

THE OXFORD HANDBOOK OF

**JURISPRUDENCE**  
**AND PHILOSOPHY OF LAW**



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**JURISPRUDENCE**  
**AND PHILOSOPHY OF LAW**

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**OXFORD**  
UNIVERSITY PRESS

# OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai  
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata  
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi  
São Paulo Shanghai Singapore Taipei Tokyo Toronto  
with an associated company in Berlin

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Published in the United States  
by Oxford University Press Inc., New York

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First published 2002

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British Library Cataloguing in Publication Data  
Data available

Library of Congress Cataloging in Publication Data  
Data available

ISBN 0-19-829824-2

1 3 5 7 9 10 8 6 4 2

Typeset by Hope Services (Abingdon) Ltd  
Printed in Great Britain  
on acid-free paper by  
Biddles Ltd., Guildford and King's Lynn

## PREFACE

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Dictionaries, encyclopedias, and companions are all the rage in philosophical publishing these days, and the philosophy of law certainly has its share. It was not our intention to add to the growing list of titles. Rather, we wanted to put together a volume of work on the main topics in the philosophy of law that not only reported on the state of the art, but contributed to it as well.

We provided the authors with very simple instructions: give us your ‘take’ on the chosen topic. Ideally we wanted the chapters to canvass some of the major issues in the field and some of the prominent approaches to such issues. But we also wanted these surveys to serve as points of departure for the authors’ own views. We realized that to complete such assignments, the authors would need significantly more freedom and space than encyclopedia entries or journal articles typically allow. Accordingly, we permitted the authors to write entries of any size up to 15,000 words. While most made it within that limit, several authors went significantly over, and we let these bursts of exuberance stand.

The chapters, therefore, do not aim to be comprehensive and are intentionally distinctive, as is the *Handbook* itself. Just as the authors made no effort to cover every significant issue and position, we did not attempt to include an entry on every worthwhile topic or major school of thought in the philosophy of law—and for several reasons. First, though we have produced a large book of many pages, there were space limitations none the less. The size of each chapter significantly limited the number of entries we could include. Secondly, certain important jurisprudential topics have been extensively explored in the literature in recent years and we did not believe that additional coverage would be profitable (jurisprudence does not need another essay on the normative foundations of law and economics, for example). Thirdly, a few individuals who had committed to write entries had to withdraw at late stages of the project and time constraints prevented us from securing an adequate substitute.

All in all, though, the project has emerged substantially as we imagined it: a collection of original essays on the major topics in the philosophy of law written by many of the most interesting and thoughtful researchers working today. The volume not only captures much of the jurisprudential past; it represents the current state of the philosophy of law and points us in several of the directions where it will likely be in the future.

Finally, we would be remiss if we did not acknowledge Kenneth Himma's contribution to the success of this project. Ken began as the 'anonymous' referee for the project, and soon became Associate Editor. Virtually every submission we received was eventually sent to Ken for review. Ken responded with breathtaking speed and provided the authors with copious and penetrating comments on substance, as well as helpful suggestions on style and presentation. It is a credit to Ken that most every author, including those who were initially piqued by his criticisms, told us that the referee's comments substantially improved their piece. We entirely concur.

Jules L. Coleman  
Scott Shapiro

*New Haven*  
*New York*

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## CHAPTER 1

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# NATURAL LAW: THE CLASSICAL TRADITION

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JOHN FINNIS

## INTRODUCTION

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WE can speak of law wherever we can speak of obligation. Indeed, we can use the word more broadly still, and speak of law(s) wherever we can speak of normativity, that is of general directions considered as counting, or entitled to count, in one's deliberations about what to do. So, though it certainly has other meanings, 'law' can be used to refer to any criteria of right judgment in matters of practice (conduct, action), any standards for assessing options for human conduct as good or bad, right or wrong, desirable or undesirable, decent or unworthy. That is how the word is used in the term 'natural law'.

Though it too has a range of meanings, 'natural' can be used to signify that some of those criteria or standards<sup>1</sup> are somehow normative prior to any human choices. On this conception, these prior standards are not the product of either individual or collective choosing or positing, and cannot be repealed, however much they may be

<sup>1</sup> For economy, this chapter uses 'standards' to refer to any principles, rules, or norms which give or purport to give direction (to motivate and to sort and rank motivations) in the deliberations of someone considering what to do. So the word covers not only the 'general directions' mentioned in the preceding paragraph, and the 'criteria' mentioned in the present text sentence, but also principles and rules of positive law, and so forth.

violated, defied, or ignored. The idea is that acknowledging these standards in one's deliberations is part of what it is to be *reasonable*—as much part of reasonableness as acknowledging basic natural realities (the world's longevity, or time's one-way flow, etc.), or the requirements of logic, or the aptness or inaptness of means to clear-cut ends (recipes for cakes, remedies for deflation, strategies for battle, circuitry for chips, etc.). Persons or cultures which fail to acknowledge these standards are in that respect unreasonable, even if in many respects rational (see Sects. 10 and 18 below).

Unreasonableness of this kind is, as the saying goes, 'human, all too human'. But to speak more precisely, it is a way of being less than fully what a human person can be. And this is not the only reason for calling it 'unnatural'. Poor thinking and choosing not only fails to actualize to the full one's capacities to be intelligent and reasonable, but also results in actions and omissions which fail to respect and promote the humanity, the nature, of everyone they affect. A community in which the standards by which we identify such failure are violated is not flourishing as it might. Its members, whether they are those acting (and forbearing) or those who should have been benefited not harmed, do not fulfil their capacities. However typical of human affairs, such a condition is unnatural so far as it is disrespectful of human persons. It is unnatural *because* unreasonable, and unreasonable *because* neglectful of the good of persons, the good which is the subject-matter of practical reason's standards.

'Classic(al)' can be taken normatively or merely descriptively. Descriptively it can signify mere chronology; so 'classical natural law theory' might mean no more than the theory that emerged in 'classical times'; for us, ancient Greece. Or the description may be of conventional assessment; so 'classical natural law theory' might mean no more than the theory that is commonly taken to be the version or subclass of such theories which is typical or most commonly under discussion. Or one can use the phrase normatively, to signal one's judgment that this theory or set of ideas, however popular or unpopular, neglected or well-known, is actually sound and entitled to acceptance as guide to personal and communal life. In this chapter, I normally use the term in all three senses at once; the weight of my interest is, of course, in the normative sense and claim.

Natural law theory claims to be the *adequate* or *sound* jurisprudence (or legal philosophy), and the sound ethics and political theory. So I shall explore the theory not only in the brief section which follows but also under a further twenty-seven headings. What sorts of things does the theory say—or would it say if consistently developed—about each of the other twenty-seven topics taken up in this *Handbook*? Sketching a response to that question, I shall follow the book's order, at the expense of some repetition, and some departure from a more natural (more coherent, illuminating, fruitful) sequence of ideas and issues.

# 1 CLASSICAL NATURAL LAW THEORY

---

The thesis that, despite the variety of opinions and practices, there are indeed some true and valid standards of right conduct was philosophically (reflectively and critically) articulated by Plato. In his dialectic with sceptics Plato also found it appropriate to recapture from them the words ‘nature’ and ‘natural’. For sceptics contended that by nature, naturally, the strong and selfish prevail over those who are weak or who weaken themselves by care for other persons, or for promises, or for their other ‘responsibilities’. With resourceful brilliance Plato responded that trying to live ‘naturally’ or ‘in line with the law of nature’ by ruthless pursuit of one’s desires for power or other satisfaction is self-stultifying, incoherent, and unreasonable. By nature one’s desires, whether intelligent (say for knowledge and friendship), or primarily emotional (say for tasty food, sex, power, reputation, and so forth) are in need of being governed and moderated by the standards of reason. These standards extend beyond setting one’s own psyche in order, and include the establishing and maintenance of a good order with, and among, one’s fellows. Justice in the soul, indeed in the whole make-up of the particular individual, is the source of, and mirrors and is reflected by, justice in society. The nature of the political community is the nature of a human individual ‘writ large’—and vice versa. The standards by which we judge the lustful tyrant a bad human being, a failure (as well as, and because, wicked), are *natural right, natural law*. The sceptics’ ‘law of nature’, despite appearances (the glamour of evil), is unnatural because unreasonable. Such is the theme of Plato’s *Gorgias*, his *Republic*, his *Laws*, and others of his works.<sup>2</sup>

The dialectic undertaken by Plato with scepticism, and with the prototypes of modern utilitarianism and pragmatism, is a dialectic carried forward more or less continuously to this day. His conceptual apparatus and argumentative strategies are employed by Aristotle, Cicero, Augustine, and Aquinas, not to mention the works of Shakespeare and many others. Indeed, some main elements of the tradition are present in Locke, Kant, and Hegel, though with such heavy concessions to scepticism about practical reason that their theories can be called no longer classical but ‘modern’. This modernity was in some respects an advance on the classic understanding and on the political and legal orders sustained by theories more or less classical in kind. But in important and fundamental ways, the ‘modern’ conceptions are a regression from Plato’s insights, back toward the pre-Socratic philosophers and sophists. Moreover, it is a modernity already passing away.

Three introductory points about the tradition of natural law theory.

1. Its guiding purpose is to answer the parallel questions of a conscientious individual or a group or a group’s responsible officer (e.g. a judge): ‘What should I do?’

<sup>2</sup> See John Finnis, ‘Natural Law and the Ethics of Discourse’, *Ratio Juris*, 12 (1999), 354–73; *American Journal of Jurisprudence*, 43 (1999), 53–73.

‘What should we decide, enact, require, promote?’ True, these normative questions cannot be answered well without a sound and unblinkered knowledge of the facts about the way the world works. So good descriptions, general and specific, are needed. But descriptions remain of secondary, derivative interest. The dominant concern is with *judging for oneself* what reasons are good reasons for adopting or rejecting specific kinds of option. Societies and their laws and institutions are therefore to be understood as they would be understood by a participant in deliberations about whether or not to make the choices (of actions, dispositions, institutions, practices, etc.) which shape and largely constitute that society’s reality and determine its worth or worthlessness. This ‘internal’ point of view is dominant, and standards and norms of conduct are never constituted by the facts of convention, custom, or consensus. (Nor by the *fact* that the deliberating person accepts them.) ‘Ought’ is never derivable from ‘is’, save by virtue of some higher, more ultimate ought-premise. Positivism, as we shall see, fails to meet this demand of logic coherently. But everything that positivism reasonably wishes to insist upon is clearly, and coherently, accommodated in classical natural law theory.

2. The reason why classical natural law theory does not reduce ought to is (whether by ‘deduction’ or otherwise) is that in its debates with prescientific superstition and with sophistic reductions of right to might, it got clear about the irreducibility to each other of four kinds of order, to which correspond four kinds of theory: (i) orders which are what they are, independently of our thinking, that is, nature, laws of nature, and correspondingly the natural sciences and metaphysics; (ii) the order which we can bring into our thinking, and correspondingly the standards and discipline of logic; (iii) the order which we can bring into our deliberating, choosing, and acting in the open horizon of our whole life, and correspondingly the standards of morality and the reflective discipline of ethics; (iv) the order which we can bring into matter (including our own bodies) subject to our power, as means to relatively specific purposes, and correspondingly the countless techniques, crafts, and technologies.<sup>3</sup> Morality, and natural law (in the relevant sense of that term), cannot be reduced to, or deduced from, the principles of natural science or metaphysics, logic, or any craft.
3. None the less, the tradition has a clear understanding that one cannot reasonably affirm the equality of human beings, or the universality and binding force of human rights, unless one acknowledges that there is something about persons which distinguishes them radically from sub-rational creatures, and which, prior to any acknowledgement of ‘status’, is intrinsic to the factual reality of every human being, adult or immature, healthy or disabled.

<sup>3</sup> On the four kinds of knowledge/science/discipline considered in this paragraph, and their irreducibility, see e.g. Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998) (hereafter *Aquinas*), ch. 2; Finnis, ‘Legal Reasoning and Legal Theory’, in Robert P. George (ed.), *Natural Law Theory* (Oxford: Oxford University Press, 1992), 134–57 at 139–40.

## 2 THE MODERN NATURAL LAW TRADITION

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‘Modern’ might here mean ‘contemporary.’ But virtually all who today are willing to call their own work ‘natural law theory’ regard themselves as re-presenting and developing the classical tradition. Moreover, they reject the characteristic tenets of that ‘modern’ tradition which emerges in the 1600s and which self-consciously set aside some of the very elements of the classical tradition that today’s ‘new classical’ theorists esteem most highly.

So I shall follow a conventional scholarly view: the modern tradition of natural law theory emerges clearly by 1660, when Samuel Pufendorf published in The Hague his *Elements of Universal Jurisprudence*.<sup>4</sup> Characteristic features of this kind of natural law theory can be studied there, or in Pufendorf’s fuller treatise *On the Law of Nature and of Nations* (1672),<sup>5</sup> or in John Locke’s long-unpublished *Questions concerning the Law of Nature*<sup>6</sup> dating apparently from around 1660 to 1664. Both writers are clearly derivative in some ways from Hugo Grotius and in other ways from Thomas Hobbes. Very tellingly, Pufendorf prominently describes Hobbes’s *De Cive* (1642) (on being a citizen), which anticipates the moral and jurisprudential substance of Hobbes’s more famous *Leviathan* (1651), as ‘for the most part extremely acute and sound.’<sup>7</sup>

From Grotius’s massively influential *On the Law of War and Peace* (1625), Locke and Pufendorf take the well-sounding but quite opaque idea that morality and the law’s basic principles are a matter of ‘conformity to rational nature.’ How this nature is known, and why it is normative for anyone, these writers never carefully consider. Such fundamental questions were confronted and answered by Hobbes. But his answers treat our practical reasoning as all in the service of sub-rational passions such as fear of death, and desire to surpass others—motivations of the very kind identified by the classical tradition as in need of direction by our reason’s grasp of more ultimate and better ends, of true and intrinsic goods, of really intelligent reasons for action. Hobbes proclaims his contempt for the classical search for ultimate ends or intrinsic reasons for action. Accordingly there can be for him no question of finding the source of obligation and law in the kind of necessity which we identify when we notice that some specific means is *required* by and for the sake of some end which it would be unreasonable not to judge desirable and

<sup>4</sup> *Elementorum Jurisprudentiae Universalis Libri Duo* by Samuel Pufendorf, vol. ii, *The Translation*, by William Abbott Oldfather (Oxford: Oxford University Press, 1931) (hereafter *Elements*).

<sup>5</sup> *De Jure Naturae et Gentium Libri Octo* by Samuel Pufendorf, vol. ii, *The Translation*, by C. H. Oldfather and W. A. Oldfather (Oxford: Oxford University Press, 1934).

<sup>6</sup> Ed. Robert Horwitz, Jenny Strauss Clay, and Diskin Clay (Ithaca, NY: Cornell University Press, 1990); also published as W. von Leyden (ed.), *Essays on the Law of Nature* (Oxford: Oxford University Press, 1954).

<sup>7</sup> Pufendorf, *Elements*, preface, p. xxx.

pursuit-worthy.<sup>8</sup> Rather, obligation and law are defined, by Hobbes and then by Locke and Pufendorf, as matters of superior *will*.

‘No law without a legislator.’<sup>9</sup> No obligation without subjection to the ‘will of a superior power.’<sup>10</sup> ‘Law’s formal definition is: the declaration of a superior will.’<sup>11</sup> ‘The rule of our actions is the will of a superior power.’<sup>12</sup> These definitions and axioms are meant by these founders of modern natural law theory to be as applicable to natural law, the very principles of morality, as to the positive law of states.<sup>13</sup> So obligation is being openly ‘deduced’ from fact, the fact that such and such has been willed by a superior. To be sure, when natural law (morality) is in issue, the superior, God, is assumed to be wise. But the idea of divine wisdom is given no positive role in explaining why God’s commands create obligations for a rational conscience. God’s *right* to legislate is explained instead by the analogy of sheer power: ‘For who will deny that clay is subject to the potter’s will and that the pot can be destroyed by the same hand that shaped it?’<sup>14</sup>

Locke, like Hobbes, is uneasily though dimly aware that ‘ought’ cannot be inferred from ‘is’ without some further ‘ought’. That is to say, he is uneasily aware that the fact that conduct *was* willed by a superior, or indeed by a party to a contract, does not explain why that conduct is *now* obligatory, or indeed can ever be *obligatory* at all. So he sometimes thinks of supplementing his naked voluntarism (oughts are explained by acts of will) by the rationality of logical coherence: fundamental moral principles are tautologies, norms which it would be *self-contradictory* to deny.<sup>15</sup> Hobbes had ventured a similar account of the obligatoriness of his fundamental social contract, of subjection to the sovereign. His official and prominent explanation was of the form, ‘clubs are trumps’ (superior will and power/force). But, for anyone unimpressed by the naked assimilation of right with might and ought with is, he offers another explanation: it is *self-contradictory* not to keep a promise one has made.<sup>16</sup>

<sup>8</sup> What this obligation-explaining end is, in the last analysis, is considered in Sect. 7 below.

