral, Political and Legal Philosophy", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/aquinas-moral-political/* (2017).
— ed., *Natural Law*, 2 volumes (Dartmouth Pub. Co., London; New York University Press, New York, 1991) (a wide-ranging collection of law review articles on natural law theory).
—, "Natural Law Theories", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/natural-law-theories/* (2015).
Robert P. George, *In Defense of Natural Law* (Clarendon Press, Oxford, 1999).
— ed., *Natural Law Theory: Contemporary Essays* (Clarendon Press, Oxford, 1992) (a collection of contemporary articles on natural law theory).
—, "Natural Law", in Keith E. Whittington, R. Daniel Kelemen and Gregory A. Caldeira eds., *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2008), pp. 399–413.
Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, Cambridge, 2006).
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Lloyd L. Weinreb, *Natural Law and Justice* (Harvard University Press, Cambridge, Mass., 1987).