<sup>9</sup> Locke, *Questions*, 192–3.

<sup>10</sup> *ibid.* 158–9, 166–7.

<sup>11</sup> See *ibid.* 102–3

<sup>12</sup> See *ibid.* 204–5

<sup>13</sup> See e.g. Pufendorf, *Elements*, i, def. 12, sect. 17: ‘For, if you have removed God from the function of administering justice, all the efficacy of . . . pacts, to the observance of which one of the contracting parties is not able to compel the other by force, will immediately expire, and everyone will measure justice by his own particular advantage. And assuredly, if we are willing to confess the truth, once the fear of divine vengeance has been removed, there appears no sufficient reason why I should be at all obligated, after the conditions governing my advantage have once changed, to furnish that thing, for the furnishing to the second party I had bound myself while my interests led in that direction; that is, of course, if I have to fear no real evil, at least from any man, in consequence of that act.’

<sup>14</sup> Locke, *Questions*, 165–6: ‘patet . . . posse homines a rebus sensibilibus colligere *superiorem esse aliquem potentem sapientemque* qui in homines ipsos *jus habet et imperium*. Quis enim negabit lutum figuli voluntati esse subjectum, testamque eadem manu qua formata est’ (emphasis added, here as elsewhere).

<sup>15</sup> See Locke, *Questions*, 178–9 (passage deleted by Locke in 1664).

<sup>16</sup> See Hobbes, *De Corpore Politico* (1650), part I, ch. 3; *Leviathan*, ch. 14; Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) (hereafter *NLNR*), 348–9 (quoting and analysing the relevant passages, and pointing to the fallacies of temporal equivocation and unexplained chronological preference inherent in the strategy).

The strategy of assimilating the norms of natural law (morality) with those of logic finds its principal exponent in Kant, whose *Metaphysics of Morals* (1797) is in some ways the most sophisticated exposition of modern natural law theory. Officially rejecting any reduction of *ought* to the *is* of will, Kant holds that reason alone holds sway in conscientious deliberation and action. The rational necessity decisive for this sway is the logical necessity of non-contradiction, and all Kant's efforts to explain particular kinds of obligation (promissory, proprietary, political, marital, etc.) are claims that to proceed on any other 'maxim of action' would entail (self-)contradiction.<sup>17</sup>

Kant's reductions of moral rationality to logic all fail. They were bound to, because his basic theory lacks the concept of a substantive reason for action—a reason which is not a true judgment about natural facts, nor a logical requirement, nor a technical necessity of efficient means to a definite and realizable end. His theoretical and practical purpose is to save the content of civilization from the ravages of utilitarianism and scepticism. He articulates with novel power the radically anti-utilitarian principle that one must always treat humanity, in oneself as in others, as an end and never as a mere means. But his own official definition of 'humanity' would rob this categorical imperative of its significance. For if our humanity is, as he says, our rationality, and that rationality has no directive content save that one be consistent, we are left with neither rational motivation nor intelligent direction that could count in deliberation.

In the end, like Locke and Hume, Kant remains firmly in the grip of the assumption that what motivates us towards one purpose rather than another is our sub-rational passions. He lacks almost all the building blocks of classical natural law theory, the substantive first principles—basic reasons for action—that direct us towards bodily life and health, marriage, friendship, knowledge, and so forth,<sup>18</sup> as the intrinsic human goods which give us reasons (intelligent, not merely passionate motives) for action, and which, as aspects of our humanity as flesh-and-blood persons, are to be treated always as ends and never as mere means. He cannot account for the obligations and institutions which he does try to justify, let alone others which he overlooks, such as the obligation in justice to employ much of one's wealth for the relief of the needs of others. Kant's official rejection of reductions of *ought* to the *is* of will is subverted by the ambiguities of his claim that the moral law is a matter of one's legislation for oneself, ambiguities made inevitable by the absence of any substantive *ends* (*reasons for action*) in his conception of what practical reason understands.<sup>19</sup>

In the mid-twentieth century it became popular to distinguish classical from modern natural law theory by saying that the former works with the idea of natural *right*

<sup>17</sup> See *NLNR*, 349.

<sup>18</sup> For a list of basic goods, see e.g. Finnis, 'Is Natural Law Theory Compatible with Limited Government?', in Robert P. George (ed.), *Liberalism and Morality* (Oxford: Oxford University Press, 1996), 1–26 at 4; more fully, *Aquinas*, 79–86; earlier, Finnis, *NLNR*, 59–99.

<sup>19</sup> See Finnis, 'Legal Enforcement of Duties to Oneself: Kant versus Neo-Kantians', *Columbia Law Review*, 87 (1987), 433–56 at 443–5, 454–6.

but, unlike the latter, has no concept of natural or human *rights*. Some scholars added that the concept of natural rights is inextricably bound up with the individualist voluntarism of theories which try—of course in vain, like Hobbes—to ground political obligation in a contract of self-imposed political allegiance, and which often fail to integrate rights to freedom with obligations both of self-restraint and of service to others. And so the shift from classical to modern was judged by some a mere corruption of thought. But further reflection and investigation has shown that the concept, if not the idiom, of natural or human rights is certainly present in the classical theory, and deserves a central place in any sound moral and political theory (see further Sect. 8 below).

So the break between ‘modern’ and ‘classical’ natural law theories should be located, fundamentally, in the loss of the classical theorists’ insight that one comes to understand human nature only by understanding human capacities, and these capacities in turn only by understanding the acts which actualize them, and those acts only by understanding their ‘objects’, that is, the goods they intend to attain.<sup>20</sup> Those goods are the *reasons* we have for action, and nothing in moral, political, or legal theory is well understood save by attending to those goods with full attention to their intrinsic worth, the ways they fulfil and perfect human persons, and their directiveness or normativity for all thinking about what is to be done.

### 3 EXCLUSIVE LEGAL POSITIVISM

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The notion that there are no standards of action save those created—put in place, posited—by conventions, commands, or other such social facts was well known to Plato and Aristotle.<sup>21</sup> Developing a sustained critique of any such notion was a primary objective of these philosophers and of successors of theirs such as Cicero. Today the promoters of this radical kind of ‘exclusive positivism’ are the followers, conscious or unconscious, of Nietzsche or of others who like him reduce ethics and normative political or legal theory to a search for the ‘genealogy’, the immediate and deeper historical (perhaps partly or wholly physiological) sources, of ethical, political, or legal standards. These standards have their immediate sources in exercises of the will of charismatic individuals or power-seeking groups, and their deeper sources in the supposedly will-like sub-rational drives and compulsions of domination, submission, resentment, and so forth. Such ideas about the ‘genealogy of morals’ are also found among those who today promote ‘pragmatism’ in legal theory.

<sup>20</sup> See *Aquinas*, 29–34, 90–91.

<sup>21</sup> See e.g. *Nicomachean Ethics*, I: 1094b15–16.

*Legal* positivism is in principle a more modest proposal: that state law is, or should systematically be studied as if it were, a set of standards originated exclusively by conventions, commands, or other such social facts. As developed by Bentham, Austin, and Kelsen, legal positivism was officially neutral on the question whether, outside the law, there are moral standards whose directiveness (normativity, authority, obligatoriness) is not to be explained entirely by any social fact. Bentham and Austin certainly did not think that their utilitarian morality depended for its obligatoriness upon the say-so of any person or group, even though Austin held that the whole content of utilitarian moral requirements is also commanded by God. Until near the end of his life, Kelsen's official theory—at least when he was doing legal philosophy—was that there may be moral truths, but if so they are completely outside the field of vision of legal science or philosophy. His final position, however, was one of either complete moral scepticism or undiluted moral voluntarism: moral norms could not be other than commands of God, if God there were. Such a position was the consummation, not only of the voluntarism that ran through all Kelsen's theorizing about positive law, but also of every earlier theory which took for granted (see Sect. 2 above) that law and its obligatoriness are and must be a resultant of the will and coercive power of a superior. As Kelsen argues, this position ultimately leaves no room for a requirement of logical consistency in the law, or for any attempt to reason that a general rule ('murder is to be punished'), taken with a relevant factual proposition ('Smith murdered Jones last week'), can require a normative conclusion ('Smith is to be punished'). The only source of normativity, and therefore of the normativity of a particular norm, is positivity, that is, the actual willing of that norm by a superior; reason, even the rationality of logic and uncontroversial legal reasoning by subsumption of facts under rules, can never substitute for will.<sup>22</sup>

Kelsen's final positions cannot be written off as eccentricities, of merely biographical interest. Still, the exclusive legal positivism defended today by legal philosophers such as Joseph Raz, is very different.<sup>23</sup> While affirming that all *law* is based upon and validated by social-fact sources—the affirmation which makes it exclusive legal positivism—it accepts also that judges can and not rarely do have a legal and moral obligation to include in their judicial reasoning principles and norms which are applicable because, although not legally valid (because not hitherto posited by any social-fact source), they are, or are taken by the judge in question to be, *morally true*. Perhaps some enacted rule is directing the judge to decide certain cases according to what is fair and equitable. Or perhaps the judge considers that where substantive justice is sufficiently urgently at stake, judges are entitled to import the moral rule of justice where it is not explicitly excluded by any legally posited rule.

<sup>22</sup> Hans Kelsen, *The General Theory of Norms*, 1st pub. 1979, trans. Michael Hartney (Oxford: Oxford University Press, 1991), chs. 57–8.

<sup>23</sup> See, e.g., 'A postscript', in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), 81–7.

Classical natural law theory does not reject the theses that what has been posited is positive, and what has not been posited is not positive. (Indeed, the very term ‘positive law’ is one imported into philosophy by Aquinas, who was also the first to propose that the whole law of a political community may be considered philosophically as *positive law*.)<sup>24</sup> But the theses need much clarification. What does it mean to say that a rule, principle, or other standard ‘has been posited by a social-fact source’? Does it mean what Kelsen finally took it to mean, that nothing short of express articulation of the very norm in all its specificity—and no kind of mere derivation (inference) or derivability—will suffice? Virtually no other positivist can be found to follow Kelsen here. But if not, which kinds of consistency-with-what-has-been-specifically-articulated by a social-fact source are necessary and sufficient to entitle a standard to be counted as ‘posited’? By what criteria is one to answer that last theoretical question? Clearly, legal theorists have little reason to be content with any notion that legal theory should merely report the social facts about what has and has not been expressly posited, by actual acts of deliberate articulation, in this or that community. Raz himself goes well beyond so confined a project when he affirms that courts characteristically have the legal and/or moral duty to apply non-legal standards.

Now consider the judicial or juristic process of identifying a moral standard as one which anyone adjudicating a given case has the duty to apply even though it has not (yet) been posited by the social facts of custom, enactment, or prior adjudication. This specific moral standard will usually be a specification of some very general principle such as fairness, of rejecting favourable or unfavourable treatment which is arbitrary when measured by the principle (the Golden Rule) that like cases are to be treated alike, unlike cases differently, and one should do for others what one would have them do for oneself or for those one already favours . . . (see Sect. 10 below). But such a specification—a making more specific—of a general moral principle cannot reasonably proceed without close attention to the way classes of persons, things, and activities are already treated by the indubitably posited law. Without such attention one cannot settle what cases are alike and what different, and cannot know what classes of persons, acts, or things are already favoured, or disfavoured, by the existing positive law. The selection of the morally right standard, the morally right resolution of the case in hand, can therefore be done properly only by those who know the posited (positive) law well enough to know what new dispute-resolving standard really fits it better than any alternative standard. This selection, when thus made judicially, is in a sense ‘making’ new law. But this judicial responsibility, as judges regularly remind themselves (and counsel, and their readers), is significantly different from the authority of legislatures to enact wide measures of repeal, make novel classifications of persons, things, and acts, and draw bright lines of distinction which

<sup>24</sup> See Finnis, ‘The Truth in Legal Positivism’, in Robert P. George (ed.), *The Autonomy of Law* (Oxford: Oxford University Press, 1996), 195–214.

could reasonably have been drawn in other ways. This significant difference can reasonably be signalled by saying that the ‘new’ judicially adopted standard, being so narrowly controlled by the contingencies of the existing posited law, was in an important sense *already part* of the law.<sup>25</sup> (See further Sect. 14 below.) Exclusive legal positivism’s refusal to countenance such a way of speaking is inadequately grounded.

The law has a double life, for a judge or a lawyer trying to track judicial reasoning. It exists as the sheer fact that certain people have done such and such in the past, and that certain people here and now have such and such dispositions to decide and act. These facts provide exclusive legal positivism with its account of a community’s law.<sup>26</sup> But the law also exists as standards directive for the conscientious deliberations of those whose responsibility is to decide (do justice) according to law. From this ‘internal’ viewpoint, the social facts of positing yield both too little and too much. Too little, because in cases of legal *development* of the kind just sketched, those facts, while never irrelevant, must be supplemented by moral standards to be applied because true. And too much, because sometimes the social-fact sources yield standards so morally flawed that even judges sworn to follow the law should set them aside in favour of alternative norms more consistent both with moral principle (full practical reasonableness) and with all those other parts of the posited law which are consistent with moral principle.

On positivism’s incoherence and redundancy, see Section 7 below.

## 4 INCLUSIVE LEGAL POSITIVISM

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Inclusive legal positivists are unwilling to sever the question ‘What is the law governing this case?’ from the question ‘What, according to our law, is my duty as judge in this case?’ If a state’s law, taken as a whole, explicitly or implicitly authorizes or requires the judges, in certain kinds of case, to ask themselves what morality requires in circumstances of this kind, then the moral standard(s) answering that question—or at least the moral conclusions applicable in such circumstances—have legal as well as moral authority. The moral standard(s) are to that extent, and for that reason, to be counted as part of our law. They are, as some say, ‘included’ within or ‘incorporated’ into the community’s law. The exclusive legal positivist (to recall) insists that

<sup>25</sup> See Finnis, ‘The Fairy Tale’s Moral’, *Law Quarterly Review*, 115 (1999), 170–5 at 174–5.

<sup>26</sup> Raz rightly begins to leave behind the view that legal theory should attend only to what is posited in social-fact sources, when he affirms that law is systemic, so that the content of what counts as ‘expressly posited’ is settled by the content of *other* norms and principles of the system. For this entails that, even if these other standards are each posited by social facts, no law-makers, judicial or otherwise, do or can settle by themselves the legal content and effect of their act (social fact) of positing.

such standards, even if controlling the judges' duty in such a case, remain outside the law, excluded from it by their lack (at least hitherto) of social-fact pedigree.

Those who work in the classical natural law tradition suspect that the disputes between exclusive and inclusive legal positivists are a fruitless demarcation dispute, little more than a squabble about the word 'law' or 'legal system'. As was stated at the end of Section 3, law in general, and the law of a particular community past or present, can be profitably considered in one or other of two basic ways. It can be considered as a complex fact about the opinions and practices of a set or persons at some time, prioritizing (usually) the beliefs and practices of those members of the community who are professionally concerned with law as judges, legal advisers, bailiffs, police, and so forth. In describing this complex fact, one will observe that these people treat the law as a reason for action, and one will perhaps describe the law as they do, as a set of reasons (some authorizing, some obligating, some both) which are systematized by interrelationships of derivation, interpretative constraint, or other kinds of interdependence, and which purport to give coherent guidance. But since one is ultimately concerned with the facts about this set of people's belief and practice, one will not need to make judgments about whether the system's standards are indeed coherent, or whether its most basic rules of validation, authorization, origination, or recognition satisfyingly account for the system's other standards or give anyone a truly reasonable, rationally sufficient reason for acting in a specific way, whether as judge, citizen, or otherwise.

Alternatively, law and the law of a particular community can be considered precisely as good reasons for action. But, when deliberation runs its course, the really good and only truly sufficient *reasons* we have for action (and forbearance from action) are moral reasons: that is what it is for a reason to be moral, in the eyes of anyone who intends to think and act with the autonomy, the self-determination and conscientiousness, that the classical tradition makes central.<sup>27</sup> And it is obvious that, *for the purposes of this kind of consideration*, nothing will count as law unless it is in line with morality's requirements, both positive and negative. Morality, for reasons to be indicated (see Sect. 7 below), requires that we concern ourselves with making, executing, complying with, and maintaining positive, social-fact source-based and pedigreed laws, and that we keep them coherent with each other. These positive laws add something, indeed much, to morality's inherent directives. What is added is specific to the community, time, and place in question, even if it is, as it doubtless often should be, the same in content as other specific communities' positive-law standards on the relevant matters.

Classical natural law theory is primarily concerned with this second kind of enquiry. But it has respect for descriptive, historical, 'sociological' considerations of the first kind, and seeks to benefit from them. Classical natural law theory also, as we shall see (Sect. 5 below), offers reason for considering *general* descriptions of law

<sup>27</sup> See Plato, *Gorgias*; Aquinas, *Summa Theologiae*, I-II, prol.; Aquinas, 20, 124–5.

fruitful only if their basic conceptual structure is, self-consciously and critically, derived from that understanding of *good reasons* which enquiries of the second kind make it their business to reach by open debate and critical assessment.

Anyone who makes and adheres steadily to this basic distinction between enquiries about what *is* (or *was*, or *is likely*) and enquiries about what *ought* to be will notice that much of the debate among legal positivists arises from, or at least involves, an inattention to the distinction. Indeed, much of the contemporary jurisprudential literature swings back and forth between the rigorously descriptive ('external' to conscience) and the rigorously normative ('internal' to conscience), offering various but always incoherent mixes of the two. A rigorously descriptive understanding of Ruritania's law can do no more than report that it is widely or in some other way *accepted* in Ruritania that in certain circumstances the judges should settle cases by applying standards which they judge morally true even though unpedigreed—that is, not hitherto certified by any social-fact source of law.

Suppose that the rule of recognition so reported includes in its own terms the statement that any unpedigreed standard which the judges are required or authorized by this rule of recognition to apply (because considered by them to be morally true) shall be taken and declared by the judges to be *an integral part of the community's law*. What reason have exclusive positivists to say that such a rule of recognition is somehow false to the nature of law? Suppose, on the other hand, that Ruritania's rule of recognition stipulates (*a*) that under certain conditions its judges are *required* to apply an unpedigreed standard because they consider it *morally true*, but also (*b*) that in doing so they shall treat that standard *not* as an *integral part* of Ruritanian law, but rather as analogous to those rules of foreign states which are applicable in Ruritanian courts by virtue of the choice-of-law rules in Ruritania's law of Conflicts of Laws. (Stipulation (*b*) could well have legal consequences, e.g. in cases concerning the retrospective applicability of the standard, or its use in assessing whether there has been a 'mistake of law' for the purposes of rules of limitation of action, or restitution.) What reason have inclusive legal positivists to say that part (*b*) of such a rule of recognition is somehow false to the nature of law?

Can a dispute between rival 'isms' in legal philosophy have serious theoretical content if it could be affected by what a particular community declares to be its law? No truth about law seems to be systematically at stake in contemporary disputes between exclusive and inclusive legal positivists. The central dispute seems not worth pursuing. Provided one makes oneself clear and unambiguous to one's readers, it matters not at all whether one defines positive law as (*a*) all and only the pedigreed standards or as (*b*) all and only the standards applicable by judges acting as such. Either definition has its advantages and inconveniences. Counting as law only (*a*) what has been pedigreed has the inconveniences already mentioned: the relationship between legal duty and the duty of courts seems to fall outside the 'science' or 'philosophy' of law, and there seems no way of specifying precisely what counts as 'pedigreed' ('derived', 'derivable', etc.) short of the late-Kelsenian amputation of most of juristic thought

and method (i.e. all reasoning from one standard to another, or from systematic consistency) by virtue of the demand that there be a specific act of will to pedigree each and every proposition of law. Counting as law (*b*) whatever standards the courts have a judicial duty to enforce has the inconvenience that it cannot be done well—critically and sufficiently—without undertaking precisely the task, and following substantially the route, of classical natural law theory.

Law's 'positivity' was first articulated, embraced, and explained by the classical natural law theorists.<sup>28</sup> Legal positivism identifies itself as a challenge to natural law theories. It has had, say, 225 years<sup>29</sup> to make its challenge intelligible. The best its contemporary exponents can offer as a statement of its challenge seems to be: 'there is no necessary connection between law and morality'.<sup>30</sup> But classical natural law theory has always enthusiastically affirmed that statement. Some *laws* are utterly unjust, utterly immoral; the fact that something is declared or enacted as law by the social sources authorized or recognized as sources of valid law in no way entails that it is (or is even regarded by anyone as) morally acceptable or is even relevant to a consideration of someone's moral responsibilities (whether in truth, or according to some conventional or idiosyncratic understanding). There is no necessary connection between law and morality or moral responsibility. The claim that natural law theories overlook some of the social facts relevant to law is simply, and demonstrably, false.

So the statement meant to define legal positivism is badly in need of clarification. (See further Sect. 7 below.) More fundamentally still, no genuine clarification is possible without considering *both* terms of the alleged disjunction: law *and* morality. That there is *no* necessary connection, in any relevant sense of 'connection' and 'necessity', could not be rationally affirmed without steady, critical attention to *what morality has to say* about law, either in general or as the law of particular communities. What basis is there for asserting, or implying, or allowing it to be thought, that lawyers, judges, and other citizens or subjects of the law should not, or need not, be concerned—precisely when considering how the law bears on their responsibilities

<sup>28</sup> See Sect. 3 at n. 24 above.

<sup>29</sup> That is, since Jeremy Bentham, *A Comment on the Commentaries* (London, 1776).

<sup>30</sup> Thus Jules L. Coleman and Brian Leiter, 'Legal Positivism', in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Oxford and Cambridge, Mass., Blackwell, 1996), 241. They add one other 'central belief' and one further 'commitment'. (i) The central belief is that 'what counts as law in any particular society is fundamentally a matter of social fact or convention ("the social thesis")'. On this the classical natural law theorist will comment that it is equivocal between (*a*) the tautologous proposition that what is counted as law in a particular society is counted as law in that society, and (*b*) the false proposition that what counts as law for fully reasonable persons (e.g. fully reasonable judges) deliberating about their responsibilities is all and only what is counted as law by others in that society—false because *ought* (e.g. the ought of reasonable responsibility) is not entailed by *is* (and see Sect. 7 below). (ii) The further commitment is 'a commitment to the idea that the phenomena comprising the domain at issue (for example, law . . .) must be accessible to the human mind'. This commitment is fully shared by classical natural law theory, which defines natural law as principles accessible to the human mind, and positive law as rules devised by human minds (either reasserting those principles and/or supplementing them by 'specification').

as lawyers and so forth—with the question what *morality* has to say about law, and about what is *entitled* to count as law? And where is a student of law going to find such a steady, critical attention to morality as it bears on law, and on the very idea of law, and on particular laws, other than in an enquiry which, whatever its label, extends as ambitiously far as classical natural law theory does?

If you want to be ‘positivist’, ‘rigorously descriptive’ about law as a kind of social fact, you had better be positivist, rigorously descriptive, about morality, too. It is careless of ‘inclusive legal positivists’ to assume that any legal system whose pedigreed sources refer its judges to ‘morality’ (‘justice’ etc.) is a legal system that includes *morality*. What that legal system, descriptively regarded, includes is: what that community or those judges think moral, a set of beliefs which, morally regarded, may well be radically immoral. There is no halfway house, as inclusive legal positivists seem to suppose, between considering law and morality as social facts (as *beliefs about* reasons for action, and practices corresponding to such beliefs) and considering them as reasons for action (genuine reasons).<sup>31</sup> Considered precisely as genuine *reasons* for action, positive laws are social facts which count as reasons—as positive law—just in so far as morality makes their social sources and their social-fact content count.

## 5 METHODOLOGY

There is much uncertainty in contemporary jurisprudence about whether its subject-matter is (a) the *concept* of law, or rather (b) law as a social reality and/or as a kind of reason for action, of which people including theorists have more and less adequate concepts.<sup>32</sup> Late twentieth-century legal theory’s paradigm text is called *The Concept of Law*.<sup>33</sup> But despite the definite article (‘the’), Hart’s book takes it as obvious that there exist many concepts of law, and even of the law of sophisticated nation states. The book does not for a moment try to establish that there exists in some communities, large or

<sup>31</sup> There is a third or ‘halfway house’ way of *articulating* law or morality, the ‘detached’ or ‘professional’ statement in which one speaks *as if* one were articulating standards as genuine reasons for action, while in fact reserving one’s opinion. And indeed there are many other ways of speaking, including lying, play-acting, and so forth. None of this affects the position stated in the text.

<sup>32</sup> See e.g. Joseph Raz, ‘Two Views of the Nature of the Theory of Law: A Partial Comparison’, *Legal Theory*, 4 (1998), 249–82 at 280: ‘legal philosophy . . . merely explains the concept that exists independently of it’; 256: ‘having a concept can fall well short of a thorough knowledge of *the nature of the thing* it is a concept of . . . a philosophical explanation . . . aims at improving [people’s] understanding of *the concept* in one respect or another’ (emphases added; Raz’s italicizing of the first three words removed). But see also n. 35 below.

<sup>33</sup> H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961, 2nd edn. 1994).

small, a concept of law which is entitled to be called ‘the’ concept of law. Instead it attends to the reality of law, both as a ‘social phenomenon’ and as a characteristic kind of ‘reason for action’, and—with notable if incomplete success—seeks by doing so to arrive at an ‘improved understanding’, a *better concept*, of law. Hart might more accurately, if less elegantly, have called his book *A New and Improved Concept of Law*.

Such an uncertainty about subject-matter is an uncertainty about method. One cause of the uncertainty is that, as was said in Section 3 above, law has a double life. More precisely, there is the law that exists as reportable facts about the ideas and practices of a community. And there is the law that is a set of reasons for action which count in the deliberations of someone who, in the circumstances of a particular community, is deliberating with full reasonableness about what to do. For such a person, a purported reason is a *reason* only if it is a reason which is *good* precisely as a reason. Somewhat similarly, for logicians an invalid argument towards a conclusion is *no* argument, no reason for affirming the conclusion. To be sure, the reasons which we call our law are profoundly and in almost every detail shaped by our community’s present and past ideas and practices. But what makes a reason a good reason for action can, in the last analysis, never be a fact, such as facts about what a certain community does or thinks. No *ought* from a mere *is*. So, once again (see Sects. 3 and 4) there are two distinct kinds of worthwhile enquiry about law, not one. There is inquiry about law *as* a matter of fact, that is, about what is in fact, reasonably or unreasonably, counted as law in particular communities and sub-communities. And there is inquiry about the laws *as* giving reasons (= good reasons) for acting as, say, a judge.

It is of course possible to understand and describe a person’s or a people’s reasons for action without oneself regarding them as sound reasons. One can ‘adopt’ another’s viewpoint without ‘endorsing’ it, describe evaluations without evaluating, and so on. But if one aspires to say something *general* about human affairs, and to get beyond an endless newsreel, a listing and reproduction of other people’s ideas in their conceptual idiom, one must judge which concepts better illuminate the human situation, and which purported reasons for action are more important for understanding human conduct and opportunities. Does *any* idea of law earn its place in general accounts of human affairs, or should it be replaced, in such accounts, with a concept such as domination, or socialization, or relationships of production and consumption? And if it earns its place, why so, and in what form? Command of superiors? Rules for efficient survival? Or for dispute resolution? Or for common good? And so on.

Classical natural law theory, as Aristotle’s work makes plain, considers that the proper method in social sciences, including the political theory of which legal theory is a part (see Sect. 6), requires that the selection of concepts for use in general descriptions and explanations be guided by the very same criteria that the theorist employs when judging what is *good* for a society (and therefore also what is *bad* for it), that is, when judging what are good reasons for actions in the kinds of situation encountered by and in the theorist’s own society. There is thus an inherent, if often unrecognized,

dependence of descriptive general social theory (such as Hart's *The Concept of Law*) upon the conscientious evaluations of the person who is now not deliberating but rather theorizing (describing, explaining, analysing).

Notwithstanding Hart's claims to descriptive neutrality or value-freedom, his actual method abundantly verifies what classical theory asserts. *General* description and explanation are necessarily dependent on evaluations presumed to be shared between writer and reader. Rightly Hart proceeds at every point by identifying social functions, benefits, amenities, defects and their remedies, and so forth. Without these appeals to value, to good reasons for action, his arguments against rival descriptive and explanatory theories of law could hardly begin let alone succeed. There are no grounds for thinking that it could be otherwise. The history of legal theories which, like Bentham's or Kelsen's, attempted to base themselves on bare fact is a history of definitions which manage to combine arbitrariness with lack of explanatory power.<sup>34</sup> And we need not accept Raz's claim<sup>35</sup> that we can come to know the 'essential nature' or 'essential properties' of law without considering what kind of other rule(s), institution(s) or, in general, social arrangement(s) and corresponding reason(s) for action, it would be valuable to have to overcome or alleviate the evils of anarchy, tyranny, and the 'rule of men'. Nor his equivalent claim that 'law has' its essential nature or properties otherwise than in virtue of requirements of practical reason, that is, of the reasons there are for action: human goods.

The classical concepts of analogy and focal meaning, used extensively by Plato and articulated by Aristotle and Aquinas, enable theory to proceed on this basis without suppressing or even obscuring any of the evils, deviations, perversions, and vicious practices or institutions which disfigure human affairs. The immature, the decayed, the parasitic, and the morally corrupted instances of constitutions, or friendship, or legal system, are not allowed to force a thinning down of the account of the good kinds of constitution, friendship, law, etc., but appear in the account, none the less, as what they are: as not *fully* constitutions, law, and so on—not central cases of

<sup>34</sup> There is a moment in Bentham's thought when he half sees the intrinsic connection between understanding law and evaluating it: see his *An Introduction to the Principles of Morals and Legislation* (first printed 1780, ed. Wilfrid Harrison, Oxford: Basil Blackwell, 1967), 401 (ch. 16, para. 57); likewise paras 48–57 of his *A Fragment on Government* (first published 1776, ed. Harrison 1967), 23–5. But his official and stable view of general descriptive jurisprudence is the raw, barren, and reality-obscuring empiricism of his *Of Laws in General*, ed. Hart (University of London, Athlone Press, 1970).

<sup>35</sup> Joseph Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment', *Legal Theory*, 4 (1998), 1–20 at 16. But cf. Raz, 'Two Views of the Nature of the Theory of Law', n. 31, at 267: 'Hart . . . denied that the explanation of the nature of law is evaluative. For him it was a 'descriptive' enterprise. For reasons explained by John Finnis [*NLNR*, ch. 1], I believe that Hart is mistaken here, and Dworkin is right that the explanation of the nature of law involves evaluative considerations.' Still Raz, like other contemporary positivists who acknowledge the necessity of such 'evaluation', insists that it need not and should not or does not extend to *moral* evaluation. Like Hart's insistence that the evaluation which is intrinsic to the concept of law can and should be limited to 'survival', all such attempts to truncate practical reason (evaluation) seem arbitrary.

those kinds of human reality and human purposefulness, and not within the focal meaning of those terms.<sup>36</sup>

This method is used throughout my *Natural Law and Natural Rights*: see especially the definition of law, and my explanation of the ways in which reaching such a definition differs from ‘describing a concept’. The classical method is vindicated in general terms in chapter 1 of that book, and its bearing on the remarkable mistakes of interpretation made by positivists when they glance at classical texts is explained in the penultimate chapter (on unjust laws).

## 6 ON THE RELATIONSHIP BETWEEN LEGAL AND POLITICAL PHILOSOPHY

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Aristotle’s treatment of law appears in both parts of his ‘philosophy of human affairs’: in book V of his *Ethics*, in book III and other parts of his *Politics*, and as the subject-matter of his careful bridging passage between the two treatises (the final pages of *Ethics*, book X). Aquinas’s main treatment appears in two prominent parts of his vast treatise on human self-determination (part II of his *Summa Theologiae*): a treatment dedicated to over forty issues about law as a kind of guide to co-ordination (qq. 90–7 of part I–II), and a treatment of rights, adjudication, and many related aspects of justice (in the midst of part II–II, esp. qq. 57–71).

As these analyses and syntheses suggest, both legal philosophy and political philosophy are parts of aspects of a wider enterprise, no part of which can safely be pursued without some attention to the others and to the character of the whole. That wider enterprise could be characterized as Aristotle does: ‘philosophy of human affairs’. Or, more pointedly, as Aquinas does: the study of human action as self-determined and self-determining. Neither characterization in any way excludes the analysis of those aspects of human make-up, motivation, and behaviour that are biological, physiological, and in many respects similar to the life of other animals and organisms. But in focusing specifically upon the implications of human *freedom of choice*, Aquinas is putting squarely on the table, for critical analysis and appropri-

<sup>36</sup> There is no suggestion here that to understand *any* term, one must identify one instance (or type of instance) as central or paradigmatic, and one meaning as focal. On the contrary, the identification of meanings as ‘focal’ and instances or types as ‘central’ is always *relative* to some viewpoint or specific line of inquiry or focus of interest, and so has a particular importance in the social sciences, in so far as their subject-matter is constituted by what people have chosen to do: Finnis, ‘Reason, Authority and Friendship in Law and Morals’, in B. Y. Khanbai, R. S. Katz, and R. A. Pineau, *Jowett Papers 1968–1969* (Oxford: Blackwell, 1970), 101–24 at 101; *NLNR*, 11; *Aquinas*, 45–6: ‘Judged by the standards appropriate for evaluating human actions as reasonable or unreasonable, some constitutions are central . . .’.

tion, that feature of human reality which makes sense of practical philosophy's distinctive concern with understanding action from 'the internal point of view', that is, precisely as action is understood by the acting person who deliberates, identifies intelligent options, chooses, and successfully or unsuccessfully carries out the intention(s) so adopted.

Those who thus deliberate with intelligence, honesty, and care about what to do find good reasons to respect and promote the well-being not only of themselves but of the members of their family, of their neighbourhood, and of their economic associates and associations. The critical reflective analysis of those reasons is what Aristotle called ethics. In the first instance this is the ethics which focuses on the core of an individual's self-determination, virtue, or viciousness, and so forth. This focus tends to abstract somewhat from the full range of *inter-personal* associations whose flourishing is intrinsic, not merely instrumental, to any individual's well-being. So the study of the ethical ideas of, for example, justice, or marriage, broadens out into the practical philosophy of households, their 'economy', and its relationship to the wider network of economic relations which we follow Aristotle in calling economics. But the reasoning about what to do—about what anyone should regard as a responsibility—cannot rest there. Problems of justice between contracting parties (including spouses), between injurer and injured (including parent and child), between property-holder and trespasser, and so forth, and similarly problems of coordinating action—be it for defence of the whole network of neighbourhoods and associations, or to facilitate exchange, productive enterprise, and fair distribution of wealth—all call for the institution and maintenance of an all-embracing association of the kind we call political community or state. Ethical philosophy, without any essential shift in its normative, good-reason-seeking purpose and method, extends into political philosophy. And since the problems of administering justice, and of coordination for defence and economic welfare, cannot reasonably be resolved without new norms of conduct, new procedures for enforcing morality's perennial requirements, and new procedures for introducing and maintaining those new norms and procedures appropriately, political philosophy must include a theory of law.

In so far as it is a matter of acknowledging genuinely good reasons for action, the philosophy of politics and law cannot but be as normative as ethics itself, of which it is a specialized extension. In so far, however, as ethics is a matter of reasonable ways of thinking, both ethics in general and political and legal philosophy in particular draw upon logic, a distinct because wider discipline. Similarly, in so far as ethics and the rest of practical philosophy guide the conduct of flesh-and-blood people, they draw also upon the understanding of nature which we call science and Aristotelians used to call natural philosophy. And finally, in so far as law's ethically warranted response to the problems of social life mentioned in the previous paragraph involves the *creation* of new norms and institutions by the manipulation of language and of other conventional devices such as voting systems, jurisdictional boundaries, and so forth, legal philosophy has the character of other non-ethical 'arts'—techniques and

technologies for attaining goals far more limited than ethics' unbounded horizon of human good. So, just as technologies cannot be reduced to ethics (nor technologies and ethics to logic or natural science), so legal theory cannot be reduced without remainder to ethics or to political philosophy in general.

'Legal realism' tends to reduce its subject-matter and method to natural science. Kantian legal theory tends to reduce its subject-matter, and its method, to logic. Positivisms of various kinds, to the extent that they are not simply incoherent (see Sects. 4 above and 7 below), reduce legal theory to a kind of technology. Natural law theory seeks to avoid all these kinds of reductionism. And its centrepiece is its explanation of why, and how law, though dependent on its ethical reasonableness for its worth and its normativity or authority, *cannot be reduced to ethics*, or any deduction from ethics, but is in large part genuinely created, fully positive. That strategy of explanation is sketched in the following section.

## 7 AUTHORITY

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Now we can see the problem with the natural lawyer's account of authority. For in order to be law, a norm must be required by morality. Morality has authority, in the sense that the fact that a norm is a requirement of morality gives agents a (perhaps overriding) reason to comply with it. If morality has authority, and legal norms are necessarily moral, then law has authority too.

This argument for the authority of law, however, is actually fatal to it, because it makes law's authority redundant on morality's. . . . if all legal requirements are also moral requirements (as the natural lawyer would have it) then the fact that a norm is a norm of law does not provide citizens with an additional reason for acting. Natural law theory, then, fails to account for the authority of law.<sup>37</sup>

The criticism entirely fails. No natural law theory of law has ever claimed that 'in order to be law, a norm must be required by morality', or that 'all legal requirements are also'—independently of being validly posited as law—'moral requirements'. Natural law theorists hold that the contents of a just and validly enacted rule of law such as 'Do not exceed 35 m.p.h. in city streets' are *not* required by morality until validly posited by the legal authority with jurisdiction (legal authority) to make such a rule. The centrepiece of natural law theory of law is its explanation of how the mak-

<sup>37</sup> Jules L. Coleman and Brian Leiter, 'Legal Positivism', in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Oxford and Cambridge, Mass.: Blackwell, 1996), 244.

ing of 'purely positive' law can create moral obligations which did *not* exist until the moment of enactment. Unfortunately, Coleman and Leiter's error, thoroughgoing as it is, has many precedents. Kelsen, particularly, used to claim that, according to natural law theory, positive law is a mere 'copy' of natural law and 'merely reproduces the true law which is already somehow in existence'; the claim has been shown to be mere travesty.<sup>38</sup> Like Coleman and Leiter, Kelsen cited no text to support his claims about what natural law theory says, because (as he had every opportunity to know) none could be cited.

As the fifty-five years of Kelsen's jurisprudence abundantly illustrate, positivism's efforts to explain the law's authority are doomed to fail. For, as Coleman and Leiter rightly say, 'A practical authority is a person or institution whose directives provide individuals with a *reason for* acting (in compliance with those dictates);'<sup>39</sup> and they might have added, a reason that is not merely a replica, for each individual, of that individual's self-interested 'prudential reasons' for so acting. But, as they ought (but fail) to acknowledge, no facts, however complex, can by themselves provide a *reason for* acting, let alone an *ought* of the kind that could speak with authority against an individual's self-interest. (To repeat, 'authority' that does no more than track the 'I want' of self-interest is redundant for the individual addressed, and futile for the community.) No *ought* from a mere *is*. So, since positivism prides itself on dealing only in facts, it deprives itself of the only conceivable *source* of reasons for action (oughts), namely true and intrinsic values (basic human goods, and the propositional first principles of practical reason that direct us to those goods as to-be-pursued, and point to what damages them as to-be-shunned).

The incoherence of positivism—its inherent and self-imposed incapacity to succeed in the explanatory task it sets itself—is nicely illustrated by Coleman and Leiter's effort to explain 'the authority of the rule of recognition.'<sup>40</sup> They preface this explanation with the remark that 'we all recognize cases of binding laws that are morally reprehensible (for example, the laws that supported apartheid in South Africa)'.<sup>41</sup> So we can conveniently test their explanations of this bindingness, this authoritative-ness, by asking how such explanations could figure in the deliberations of an official (say Nelson Mandela when practising as an advocate of the Supreme Court) in South Africa in those days. Mandela (let us imagine) asks Coleman and Leiter *why* (and whether) the South African rule of recognition, which he knows is the propositional content of the attitudes accompanying and supporting the massive fact of convergent official behaviour in South Africa, gives him a reason for action of a kind that he could reasonably judge authoritative. How does this fact of convergent official behaviour, he asks, make the law not merely *accepted as* legally authoritative but actually *authoritative as law* for him or anyone else who recognizes its injustice? Coleman and

<sup>38</sup> Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), 416; Finnis, *NLNR*, 28.

<sup>39</sup> 'Legal Positivism', n. 37 above, at 243 (emphasis added). For 'dictate' read directive or prescription (e.g. enactment, judicial judgment, etc.).

<sup>40</sup> *ibid.* 248.

<sup>41</sup> *ibid.* 243.

Leiter's explanation goes like this: (1) Often your self-interest requires you to coordinate your behaviour with that of these officials or of other people who are in fact acting in line with those officials. (But Mandela is enquiring about authoritative directions, not guides to self-interest. Self-interest requires co-operation with local gangsters, but their directions are not authoritative.) (2) Moreover, if you think that those officials are trying to do what morality requires, you have reason to follow their lead. (Mandela will not think so, and will be right.) (3) You may 'believe that the rule of recognition provides something like the right standards for evaluating the validity of norms subordinate to it'.<sup>42</sup> (He rightly does not.) (4) '... quite apart from [your] views about the substantive merits of the rule of recognition itself... [t]he avoidance of confusion and mayhem, as well as the conditions of liberal stability require co-ordination among officials.' Here at last Coleman and Leiter offer a reason of the relevant kind, a reason which could be rationally debated by being confronted with reasons of the same kind. The requirement asserted in the quoted sentence goes far beyond the 'fact of convergent behaviour'; it acknowledges strong evaluations of order, peace, and justice ('liberalism'); it is indeed nothing if not a moral requirement. It is *available* to explain the law's authoritativeness only if the 'separability thesis'<sup>43</sup> is recognized as an equivocation between defensible and indefensible theses, and Coleman and Leiter's favoured, 'positivist' interpretation of it is abandoned as the mistake it is. In jurisprudence, there is a name for a theory of law that undertakes to identify and debate, openly and critically, the moral principles and requirements which respond to *deliberating persons'* request to be shown why a legal rule, validly enacted, is binding and authoritative *for them*, precisely as law. That name, for good and ill, is 'natural law theory'.

Coleman and Leiter might reply that I am confusing legal with moral authority. But this reply depends upon the mistaken view—one which, as we have seen, they starkly hold—that positive law as understood in natural law theory adds nothing to pre-existing moral requirements. Once we acknowledge that very many (not all!) legal requirements would not be moral requirements unless legally created in accordance with the law's own criteria of legal validity, we can readily see the sense in saying that the law's authoritativeness, in the focal sense of 'authoritative', is nothing other than its moral authoritativeness. To repeat, most of our laws would have no moral authority unless they were legally valid, positive laws. So their moral authority is also truly *legal* authority. Laws that, because of their injustice, are without moral authoritativeness, are not legally authoritative in the focal sense of 'authoritative'. Their 'authority' is in the end no more than the 'authority' of the Syndicate, of powerful people who can *oblige* you to comply with their will on pain of unpleasant consequences, but who cannot create what any self-respecting person would count as a genuine obligation. (See also Sect. 13 below.)

<sup>42</sup> 'Legal Positivism', n. 37 above, at 248.

<sup>43</sup> See Sect. 4 text at n. 30 above.

Natural law theory's central strategy for explaining the law's authority points to the under-determinacy (far short of sheer indeterminacy) of most if not all of practical reason's requirements in the field of open-ended (not merely technological) self-determination by individuals and societies. Indeed, the more benevolent and intelligent people are, the more they will come up with good but incompatible (non-compossible) schemes of social co-ordination (including always the 'negative' co-ordination of mutual forbearances) at the political level—property, currency, defence, legal procedure, and so forth. Unanimity on the merits of particular schemes being thus practically unavailable, but co-ordination around *some* scheme(s) being required for common good (justice, peace, welfare), these good people have sufficient reason to acknowledge authority, that is, an accepted and acceptable procedure for selecting particular schemes of co-ordination with which, once they are so selected, each reasonable member of the community is morally obligated to co-operate *precisely because they have been selected*—that is, precisely as *legally* obligatory for the morally decent conscience.

This is the source of the content-independence and preemptoriness that Hart, in his late work, rightly acknowledged as characteristic of legal reasons for action, and as the essence of their authoritativeness. And as the explanation shows, this content-independence and preemptoriness is neither unconditional nor exceptionless. A sufficient degree of injustice in content will negate the preemptoriness-for-conscience. *Pace* Coleman and Leiter, the laws of South Africa, or some of them, were not binding, albeit widely *regarded and treated and enforced as binding*. Positivism never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change, and adjudication). It has nothing to say to officials or private citizens who want to judge whether, when, and why the authority and obligatoriness *claimed* and *enforced* by those who are *acting as* officials of a legal system, and by their directives, are indeed *authoritative reasons* for their own conscientious action. Positivism, at this point, does no more than repeat (i) what any competent lawyer—including every legally competent adherent of natural law theory—would say are (or are not) intra-systemically valid laws, imposing 'legal requirements' and (ii) what any streetwise observer would warn are the likely consequences of non-compliance. It cannot explain the authoritativeness, for an official's or a private citizen's conscience (ultimate rational judgment), of these alleged and imposed requirements, nor their lack of such authority when radically unjust. Positivism is not only incoherent. It is also redundant.

For all their sophistication, contemporary legal positivisms are essentially in the position adopted by Austin in his brutal, *and irrelevant*, account of the authoritativeness of wicked laws: if I say that laws gravely contrary to morality are not binding, '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'.<sup>44</sup>

<sup>44</sup> Austin, *The Province of Jurisprudence Determined*, 1st pub. 1832, ed. Hart (London, 1954), 185; see Finnis, *NLNR*, 354–5.

## 8 RIGHTS

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Jurisprudence progresses as well as regresses. The late nineteenth-century analysis of rights which Hohfeld brought to completion makes a notable advance in clarity. But rights of each of the four Hohfeldian types are spoken of by Aquinas,<sup>45</sup> as well as by the civilian lawyers of his age (and indeed of earlier ages). The word ‘right’ translates the Latin *ius* or *jus*, the root of the words ‘justice’, ‘jurist’, ‘juridical’, and ‘jurisprudence’. Though Aquinas does not use the plural forms of the word *ius* as often as we use the plural ‘rights’, it is a sheer mistake to claim, as some have, that he lacked or repudiated the concept of rights in the modern sense, in which a right is ‘subjective’ in the sense of belonging to someone (the subject of the right). When he defines justice as the steady willingness to give to others *what is theirs*, Aquinas immediately goes on to treat that phrase as synonymous with *their right* (*ius suum*); hence he treats a right/rights (*ius/iura*) as subjective. (He also uses the word to speak of ‘objective’ right, that is, what interpersonal action or relationship is *right*—morally or legally, depending upon the context.)<sup>46</sup>

Hobbes, who inspired much in Benthamite and Austinian positivism, spurned the classical juristic tradition and defined ‘right’ as liberty in the sense of sheer absence of duty. So people have most rights in the state of nature where they have no duties. This move exemplifies regression in legal and, more generally, in political and moral philosophy. Fortunately, the mistake is quite obvious. If no one has any duties to or in respect of others, it will be more accurate to say that no one has any rights at all. For everyone, in such a state of affairs, is subject to being destroyed or abused by everyone and anyone else, and everyone’s actions can be impeded as much as any person or group cares, and is able, to arrange. The truth is that the concept of a right makes little sense save as (the Hohfeldian claim-right) a correlative of someone else’s duty, or (the Hohfeldian liberty) as protected by someone else’s duty of non-interference, or (the Hohfeldian power) as promoted by the duty of officials and others to recognize and effectuate one’s acts-in-the-law (or their ethical counterparts), or (the Hohfeldian immunity) as protected by a similar duty of officials and others not to recognize another’s juridical acts as it purportedly bears on my position.

It does not follow, as some have supposed, that in the classical view duty is conceptually or otherwise prior to right(s). Duties to others are (by definition) duties in justice, and justice is (by definition) the willingness to give to others their *right(s)*. So duties, at least to others, and rights are interdefined; neither is prior to the other. One does not really understand the relevant concept of duty unless one has an understanding of that factual and normative equality of human beings which is the foundation of justice; the concept of right(s) gives normative recognition to that equality. To the extent that the school of ‘modern natural law’ defined rights rather unilater-

<sup>45</sup> See Aquinas, 133 n. 10, 134 n. 12.

<sup>46</sup> See Finnis, *NLNR*, 206, 228; Aquinas, 132–8.

ally in terms of liberty and/or power, conceived as properties of the subject, it ran the risk of obscuring the essential correlativity of, or interdependence with, duties and, in general, with right relationships between persons.

Though the phrase ‘human rights’ is rather recent, and he never happens to use the exactly equivalent phrase ‘natural rights’ (plural), Aquinas clearly has the concept of human rights. For he articulates a series of precepts or norms of justice which concern, he says, what is owed to *everyone alike*.<sup>47</sup>

More fundamental than either rights or duties, and also indispensable for rationally determining what rights people have, are the first principles of practical reason which identify the basic reasons for action, directing us towards the basic human goods. No theory of rights is grounded or, even in outline, complete unless it attends to the question of the basic aspects of human well-being. No theory of human rights can be satisfactory unless it attends to the question what real features of human reality make us each, in the relevant sense(s), the equal of other human beings, and make it the case that other creatures in this world are not our equals and lack the rights we have. Contemporary legal philosophy (and legal theory: see Sect. 27 below) is marred by its inattention to the human person,<sup>48</sup> an inattention exemplified (one may think) by this *Handbook*’s selection of topics, and reparable only by taking up again the systematically complex and ambitious enterprise pursued by classical natural law theory.

## 9 INSTITUTIONALITY

The clustered meanings of our word ‘institution’, as of its Latin root *institutio*, point to salient features of laws, and of many things that law concerns: they are *made*, originated, established, instituted; they establish a pattern, arrangement, *order*, system, constitution, and/or organization; they *last* while persons and/or their actions come and go. For those are the salient features of the quite various kinds of reality we call institutions: slavery, contract, property, banking, this bank (undertaking or building), the courts, jury trial, ritual suicide, Friday dressing-down, and so forth. Roman jurists such as Gaius and Tribonian did much to transmit the word to the modern world by calling their books of foundational instruction *Institut[ion]es*: books to initiate the student in the *principles* (the rational origins or foundations) and the *established* ideas and practices which give a legal system its shape both as something

<sup>47</sup> See Aquinas, 136 (‘*indifferenter omnibus debitum*’).

<sup>48</sup> See Finnis, ‘The Priority of Persons’, in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), 1–15.

distinct from other kinds of social arrangement and as something different from other legal systems.

Thus an exploration of the many facets of law's institutionality will be an exploration of the twin roles of reasonableness and rationally under-determined choice in the positing and maintaining of even a thoroughly decent legal system. It will also be an exploration of the ways in which law is both secondary or even subordinate to, while regulating, other social institutions which it does not institute, whether they be reasonable and good (like proper forms of marriage and family, or less ambitious kinds of promising, not to mention religious communities and practices), or unreasonable, vicious, and harmful (like prostitution, slavery, or the vendetta). We should not imagine that market institutions or marriages or corporations await the emergence of 'power-conferring' rules of law. Legal rules are often ratificatory and regulative rather than truly constitutive, whatever their legal form and their role in creating the law's versions of the social practices and institutions upon which it, so to speak, supervenes. This ratificatory and regulatory role is often highly desirable as a means of preserving peace and fairness. But, for all their originality and variability, the law's institutions—to the extent that they are reasonable and give rise to claims on conscience—remain dependent upon foundational moral principles which pick out the requirements of a reasonableness attentive to the basic human goods and the human characteristics of freedom of choice within constraints of bodiliness and emotionality, maturation, mortality, the shape and dynamics of the environment, and so forth.

Time and positivity: the law's institutional character is an emblem of law's aspiration to bring into the present and the foreseeable future an order rooted in the past, the past of some originating event (such as conception or birth) or act, usually but not always a juridical act—an act intended precisely to change legal relationships—such as accepting a contractual offer, incorporating a company or acquiring shares in it, settling a trust, and so forth. As the events of revolution and *coup d'état* remind constitutional theorists, judges, and practitioners from time to time, not even the most self-referentially elaborate and complete set of constitutional provisions can make provision adequate for all contingencies in the life of that ongoing institution, the state (the political community).<sup>49</sup>

## 10 REASONS

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Hart set jurisprudence firmly on the road back—or rather, forward—to the point where it will rejoin the classical tradition. For his central message is that law and all its

<sup>49</sup> See Finnis, *NLNR*, 275–6 and citations in 275 n. 7.

constitutive elements and concepts must be understood, in jurisprudence as in life, from the internal point of view (see Sect. 1). And what is the internal point of view? It is the way of thinking of someone who treats a rule as a *reason for action* (and not simply as a prediction or basis for prediction). Hart's neglected but important later works, notably some of his *Essays on Bentham*,<sup>50</sup> recast his entire theory of law even more firmly as a theory of a particular kind of reason for action—reasons that are preemptorily normative by virtue not of their content but of their relationship to other, authoritative rules (of change, adjudication, and above all recognition).

Hart goes further. He offers an account of the *reasons* people have to introduce these authorizing rules (of change, adjudication, and recognition) and treat them as authoritative. The reasons are, in short, that social life without them is very defective—dispute-ridden, unadaptable to change, and so forth. These 'secondary' rules are reasonable precisely as remedies for such defects. But he goes further yet, and offers reasons for the 'primary' rules whose contribution to desirable social life is so enhanced by the secondary rules. The primary rules, he says, are rationally required for the sake of 'survival'. We should note, however, that besides his official categories of primary, obligation-imposing rules against violence, theft, and fraud, and secondary rules of legislation, adjudication, and law-recognition, Hart gives prominence to another vast category of rules: those that confer more or less *private* powers of changing one's normative position by contracting, conveying, and so forth. There is *reason* to introduce these and acknowledge their authority, for the sake of their immense 'amenity'—they are a 'step forward' as important as the wheel, he says.

All this brings Hart well within the territory of classical natural law theory.<sup>51</sup> But he declines to settle down as a citizen there. (1) Basic goods and reasons for acting besides 'survival' he declares 'controversial', and he declines to enter the classical dialectic showing how unreasonable and unrealistic it is to treat survival as the sole basic reason for acting. (2) The good reasons there are for benefiting society by having law (secondary as well as primary rules, etc.) he treats as entitled to no priority in accounting for the internal attitude of allegiance to the society and its law; people, including judges, 'can' conform for other 'reasons' such as careerism, blind conformism, uncritical traditionalism, and so forth. He never responds to the classical objection that, though these alternative motivations can and do indeed exist, and may be widespread, they can never have the justificatory or even the descriptive-explanatory power of the good reasons there are for introducing and upholding law *against* the pull of careerism or other forms of selfish self-interest, and *against* conformism to old ways and traditions. When thinking of the variety of law-like social institutions, he firmly and most beneficially employs the distinction between central

<sup>50</sup> H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982), especially the final essay and essay VII.

<sup>51</sup> For these purposes it does not matter that, as indicated in Section 9, natural law theorists would rightly have reservations about the inference which some might draw from Hart, that people did not have the capacity to, say, marry until there were 'power-conferring' legal rules about marriage.

and secondary cases, and between focal and analogous meanings. But he never recognizes how the facts of varied motivation can, likewise, be best accommodated if one acknowledges central and secondary cases of *the internal attitude*.

Thus Hart sets us on the road of understanding law as a kind of good reason for action, but balks at a full-blooded, open, critical consideration of what kinds of reason for action are really reasonable, really good as reasons. The whole ambition of natural law theory is to be precisely such a consideration.

The road lies open once one notices the error in Hume's claim that reason can only be the slave of—cannot motivate save as directing means to satisfy or respond to—the passions.<sup>52</sup> Emotions are involved in human action but *need not* be the exclusive or even primary ultimate motivating factor. Far better fitted for that role are the basic intelligible human goods, the intelligent opportunities of real improvement and flourishing as a person with other persons. These intrinsic goods were introduced in Section 2 above.<sup>53</sup> Their intelligibility, as benefiting and perfective of human persons, is the source of their directiveness, their counting as *reasons for* action. It is also the source of the further question: what is one to do, and what are the requirements of practical reasonableness,<sup>54</sup> given the multiplicity of basic human goods and of persons who could actualize them in their lives? The nub of the answer to that question is that one must not cut back on the directiveness of the basic reasons for action. Their combined or integral directiveness, while it is not another good or additional reason to add to the list, can be articulated as this principle: in all one's deliberating and acting, one ought to choose and in other ways will those and only those possibilities the willing of which is compatible with integral human fulfilment—that is, the fulfilment of all human beings and their communities, in all the basic human goods.<sup>55</sup> This is the master principle of morality, and it can also be formulated as the primary principle of human rights: other persons, so far as satisfying their needs is dependent on one's choosing and other willing, have a right that one's choosing and other willing remain open to integral human fulfilment.

All other moral principles are specifications of this master moral principle. The Kantian imperative that in every act one regard oneself as legislating for 'a kingdom of ends' ('a whole of ends in systematic conjunction') is an intimation of it; so too is Christianity's first principle, love of neighbour as oneself for the sake of the Kingdom; the Aristotelian conception of *eudaimonia* as ultimate end, and the utilitarian injunction to seek 'the greatest good/happiness of the greatest number' are other, less

<sup>52</sup> See e.g. Robert P. George, *In Defence of Natural Law* (Oxford: Oxford University Press, 1999), ch. 1. For Hume's own violations of the logical truth (often called, with some naivety, Hume's law) that *ought* cannot be deduced from *is*, see Finnis, *NLNR*, 36–8, 41–2.

<sup>53</sup> See n. 18 above.

<sup>54</sup> In *NLNR*, ch. 5 the requirements of practical reasonableness are presented as if they were each self-evident, but they should rather be understood as specifications of the unifying master principle of openness to integral human fulfilment: see *Aquinas*, ch. 4.

<sup>55</sup> On this 'master principle of morality', see, e.g. Finnis, J. Boyle and G. Grisez, *Nuclear Deterrence, Morality, and Realism* (Oxford: Oxford University Press, 1987), 281–8.

happy attempts to articulate it. *Integral human fulfilment* can be thought of as a kind of ultimate point (end) of human life and action, but only in the sense that it is at the heart of the master principle.

How is the first principle of morality specified into less abstract moral standards? How is its rational prescription shaped into definite responsibilities? Integral human fulfilment is not a vast state of affairs which might be projected as the goal (end) of a worldwide billion-year plan. Rather, what the master principle prescribes is that one not narrow voluntarily the range of people and goods one cares about by following non-rational motives, that is, motives not grounded in intelligible requirements of the basic reasons for action. One type of non-rational motive is hostile feelings such as anger and hatred towards oneself or others. A person or group motivated by feelings of, for example, revenge does not have a will open to integral human fulfilment. So a first specification of the master principle is: do not answer injury with injury. This principle is treated as foundational in all decent legal systems and is quite compatible with standards of just compensation (even by self-help), and of retributive punishment to restore the balance of fairness between wrongdoers and the law-abiding (see Sects. 20–2 and 26 below).

A second strategic specification of morality's master principle is the principle which every form of consequentialist, proportionalist, utilitarian, or other purportedly aggregative moral theory is tailor-made to reject: do not do evil—choose to destroy, damage, or impede some instance of a basic human good—that good may come.<sup>56</sup> This is the foundation of truly inviolable human rights and is the backbone of decent legal systems, for these legal systems exclude unconditionally the killing or harming of innocent human persons as a means to any end, public or private; and on the basis of analogous specifications of the master moral principle exclude unconditionally the use of perjured testimony, the choice to render false judgment or other judicial or official support of fraud, rape even for the sake of national security, and chattel slavery. A necessary part of the defence of every such specification of morality's primary principle is the critique of aggregative ethical methods, which all claim to identify greater goods which outweigh the evil done, and all fail by overlooking the incommensurability of persons, of the basic goods of persons, and of the transitive with the intransitive effects of choosing.<sup>57</sup>

A third principle giving relative specificity to the morality's master principle is the Golden Rule, the core principle of fairness: 'Do to others as you would have them do to you; do not impose on others what you would not want to be obliged by them to accept'. For a will marked by egoism or other partiality cannot be open to integral

<sup>56</sup> For some explanation and defence of this principle, see Finnis, 'Commensuration and Public Reason', in Ruth Chang (ed.), *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass.: Harvard University Press, 1997), 215–33 at 226; more extensively, Finnis *et al.*, *Nuclear Deterrence*, chs. 9 and 10.

<sup>57</sup> See e.g. Finnis, 'Commensuration and Public Reason', n. 56 above, at 218–23; *Fundamentals of Ethics* (Oxford: Georgetown University Press and Oxford University Press, 1983), 109–42.

human fulfilment. This rational principle of impartiality<sup>58</sup> by no means excludes all forms and corresponding feelings of preference for oneself and those who are near and dear (e.g. parental responsibility for, and consequent prioritizing of, their children); it excludes preferences motivated by desires, aversions, or hostilities that do not correspond to intelligible aspects of the real *reasons* for action, the basic human goods instantiated in the lives of other human beings as in the lives of oneself or those close to one's heart.

## 11 FORMALISM

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Law cannot fulfil its co-ordinating and other directive functions unless it is promulgated. Even if it could, it would normally be unfair to some if not all of the law's subjects for it to remain unpublished. Moreover, it is normally unfair for officials, including courts, not to apply the rules that were published to and taken by the law's subjects as applicable to circumstances of the kind now before the court or other official. That the law have a public 'form' is, in both these ways, at the heart of the idea of a rule of rules ('... of law') and not of personal discretion ('... of men'). And that the products of law-making be treated as valid, as law, only if made in accordance with a determinate 'manner and form' is equally essential to the law's desirable positivity and the desirable limitation of political rulers and their officials by law. One should be able to know much if not all of the law by attending, and in large measure only by attending, to its form—rather than to the unpublished intentions of its makers, or to its or their purposes, or to its justice or other value. If all this were not so, positive law would be redundant; but it is not redundant (see Sects. 3, 6–7 above); so form and formalities come as part of the very idea of having law.

Very occasionally a theory of law will describe itself as 'formalist'. Thus Ernest Weinrib offers, under that label, an account of certain institutions, such as the Law of Tort, which he considers can be understood only if one sets aside all questions about their point, their value or social utility. Their intelligibility and ideal reality is independent of any value they may have, and is trans-historical in the sense that it is independent also of the purposes of particular communities. But both the metaphysics and the illuminating power of this thesis are highly questionable. Apart from the existence of laws and legal institutions in the minds and dispositions of particular persons and communities, the only reality of laws and legal institutions—but this is

<sup>58</sup> See further 'Commensuration and Public Reason', 227–9, showing, *inter alia*, how the content of this rational standard is usually supplied, in specific cases, by sub-rational factors (taste for risk, conventions, etc.).

also their *primary* reality—is *as reasons for action* which are good because intelligibly related to (albeit usually not deducible from!) the basic reasons for action, the basic goods, the intrinsic values at stake in human action, and to their integral unfolding in moral standards.

Usually ‘formalist’ is an epithet applied with hostile intent by those who consider someone’s actual or recommended adjudicative method insufficiently attentive to the unexpressed intentions or further purposes of law-makers, or to the considerations of justice, mercy, and/or some other aspect of human welfare.<sup>59</sup> Since much (though not all) of the law exists by virtue of a *determinatio* which cannot rightly claim to be the uniquely reasonable (morally required) resolution of a social problem (see Sect. 7 above), the question how much is ‘too much’ or ‘too little’ judicial attention to evaluations not expressed in the form of the *determinatio* (the legislation or prior judgment(s) or practices) is itself a question largely for *determinatio*, not deduction or insight into the self-evident nor any other intellectual process capable of yielding a uniquely correct answer. It is, in short, a question about which very little can usefully be said in abstraction from particular legal systems and particular kinds of issues arising within them.

## 12 PRAGMATISM

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The term ‘pragmatism’ was introduced into the discourse of philosophers by Charles Sanders Peirce in 1878, to express a complex of ideas about logic (good thinking) which he had developed since 1867. In 1903 he gave at Harvard a series of seven lectures on ‘Pragmatism as a Principle and Method of Right Thinking’.<sup>60</sup> These lectures enable their readers to see that a pragmatism which is true to the insights and arguments of its founder is compatible with, indeed a kind of continuation of, key philosophical methods and findings of Plato, Aristotle, and other proponents of classical natural law theory.

For there Peirce explains that ‘the question of Pragmatism is the Question of Abduction’. Abduction he distinguishes from induction and deduction, as one of the three modes of inference, of moving soundly in one’s thinking. Peirce’s explains abduction as insight into data, into ‘a mass of facts before us’, which we find ‘a

<sup>59</sup> On Roberto Unger’s accusations of formalism in our law, see Finnis, ‘On “The Critical Legal Studies Movement”’, in John Eekelaar and John Bell (eds.), *Oxford Essays in Jurisprudence, Third Series* (Oxford: Oxford University Press, 1987), 145–65.

<sup>60</sup> Charles Sanders Peirce, *Pragmatism as a Principle and Method of Right Thinking: The 1903 Harvard Lectures on Pragmatism*, ed. Patricia Ann Turrissi (Albany, NY: State University of New York Press, 1997). William James invited Peirce, and suggested the title.

confused snarl, an impenetrable jungle,' until 'it occurs to us that if we were to assume something to be true that we do not know to be true, these facts would arrange themselves luminously. That is *abduction*.'<sup>61</sup> The core of Peirce's 'abduction' is (we can say) what Aristotle called *nous* and Aquinas *intellectus*: insight, understanding that is neither deduction nor induction in the modern senses of that term, but is into data of experience, not a mere data-less 'intuition'.

Peirce understands logic as properly normative, as directed and directing towards and by the good of truth, as the object(ive) of the human activity of thinking. 'Every man is fully satisfied that there is such a thing as truth, or he would not ask any question. That truth consists in a conformity to something *independent of his thinking it to be so*, or of any man's opinion on that subject.'<sup>62</sup> Since logic is a human activity guided by and towards a good to be attained (the logical goodness of enabling attainment of the cognitive good of truth), logic is subordinated to (though not a mere instrument of!) another, wider knowledge of normativity: ethics. And ethics, considered as norms of human action, is in turn based upon what Peirce (eccentrically) calls aesthetics—a knowledge of what is 'admirable *per se*'.<sup>63</sup> Truth and knowledge of it is, therefore, one of these *per se*, intrinsic goods.

True pragmatism is thus worlds removed from the 'pragmatism' of those, such as Richard Rorty or Richard Posner, on whose lips the term signifies a (self-refuting) scepticism about truth, and a wilful embrace of logical incoherence and other forms of overt arbitrariness in assertion. Such 'pragmatism', since it openly reduces assertion to an instrument of want-satisfaction or other drives, is no part of philosophy. (Of course, just as an unjust law is part of the law, and bad science is part of science, so base pragmatism *is* part of philosophy!) What needs to be said about it, for philosophical purposes, has been said in Plato's analysis of base rhetoric, in the first of his primary discussions of natural law, the *Gorgias*.<sup>64</sup> True pragmatism, recalled albeit incompletely by Jürgen Habermas, understands that there is a fruitful investigation of the presuppositions and preconditions of the human actions (freely chosen) of thinking reasonably (accurately, logically, responsibly) and discoursing authentically. And among the first of those preconditions is that one understand, by an unmediated *insight* into one's experience of inclination and possibility, that understanding, reasonableness, and knowledge are not merely possibilities but also an opportunity of participating in a basic human good, and thus a true *reason* for action. The occurrence of such insights and their consolidation and unfolding in practical reason is a child's reaching the age of reason.

<sup>61</sup> *Pragmatism as a Principle and Method of Right Thinking*, 282.

<sup>62</sup> *ibid.*, 255 (emphasis in original).

<sup>63</sup> *ibid.* 118–19. The classical theorists are less willing to subordinate *any* of the four kinds of 'science' to the other three (e.g. logic to ethics).

<sup>64</sup> For a consideration of the *Gorgias* and the ethics of discourse (as distinct from base rhetoric), in dialogue with Jürgen Habermas (not a pragmatist in the base sense), see Finnis, 'Natural Law and the Ethics of Discourse', n. 2 above.

## 13 LAW AND OBLIGATION

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Once it is understood that the positivity of law is a reality (and a concept, and an ideal) vigorously promoted, if not also invented, by adherents of ‘natural law’ (objective morality), it will be readily understood that the disjunction ‘legal obligation’ versus ‘moral obligation’ is far too crude. There is, rather, a unique kind of moral obligation which obtains only as a property of, or resultant from, *positive* laws. This can be called ‘legal-moral obligation’, or ‘legal obligation in the moral sense’. It is to be distinguished from, though normally it tracks, the ‘intra-systemic legal obligation’ which particular rules of law declare themselves (or are declared by other legal rules) to create, and which legal institutions also declare and take as a ground for punishments and penalties.

In recent years some jurists have argued that it is logically or conceptually possible to uncouple the concepts of authority and obligation. Rulers and their officials might be acknowledged as having authority, including moral authority to make and enforce law, and the right not to be usurped, while at the same time none of their laws, not even those imposing intra-systemic legal obligations, would create any legal obligation in the moral sense (though some of them might, of course, coincide in content with moral norms obligatory even in the absence of the law). It should be conceded that this is conceptually possible. But it should be denied that the resulting conceptions of authority and legal obligation correspond to any historical community attitudes or practices available for description. More importantly, the proposed new concepts do not pick out any reasonable kind of option, any kind of social arrangement or set of dispositions that might serve the goods for the sake of which law exists and is worth instituting, maintaining, or restoring.<sup>65</sup>

The discussion of authority in Section 7 above underlined the impotence of positivism to provide any account of it that could rationally satisfy those whom law most concerns—those who (for example, as judges) have the realistic opportunity to evade what the law seeks authoritatively to require of them. No *ought* from mere *is*, however complex. The same must therefore be true, even more obviously, of obligation. As Hart became vividly aware,<sup>66</sup> his own account of the law’s obligatoriness—even of its intra-systemic obligation—was deeply unsatisfying. His own critique of Austin had pivoted on the radical difference between *being obliged* (the *is* of ‘I am threatened’ plus the fact or sub-rational motivation of fear) and being *under an obligation* (an *ought*). But his own explanation of legal obligation in terms of insistent social pressure motivated by *other people’s* beliefs about importance yielded no more plausible

<sup>65</sup> For the suggestion and response discussed in this paragraph, see Rolf Sartorius, ‘Positivism and the Foundations of Legal Authority’, in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy* (Oxford: Oxford University Press, 1987), 43–61; Finnis, ‘Comment’, *ibid.* 62–75.

<sup>66</sup> See e.g. Hart, *Essays on Bentham*, 266–7.

bridge to the *ought* in need of explanation. Similarly, his account of the rule of recognition as a sheer fact about convergent official dispositions and practices ‘worked’ by abandoning the internal attitude—the reasonable concern with reasons for action—at its decisive moment. Hart’s reasons for suspending all the legal system’s *oughts* from the sheer *is* of official practice are weak. Undoubtedly, some or even many officials and others can abandon the search for good reasons for allegiance to law, and make do with sub-rational motivations such as conformism, traditionalism, or careerism. But such attitudes fail to make full sense of the law’s demands. The central case of reasons is not what are commonly accepted as reasons but reasons good *as reasons*. The central case of the internal attitude is the rationally warranted acceptance of law as obligatory in conscience, as speaking with true authority at the moment of choice. Only a natural law theory traces the rational warrant for such an acceptance.

Nor is it true that classical natural law theory merely puts off the evil day by suspending all reasons and obligations from an ultimate *fact*, God’s will. That may, as we saw, be true of some ‘modern’ natural law theories (Sect. 2 above). But when Aquinas, following Augustine, says that the natural moral law (and thus all just human, positive law) has its obligatoriness ‘from the eternal law’ he is referring not to a divine command but rather to the intelligibility, goodness, beauty, and rational attractiveness of the great scheme of things chosen, in creating, by divine *wisdom*.<sup>67</sup> The normativity of the obligatory is the normativity of the first principle of practical reason or natural law: good is to be pursued and done, and bad avoided—the referents of this ‘good’ being given by practical reason’s other first principles, the basic reasons for action (Sects. 2, 10 above). The reason why a particular option for action or forbearance is obligatory is always, ultimately: if I do not choose this option I do not coherently, reasonably, respect the integral human fulfilment—the good of all human persons and communities—to which I am directed by the ensemble of the only *reasons* I or others have for choosing anything.

## 14 ADJUDICATION

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The primary responsibility of courts is to apply the law. The ethics of this process of adjudication were of intense concern to classical natural law theorists such as Aquinas. Judges must be concerned to establish the truth about what was done by the parties. But this responsibility, while never detachable from its goal—correspondence with the reality of past acts and facts—is to be carried out in accordance with

<sup>67</sup> See Aquinas, *Summa Theologiae*, I–II, q. 96, a. 4; *Aquinas*, 307–12.

rules of evidence and proof. These rules have a number of purposes. One is to give effect to the presumption of innocence, which is itself a specific form of the general principle of reason that one should love one's neighbour as oneself. Another purpose of the rules of evidence is to preserve the fundamental equality of the parties by lessening the risk that one party will gain an advantage over the other by surprise, rhetorical superiority, or other such means. A further purpose is to lessen the risk that the trier of fact, whether judge or jury, will be distracted by emotional or other non-rational responsiveness to features of the case not truly relevant to the goal of doing justice by applying the positive law on the basis of true facts. The classical theorists were impressed by the risk that persons adjudicating in the emotionally engaging circumstances of particular facts and parties will be deflected from that goal.

Some pessimism, or realism, about the balanced impartiality of judges/jurors inclined the classical theorists to favour legislation—if you like, codification—over common law methods of making the *determinationes* by which natural law is non-deductively specified into rules and institutions of a particular community's positive law. Here we reach the secondary responsibility and function of judges: the interpretation and development of our law. As the discussion of 'exclusive legal positivism' shows (Sect. 3 above), this will involve considerations which somehow go beyond what is already fully specified and determined in the social-fact sources (prior legislation and precedent). But the aspiration that there be a rule, a governance, of *law* and not 'of men' (particular judges) demands that every reference back to, and reasoning forward from, morality's permanent standards be tempered by, and filtered through coherent maintenance of, the community's existing law 'as a whole' including its many sheer *determinationes* (Sects. 7 and 11 above).

The moral backbone of the law is a small number of strict and exceptionless rules against intentional harm, and lying (Sect. 10 above). Much of the rest of the frame and flesh of the law involves giving specificity to broad affirmative responsibilities of care and fairness. This specificity results in particular systems of transactional, procedural, and property law. The reasonableness of these particular standards and institutions is not of the form 'inevitably required by reason (morality)' but rather of the form 'adopted by our law by choice from among the range of reasonable options'. But once *these* options have been chosen, the rational requirements of coherence strongly limit the range of reasonable options for further specification and development. (See further Sect. 25 below.)

Short of a radical refashioning of a whole area of law, such as a legislature can undertake, legal development should proceed by what Coke called that 'artificial reason of the law'<sup>68</sup> which is peculiarly the responsibility of judges. For judges are simply persons dedicated to, and intellectually and morally equipped for, deciding as, so to speak, voices of the law and thus of the community rather than of themselves as individuals. Their responsibility to do justice between the parties—to make a

<sup>68</sup> *Prohibitions del Roy* (1608), 12 Co. Rep. 64.

morally *sound* and justified resolution of the case—is always to be harmonized with the responsibility to make that resolution also *fit*—at least, not contradict—the community’s existing law, considered as a whole and to the extent that it is morally tolerable. One traditional way of pointing towards this requirement of fit was the principle that in resolving interpretative uncertainties, judges must ask what those who made the law in its existing forms and expressions *would have* enacted (within the limits of reasonableness) *if* they had attended to the circumstances in question.

While we should thus broadly accept some main elements of Ronald Dworkin’s account of adjudication, we should reject his thesis that even in hard cases there is to be presumed to be a single legally right answer. That thesis exaggerates both the specificity of morality’s own standards and the linguistic and purposive determinacy of most posited rules. The requirements of moral soundness and fit with the posited law and its social-fact sources are requirements which eliminate countless logically possible resolutions of the case, and yield a uniquely correct legal resolution of all easy cases. But in a hard case they will characteristically leave more than one answer which is morally and legally right, that is, *not wrong*. Dworkin is right to observe that as a judge one will usually, even in a hard case on a divided bench, consider that one of the answers presents itself as compelling. But this results from the fact that each judge adds to the fully posited set of laws a set of presumptions about matters which are or involve guesses about the future, for example, about the consequences of adhering to ‘states’ rights’ in an era of international economic interdependence or national economic dislocation, or of joining a speculative political venture such as the European Union, or of the supreme court’s defying the desires and expectations of the national executive, and so on. Presumptions of this kind should be and usually are fairly stable in the mind of an individual judge, and lend that judge’s own deliberations a specificity and inevitability which in some degree outrun the law’s specificity.

Each of these two broad purposes and aspects of adjudication—application to facts, and interpretative development—requires some submerging of the judge’s own mind, including moral preferences and factual beliefs, in favour of the community’s. In the tradition this was dramatized in the moral and legal rule, defended by Aquinas and many but not all others, that judges must adjudicate in line with the legally admissible evidence, and without regard to facts which the law does not permit to be put in evidence even if they happen to be known to be true by the judge, as an individual.<sup>69</sup>

Much judicial reasoning takes the form of deciding that the relevant facts in new case *B* are analogous to those in previously decided case *A* and so should be treated in the same way. Such ‘reasoning by analogy’ has been found puzzling by theorists who observe that as reasoning it seems to have the pattern of a well-known fallacy. The puzzle is resolved by noticing that what warrants warranted appeals to analogy is not

<sup>69</sup> Aquinas, 250; Aquinas, *Summa Theologiae* II–II, q. 67, a. 2, q. 64, a. 6 ad 3.

a pattern of reasoning, but an *insight*<sup>70</sup> into some standard—perhaps never noticed or articulated before—which justifies *both* the earlier decision in *A* and the corresponding decision in *B*, and is appropriately coherent with the rest of the law and with sound practical judgment at large.

## 15 LAW AND EPISTEMOLOGY

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The law's positivity allows wide scope for 'deeming'. Some such deeming is morally and legally inevitable: for example, facts once determined by proper process must thereafter be taken to be true, and unchallengeably true after time for appeals or collateral challenges has passed. Some deeming is not inevitable but may be reasonable: for example, a court, to get jurisdiction and do justice otherwise unattainable, may deem that events occurred at a place where, in truth, they did not. But examples of fictions only serve to highlight the law's general epistemology. Events really occur and can be truly judged to have occurred. Some beliefs about events, and about good and evil, right and wrong, are false. Some accounts of events are lies because the persons giving them know, or can be known to believe, that they do not correspond to the realities they purport to describe. Some beliefs about what is choiceworthy are so contrary to the truth, so wrong and unreasonable, that anyone who acts upon one of them can and should be blamed and, where appropriate, penalized for doing so. Our law's epistemology is the common-sense realism about facts and values that, with reflective critical refinements, characterizes the classic tradition of natural law theory.

As we have seen (Sect. 1 above), the tradition distinguishes forcefully between truths about the order of nature, truths about logic, truths about the reasonable order of human action (principles of ethics, politics, law), and truths about the technically or artistically effective. Truths of the third (moral) order cannot be reduced to truths of any other kind, not even truths of nature. For the nature of human beings is such that fulfilment is a matter of self-determination by free choices (and accompanying judgments of worth) in the open horizon of the human goods; so the full measure and character of human fulfilment, and the full meaning and implications of practical reason's first principles, cannot be fully known in advance of those choices and judgments and their carrying out in action by individuals and communities. But the nature of a being that can be fulfilled cannot be adequately known otherwise than by knowing what is that kind of being's *fulfilment*. So philosophical anthropology,

<sup>70</sup> This kind of insight is an instance of what Peirce called abduction: Sect. 12 above.

knowledge of human nature in the first order, requires for its completion the practical, third-order knowledge we call ethics and political theory.

Hume's and Kant's writings amply display their authors' insightfulness. So it is very significant that the epistemological cause of their critiques of, and departures from, the classical theory of reality and value is their denial or neglect of *insight*, by which one adds to the data of experience and inclination an *understanding* of some fact or value. Such understanding is none the less authentic in those instances—which are of fundamental importance—when it can and must be attained without benefit of reasoning (but rather makes reasoning possible). Rejection of all *self-evidence* as arbitrary, spooky, fishy, or tautological, formal, and empty is self-refuting, as the epistemologies stemming from Hume and Kant all ultimately are.

## 16 LAW AND LANGUAGE

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Since one can fail to express what one means, and can struggle to find words to convey what one has in mind, and since language expands closely in the wake of advancing knowledge and (real or apparent) understanding, it is clear that language is never truly fundamental. Still, our intellectual endeavours make little progress without the assistance of language and the shared and shareable insights, beliefs, and judgments it conveys. Among our intellectual endeavours are, of course, our law, and our discourses *de lege lata*, and *de lege ferenda*, and *de lege reformanda*—about what the law is, what law there should be, and on improving the laws we have.

Language, the transmission of meaning from mind to mind by material (audible, visible, tactile) symbols, manifests in its own way our remarkable nature as beings who are, at once and in a radically *unitary* way, both spiritual and material. This duality without dualism is the source not only of opportunities, such as play, the creative arts, and marriage, but also of limitations. Among those limitations is the indeterminacy, better the under-determinacy, the vagueness inherent both in our purposes and in the language by which we may try to articulate and promote them. By the language of legislation and precedent-forming judicial arguments, we make the countless *determinationes* morally required to give effect to our moral responsibility to love (respect and promote the well-being of) our neighbour as ourselves. But those acts of specification never altogether eliminate vagueness, or the need for further determinations which must seek an appropriate fit not only with the *determinatio* being interpreted, but also with the relevant remainder of our law, and the continuing or perhaps new requirements and implications of relevant moral truths. As was said in Section 14 above, the classic theory of *determinatio* acknowledges plainly that in a

good many cases there is no *one* right answer, but rather a number of right (not-wrong) answers, one of which must, for purposes of legislating or judging, be selected by a process designed both to be fair in its process of choosing between alternative reasonable (not-wrong) answers, and to minimize the risk that one of the countless *wrong* answers will be adopted. Semantic vagueness is one, but only one, of the causes of this pervasive under-determinacy of law.

More basic than the meanings ‘of words’ are the meanings, the intentions, of speakers and other users of words. Interpretation of legal language is in the service of co-operation and justice amongst the persons who are now or will be members of the community whose law it is. The special, ‘legal’ instrument of that co-operation is the making and maintaining of legal rules by law’s ‘social sources’—persons acting with certain kinds of intention. So the intentions of the founders, ‘original intent’, is always relevant. But it was their responsibility to use language in a way that would be understood reliably and in line with any conventional and professional expectations about and modes of interpretation. So the language of texts has a certain independence—not absolute or unconditional—from the minds of the law-makers. And both those aspects of legal interpretation remain within the framework of law’s overriding purpose to promote common good by respecting rights and legitimate interests. This theme is pursued a little further in Section 27’s remarks on constitutional and statutory interpretation.

## 17 LAW AND OBJECTIVITY

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As bodily beings we have a bias in favour of understanding objectivity on the model of bodily objects and seeing (or otherwise sensing) them. Empiricist philosophy of every kind—not to be confused with empirical natural science and empirical common sense—trades on this bias. And empiricism was a very important assumption and premise in the work of contemporary legal positivism’s main founder, Jeremy Bentham. In less naïve forms it remains an important under-tow in contemporary jurisprudence.

Objectivity is not properly understood on the model of a cat’s seeing or anticipating a saucer of milk. Already the objectivity of meaning, and of successful transmission and understanding of meaning, is beyond empiricism’s explanatory resources (and renders empiricist philosophizing self-refuting). Objectivity, rather, is a matter of openness to the data, and willingness to entertain all relevant questions, and to subject every insight to the critique of further questions. It is a matter of our intellectual operations being free from all biases that would make the attainment of truth—

the goal of enquiry—less likely. To the extent that we as subjects (acting persons) have this openness and this freedom from truth-obscuring biases, we are being objective, our enquiries and judgments are objective, not merely subjective, and, subject to occasional error and deception, the realities we affirm and the goods we judge to be truly pursuit-worthy and beneficial are objectively what we judge them to be.

There are no sound reasons for thinking that judgments about goods, ‘value-judgments’, are doomed to be merely subjective. Philosophical efforts, such as John Mackie’s, to treat them as ‘too queer’ to be objective fail because they overlook the ‘queerness’—relative to the animal norm of clearly seeing a material object—of many other kinds of judgment, for example, about logical validity, or truth in natural scientific theory and in historical investigation, or about intersubjective meaning.<sup>71</sup>

## 18 LAW AND RATIONAL CHOICE

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There are at least three important and distinct senses of the ambiguous term ‘rational choice’. (1) Choice is rational when it is fully reasonable, that is, complies with all the requirements of practical reasonableness and so is morally upright. (2) Choice is rational in a thinner sense of ‘rational’ when it is rationally motivated in the sense that its object has been envisaged by practical intelligence and has rational appeal even if it is in some respect(s) motivated ultimately by feeling or emotion rather than by reason, the feelings or emotions having to some extent fettered and instrumentalized reason. (3) Choices are ‘rational’ in a special sense invented by ‘game’ or ‘decision’ theorists in the mid-twentieth century, to signify decision and action which is technically or technologically right, by the standards of some art or technique for assessing the most cost-effective way of attaining a relevant technical objective; such a decision typically will be one for which, within the game, the technique ‘rationally chosen’ is a ‘dominant’ reason, one which, being commensurable with the reasons for alternative options, includes all the benefit they offer and some more.<sup>72</sup>

This complexity of senses causes much misunderstanding. Sense (3) is the only sense in which economics and game or decision theory, as such, employ the phrase. But common sense often uses it in sense (2). And the philosophers of the great tradition use it in sense (1), arguing that choices of the other two kinds are less than fully, or even adequately, rational. The classical argument is Plato’s *Republic*, in which

<sup>71</sup> See Finnis, *Fundamentals of Ethics*, n. 57 above, at 57–66.

<sup>72</sup> On ‘rationality’ in game theory and social-choice theory, see Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’, *Notre Dame Journal of Law, Ethics & Public Policy*, 1 (1984), 115–37 at 129–33; ‘Natural Law & Legal Reasoning’, in Robert P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Oxford University Press, 1992), 134–57.

Socrates' young interlocutors most forcefully challenge him to show that justice and the other virtues opposed to egoism—opposed by egoism!—make sense even when one's justice and virtue puts one at the mercy of unscrupulous egoists and their emotion-driven supporters. The whole sweep of the dialogue is concerned, not to propose 'ideal states', but to meet the young men's challenge by showing that egoism is self-defeating, and self-defeating because it overthrows the constitutional rule (sway) of reason over the other forces in the egoist's soul, leaving egoists—tyrants—at the mercy of anarchic inner drives, lusts, and terrors, their psyches at once swollen and starved. Reason, when not subordinated by less intelligent powers, aligns one with the truths overlooked or defied by egoism. The basic human goods which give one all the reasons one can have for intelligent choices are goods for everyone, not just for me. And one of the basic human goods is the friendship that consistent egoism renders impossible.

The essence of friendship is this: *A* is interested in *B*'s well-being for *B*'s sake, and *B* in *A*'s for *A*'s sake; and so *A* has reason to be interested in *A*'s own well-being not only for its own sake but also for *B*'s; and *B* likewise. So the interest of neither person comes to rest solely on that person's own well-being, nor solely on the other person's well-being. Thus the relationship of interest (will, choice, action, affection) is, and is directed towards, a truly *common good*. This common good gives their relationship its self-sufficient point. Egoistic self-love is transcended. Or rather, it becomes clear that egoism is a form of self-mutilation, a dead-end deviation from the way to integral human fulfilment.<sup>73</sup>

There is a natural friendship, affectively thin but real and intelligent, of every person with every other person. Thus friendship and justice meet, or share a common intelligibility. The 'Prisoners' Dilemma' or Hobbesian player who regards as satisfactory or 'rationally preferable' the outcome in which he himself gets off scot-free and the other player is imprisoned for life is unreasonable. Conversely, game-theoretical or economic models of rational choice yield no determinate strategy or outcome when the players' preferences include a concern for the fairness and decency of the outcome—a concern for *common good*. So, though they have their utility as highlighting risks and unwanted side-effects, they cannot substitute for the comprehensive theory of rational choice: natural law theory.

## 19 LAW AND SEXUALITY

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State law and government are morally limited; they have no proper jurisdiction beyond the maintenance of justice and peace. That is the position reached by natural

<sup>73</sup> See *Aquinas*, 111–17.

law theory when Aquinas<sup>74</sup> left behind the Platonic–Aristotelian thesis<sup>75</sup> that the role of state law is to do everything needed to improve citizens’ well-being, including their good character. When the compulsory jurisdiction of the state is no longer conceived on the model of parenting young children, it becomes clear that the law should not punish sexually corrupt adults for acts they do alone or together in complete privacy and with full consent.

Since some ethical theories and ideas popular today deny that there is an ethics of sexuality as such, it is necessary to indicate why some kinds of choice to engage in sex acts alone or between consenting adults can be corrupt. Indeed, without such an explanation, it will prove impossible to explain why sex acts between adults and willing children are child abuse rather than an agreeable form of play or (as some ancient Greeks maintained) of loving and educating.

There is a form of life—call it marriage—in which a male and a female, each of the age of reason and sexual maturity, agree to live together permanently, co-ordinating the whole of their lives by reference to the needs and true interests of each other and of any offspring of their union, and actualizing, experiencing, and expressing this mutual commitment by marital intercourse. A sex act is any act intended to lead to one’s own or another’s sexual satisfaction, and *marital* intercourse is a sex act which in its intentions and kind is apt to actualize, express, and allow the spouses to experience their friendship, commitment, and openness to procreation of offspring. Since willingness to accept and nurture children if they are conceived by marital intercourse is an integral aspect of the rationale of marriage—is what makes sense of its commitment to exclusiveness and permanence—no sex act can be marital unless it not only expresses the spouses’ commitment in friendship but also is of a generative kind. For only a consensual act of the generative kind can express the couple’s openness to procreation.<sup>76</sup> And even an act of the generative kind will be non-marital if either of the spouses is willing, even conditionally, to engage in the same performances with someone outside of marriage.<sup>77</sup> For if one has such a willingness, one *cannot* make—though, as many do, one can *hope* in vain to make—one’s intercourse with one’s spouse an expressing and experiencing of one’s communion with and commitment to one’s partner in *our marriage*. One’s will being thus divided, one’s sex

<sup>74</sup> See the texts and analysis in *Aquinas*, 222–54.

<sup>75</sup> e.g. Aristotle, *Politics*, III: 1280a31–1281a; VII: 1332a28–b12; *Nicomachean Ethics*, V: 1130b23–6; X: 1179b32–1180a5.

<sup>76</sup> Such intercourse—a sex act which includes the man’s depositing and the woman’s taking his semen into her generative tract—can be of the generative kind even if the persons know or believe that they happen to be sterile: see Aquinas, *Quodlibet*, XI q. 9, a. 2 ad 1 and other texts cited and explained in Finnis, ‘The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations’, *American Journal of Jurisprudence*, 42 (1998), 97–134 at 126–9; *Aquinas*, 150, 181. See also Robert P. George, *In Defense of Natural Law* (Oxford: Oxford University Press, 1999), 139–83, especially 140–7, 156.

<sup>77</sup> For much fuller versions and discussions of the argument sketched in this sentence, and in the next paragraph, and of the argument’s roots in Aquinas, see *Aquinas*, 148–54; Finnis, ‘The Good of Marriage’, 118–26.

act is one of the many kinds of sex act that lack the integrity of a truly marital act, the integrity of a union in which the uniting of organs is a uniting of bodies, emotions, senses, intelligence, and willed commitment. That lack of integrity is what is meant by ‘sexually corrupt’.

Marriage is a basic form of human good.<sup>78</sup> It is a friendship, a relationship which is not a mere means to generating and nurturing children, as some inadequate natural law theories have taken it to be. And the procreateness which, if children come, will be the relationship’s completion is not a mere means to the satisfaction of the couple, as many today take it to be. So it is a relationship which is an *intrinsic* good, with two constitutive and mutually supportive aspects, friendship and procreation. Spouses’ agreement to sharing of life includes agreement to engage together in marital intercourse whenever it is mutually agreeable and not unreasonable; this is a matter of mutual right. Kant grossly confused this right with dominion—a person’s property relationship to a subpersonal thing—over one’s spouse’s body. (Much modern thought shares Locke’s and Kant’s erroneous assumption that one’s living body is not oneself but something that belongs to the self/person.)

Integral to the good of marriage is this committed willingness<sup>79</sup> to actualize together, and enable each other to experience, the good of our marriage, in the intended joy<sup>80</sup> of authentically marital acts. Where the couple’s sex acts are not authentically marital, the intelligibility of their marriage is disintegrated: their sex acts are unhinged from their mutual commitment. This unhinging and disintegration runs contrary to both of the goods constitutive of the complex basic good of marriage: not only the good of marital friendship but also the good of the children whose whole formation as persons is so deeply benefited by the context of a good marriage, and so vulnerable to everything that harms the marriage.

Therefore, the conscience of any spouse who really understands the good(s) of marriage must reject, among other things, any kind of willingness, however conditional, to engage in non-marital sex acts. And since even *approving* (regarding as morally reasonable) the sex acts of the unmarried entails a willingness, albeit conditional, to engage in non-marital sex acts, every clear-headed spouse must disapprove all such acts. Moreover, since such disapproval is required by the good of marriage, and the good of marriage is truly a basic human good and an essential component of the common good, respect for the good of marriage requires even the unmarried, and those who for some good reason will never marry, to reject non-marital sex acts and judge them a wrong kind of choice.

<sup>78</sup> See *Aquinas*, 82, 146 n. 58.

<sup>79</sup> This *positive* willingness, together with resolve *not* to engage in sex acts outside marriage (adultery), is what the tradition meant by *fides*, which is thus much richer than the modern ‘fidelity’: see *Aquinas*, 144–7; Finnis, ‘The Good of Marriage’, 106–11.

<sup>80</sup> See *Aquinas*, *In 1 Cor.*, 7.1 ad v. 5 [325], and the discussion of pleasure as motive for and good aspect of marital intercourse in Finnis, ‘The Good of Marriage’, 102–11; *Aquinas*, 143–7.

It follows that a very important part of the education of children is fitting them, emotionally and intellectually, for authentic marriage or, if their vocational choices or other circumstances of their life prevent them from marrying, for respect for the good of marriage by withholding their consent or approval from non-marital sex acts. Wilfully allowing children in one's care to become sexually corrupt—to develop a disposition to approve of sex acts disintegrated from the good of marriage—is a great injustice to them, since it blocks their genuine participation in a basic human good. Parents and others responsible for the education of children are entitled to assistance in fulfilling their responsibilities in justice. It is a fundamental responsibility of the state's government and law—here Aristotle was correct<sup>81</sup>—to afford them its assistance, by coercively prohibiting, for example, every kind of paedophilia, any kind of publication or distribution of pornography to children, any teaching by public employees or agencies that non-marital (e.g. homosexual)<sup>82</sup> sex can be reasonable, and any maintenance of places of resort arranged for non-marital sex whose public and deliberate availability for that purpose would suggest to children that such activities are approvable. A government and legal system which, having the resources to undertake these responsibilities, deliberately turns aside from them in the name of choice or pluralism or freedom of expression is mistaken about what the relevant human rights truly are, and is seriously unjust.

Similar considerations of justice to children require strenuous state support for the contract of marriage, and for mothers who devote their time to maintaining a home in preference to taking employment which will in most cases be less significant and worthwhile for the common good. The state's opposition to abuses such as polygamy is warranted by the other aspect of the good of marriage, the friendship which calls for a genuine and far-reaching *equality* between the spouses. It is of high importance for the common good that the intelligibility and worth of marriage be preserved in the minds of children and adults alike by prohibiting the appropriation of the title of marriages, and of any privileges commensurate to the heavy burdens of marriage, by relationships which, like so-called 'same-sex marriage', lack an essential part of marriage's rationale and are entered upon by people who almost universally<sup>83</sup> reject the constant exclusivity which is essential to marital fidelity and integrity (and so to justice to children). As Aristotle rightly said, 'human beings are by nature more conjugal than political'.<sup>84</sup> This centrality of the good of marriage to reasonable forms of life and community, and so to human fulfilment, is the reason why so many aspects of

<sup>81</sup> See also *NLNR*, 216–17, 222–3, on public morality and paternalism that is legitimate because for the sake of children.

<sup>82</sup> On the rejection of homosexual sex acts by Plato, Aristotle, Plutarch, and other masters of the classical natural law theory, see Finnis, 'Law, Morality, and "Sexual Orientation"', *Notre Dame Law Review*, 69 (1994), 1049–76; a revised and shortened version, with replies to some objections, is in John Corvino (ed.), *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (Lanham, Maryland, Boulder, Colo., New York, Oxford: Rowman & Littlefield, 1997), 31–43. See also 'Shameless Acts' in Colorado: Abuse of Scholarship in Constitutional Cases', *Academic Questions*, 7/4 (1994), 10–41 at 19–41.

<sup>83</sup> See Finnis, 'The Good of Marriage', 130–4.

<sup>84</sup> *Nicomachean Ethics*, VIII: 1162a17–18.

what promotes it, like what undermines or assaults it, are within the jurisdiction of state law and government despite that jurisdiction's limitation to peace and justice.

## 20 PHILOSOPHY OF TORT LAW

Many contemporary legal theorists seem to value only one part of classical legal theory, a part that is among its weakest: Aristotle's account of corrective justice. True, Aristotle is right to say that the restoration of a wrongfully disturbed equality between one person and another is the principle requiring tortfeasors to compensate those whom they have wrongfully subjected to harm or loss, and that that principle is an essentially true principle of justice even though its concern to restore equality differs from the concern to maintain equality in distributing some shared stock of benefits or burdens among a set of persons.<sup>85</sup> But he has little or nothing helpful to say by way of response to the decisive and difficult questions: are persons drastically unequal in, say, wealth to be treated as having been *equals* immediately prior to the tort? How is a tortious to be distinguished from an inculpable or non-tortious causing of loss? What measure of compensation restores the hypothesized pre-existing equality when both the fault and (independently) the resources of defendants differ so greatly relative to any given scale of loss?

Tort law's distinctive project of compensation is clearly dependent upon a prior set of judgments about what forms of interaction between persons are acceptable within a given community. But the priority of those judgments may be more logical than chronological: to some extent, a community should and does form its judgments of acceptability *in* the context of tort claims. Still, prior to such communal judgments are, in many contexts, judgments made in individual or other private deliberations about what is worthwhile and what threatens the worthwhile, and about what levels of risk of loss of the worthwhile are acceptable in different contexts. The backbone of tort is a set of moral—natural law—principles identifying as wrongful all choices precisely to harm or to deceive. But the flesh-and-blood of tort is a set of standards embodying both 'natural law' elements and 'positive elements'. The former reflect a more or less adequate understanding of the basic and intrinsic aspects of human well-being and the main social structures conducive to that well-being. (These aspects and structures are what tort theorists often call 'interests'.) The 'positive' elements in tort reflect more or less conventional—could-reasonably-be different—choices of ways of pursuing the basic human goods, choices among alternative designs for the social structures and interactions promotive of well-being, and

<sup>85</sup> *Nicomachean Ethics*, V: 1131b25–1132b20.

choices among differing kinds and levels of risk of undesirable side-effects of those alternative kinds of structure and ways of acting.

A sound tort law identifies as tortious every act *intended* precisely to cause harm to another person: the American doctrine that malice makes tortious is sound, the English rejection of it unsound (and half-hearted).<sup>86</sup> But an accurate understanding of *intention* identifies as an *unintended side-effect* many fully foreseeable and foreseen consequences of a choice. The law-school doctrine that what is foreseen is intended is an undesirable fiction, as is the similar doctrine that the intended includes whatever is reasonably foreseeable as certain or highly probable. Responsibility for one's actions' side-effects—foreseen or foreseeable—is morally and humanly different in kind from responsibility for what one intends, and therefore ought to be regarded as a distinct kind of basis for tortious liability. In principle, our law does treat it as distinct, first by dividing tort into the intentional and the negligent, and then by analysing the latter with the primarily normative apparatus of duties and standards of care and remoteness of causation.

The norms appropriately at work in those phases of tort's analysis of loss-causing incidents are, then, partly the permanently valid principles and norms of true morality, and partly the norms a community adopts by its choices of forms of life.<sup>87</sup> The principles and norms of natural law neither require nor exclude choices such as our community's choice to allow heavy vehicles to be propelled along the highways at speeds greatly exceeding walking pace. Nor choices such as a hypothetical community's choice to set the speed limit for motor vehicles at 4 m.p.h. But such rationally under-determined choices once made—as they inevitably are by practice and usage if not by legislation or by courts adjudicating claims in trespass or negligence—provide a rationally determinate measure (at least presumptively or defeasibly applicable) for identifying many of tort law's duties and standards of care, and many of tort's demarcations between actionable and remote losses. All this is a paradigm of the interplay of morality and *determinatio*—of 'natural' and 'positive'—which is classical natural law theory's central theme (see Sect. 14 above).

On the whole, the developed common law of tort, like the developed civil law of delict, embodies a true understanding of persons, of their worth, of their efficacious freedom to choose well or badly, and of the common good promoted by individual initiative and enterprise in community with and partly for the sake of other persons. The classic name for that true practical understanding of principles is natural law. It does not follow, however, that all the main features of our tort law are fully in line with the requirements of reasonableness—with natural law. How, for example, can it be just to require defendants to compensate to a measure that takes no account whatever of either the defendant's or the plaintiff's means to compensate or bear the loss,

<sup>86</sup> See Finnis, 'Intention in Tort Law', in David Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: Oxford University Press, 1995), 229–48.

<sup>87</sup> See Patrick Kelley, 'Who Decides? Community Safety Conventions at the Heart of Tort Liability', *Cleveland State Law Review*, 38 (1990), 315.

and no account whatever of the innocence or viciousness of the parties' conduct in respects not causally relevant to the actionable harm or loss? Should not tort law, without abandoning its central structure, incorporate some modifying principles of the kind which elsewhere in our law, as in natural law theory, are called equity?

## 21 PHILOSOPHY OF CONTRACT LAW

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The distinction between the duties of care and compensation specified, regulated, and enforced by tort law and the duties of performance and compensation specified, regulated, and enforced by contract is not a complete separation. Quite reasonably there are torts such as interfering in certain ways with contractual relationships. Still, the distinction is clear, sound, and should not be expected to wither away. The 'death of contract', heralded a generation ago, was rightly ignored by those whom it most concerned: businesspeople willing to sue and expecting to be sued on even purely executory (wholly unperformed) contracts. For there is good reason to treat certain kinds of agreement voluntarily entered into as creating, from the moment of agreement (or other agreed commencement), a set of obligations, and of correlative rights which pertain, from that moment, to the legally protected holdings (wealth) of the right-holder.

Historically, legal systems have been cautious about undertaking the responsibility of regulating and enforcing informal, let alone purely executory informal agreements. This is neither surprising nor sign of stupidity or superstition. Legal systems have many prior, more urgent responsibilities and, as lawyers in advanced legal systems easily forget, the existence of a clearly identifiable moral obligation does not entail that the state's legal organs have a moral responsibility to concern themselves with it. Affirmative responsibilities are always subject to circumstances. Nevertheless, the moral obligations creatable by agreement are obligations of justice, upholding justice is what the state's organs are essentially for, and the underlying moral obligations created by voluntary agreements are the rational basis for the legal obligations which are the heart of what we call contract. The moral obligations created by trustees' voluntary assumptions of responsibility are analogous to those central to contract, and are similarly the rational basis for much of the law of trusts. When the common law's old doctrines of privity and consideration are relaxed, it becomes obvious that contract and trusts are more deeply similar and interrelated than their usual doctrinal, institutional, and pedagogical separation would suggest.

So too, contract and property are deeply interconnected at the level of principle. The 'choses in action' constituted by breach of even a purely executory contract is

positive law's witness to the moral truth that one's freedom, dignity, and power as a person includes one's capacity to enrich other specific persons here and now by choosing to confer on them the present rights correlative to (entailed by) one's assuming (undertaking) the responsibility of doing them some future specific service. Still, persons are radically superior to all subpersonal realities, and property law is rightly distinct in so far as its paradigmatic subject-matter is subpersonal realities, not obligations of service, obligations which should never be treated as a kind of subpersonal thing. This insight rightly informs much of the remedial part of the law of contract, most obviously its aversion to ordering specific performance of *stricto sensu* personal service.

Essential to an account of the morally binding force of voluntarily assuming responsibility by promising or agreeing is some account of the benefits reasonably foreseeable from division of labour and co-operation. It is this benefit of co-operation between people who are *not* in *stricto sensu* partnership that gives to voluntary assumptions of responsibility (within limits) the normative significance they purport to have, and makes them reasonable kinds of act, neither mumbo-jumbo nor self-enslavement. The kind of benefit at stake is essentially a kind of control over the future, a kind of security which is not so much warding off anticipated harms as positively improving the well-being of all the parties. Hobbesian, Lockian, and Kantian efforts to explain promissory obligation by appeals to extrinsic sanctions, the supposed logic of self-consistency, and/or the metaphysics of personhood, all look the wrong way. They all fail for want of the key idea of a common good in which the parties attain individual benefits by the service of a co-operation which can be asynchronous and reliably extend well beyond the present, while not being committed to a common project such as *stricto sensu* partners share in.<sup>88</sup> The same key idea gives us reason to say that Oliver Wendell Holmes's conception of contracts as creating no more than the disjunctive legal obligation to either-perform-or-pay-damages is, while not incoherent or incapable of being adopted by a legal system, none the less neither accurate as an account of common, civil, or international law, nor at all desirable as an alternative.

Just as tort law presupposes certain truths about human action and intentionality which are often denied by theoretical sceptics, so contract presupposes all these and also some further, related truths about the intelligibility of language and the accessibility of other people's meanings, beliefs, and intentions. Even the so-called 'objective' test employed in analysing offers or acceptances takes as decisive what a reasonable person, in the context, would have judged to be the speaker's actual ('subjective') meaning and intent.

<sup>88</sup> Such a project need not be, and typically is not, entered upon out of motives of generosity (*liberalitas*), but once agreed upon by promise or contract is a matter of the virtue of strict justice and the vice of injustice, not generosity or meanness. Contrast James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991).

## 22 PHILOSOPHY OF THE CRIMINAL LAW

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A just law of crimes cannot be adequately understood and justified without understanding some main elements in (i) political theory, (ii) moral theory, (iii) the metaphysics of persons and their acts, and (iv) a common-sense awareness of the culture and dispositions of a given community's triers of fact (judges or juries). Classical natural law theory, in its contemporary forms, addresses these issues explicitly, and justifies the sharp distinction between criminal and civil law which is characteristic of modern legal systems but not of ancient or even medieval practice and theory.

That the state's law and government 'monopolize force' (as Kelsen puts it), or alone have the right to authorize and administer the irrevocably and deliberately harmful measures we call punishment (as Aquinas more accurately holds), is a decisive element in political theory, descriptive or normative. Legal theory must be regarded as incorporating and extending this element when it seeks to give an account of (a) the proper limits of the criminal law's prohibitive and affirmative requirements, and (b) the point and justice of imposing punishment when those requirements are violated. The criminal law's first function, of identifying what subjects *must* refrain from (or, in a few cases, do), is justified only by the premise that none of the other persons exercising legitimate, for example, parental or corporate directorial, authority, and no other legitimate kinds of measure save this, are likely to be either effective or fair in identifying, and seeking to avert or reduce, the prospect that some subjects will otherwise be treated *unjustly* by others.<sup>89</sup>

The criminal law's second function, of authorising and requiring the imposition of punitive measures against those judicially found to have violated its requirements, is best understood as an element in the state's wider function of upholding, and where necessary making and re-making, a just distribution of benefits and burdens. The burden of complying with the law's just requirements falls, in fairness, on all the law's subjects, indeed all persons within its territorial jurisdiction. Whenever crimes which could justly be punished are committed, the offenders are helping themselves to the advantage of, at their own arbitrary will, renouncing that burden. The advantage they thereby illicitly and unfairly gain is precisely the advantage of a kind of freedom to do as they please, to follow their own preferences and choices in preference to the way laid down for all by the law. Pursuant to the state's function of maintaining distributive justice, the state's authorities can therefore be justified in coercively depriving offenders of this kind of advantage, so that the balance of advantage and disadvantage, between them and the law-abiding—a balance disturbed by the voluntary criminal act—is restored and rectified. This balance-restoring deprivation is of precisely the kind of advantage the offenders took: of excessive freedom. Just punishment is not essentially a matter of inflicting pain, but rather of repressing the will, the

<sup>89</sup> Aquinas, 239–52.

freedom, of offenders. (Nothing other than this line of thought can make sense of the opaque notion that crimes or criminals *deserve* punishment.)

*Retribution*, therefore, is the general justifying aim of punishment.<sup>90</sup> The opportunity to use retributively justified punishments to deter and reform is only a bonus side-effect, and measures intended to deter and/or reform cannot rightly be more deleterious to the convicted offenders' interests than can be justified by retributive considerations. And retribution's intrinsic relation to the state's unique function and authority to uphold a fair pattern of relevant advantages and disadvantages explains why criminal law is so distinct from civil. In civil or private law, the victim of wrongdoing seeks redress from the wrongdoer, as a rectification of a pre-existing relationship between them presupposed to be fair. But in criminal proceedings, the wrongdoer's victim has no proper standing save as a witness, for here it is the interests of the law-abiding (normally including the victim) that are to be vindicated as a matter of restoring justice *to them*.

The criminal law's main general doctrines, about voluntariness, acts, and *mens rea*, are tightly connected with the retributive theory's understanding of what it is in offences that warrants punishment. Of course, the theory in turn, like the doctrines, rests on an understanding of what is involved in persons *acting* (rather than just behaving, as in sleep walking). It rests particularly on an understanding that the paradigm of action is the *carrying out* of a *choice*, a specific *intention* adopted as an envisaged means to some envisaged end, some wider intention. That carrying out is typically—and in all cases that are within the proper scope of the criminal law—by bodily movements (though there are certainly acts, such as prayer or mental calculation, where there is no movement of the acting person). Many of the conundrums of criminal law theory concern the question of demarcating items of behaviour from *the act*,<sup>91</sup> and demarcating the act from what it causes, its *consequences*. Many offences, though by no means all, are legally defined in terms not only of kinds of intention and of bodily movement, but also of kinds of effect. The criminal law thereby creates for itself—and for good reason—problems that do not arise in purely moral reflection, in which what is intended, generally (as end) and specifically (as means), is decisive for judgment more or less independently of what in fact happens or fails to happen as a result.

In criminal law doctrine and practice much confusion arises from the reluctance of those who administer it to differentiate clearly between *behaviour* and *action* (behaviour precisely *as* the execution of a choice), and between action and *consequences*, particularly when readily foreseeable but unintended consequences are impressively harmful and the intentions and other motivations of the accused are opaque to observers.

<sup>90</sup> See *Aquinas*, 210–15; *NLNR*, 262–4.

<sup>91</sup> See Finnis, 'Intention and Side-Effects', in R. G. Frey and Christopher W. Morris (eds.), *Liability and Responsibility: Essays in Law and Morals* (Cambridge: Cambridge University Press, 1991), 32–64.

## 23 PHILOSOPHY OF PROPERTY LAW

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Property in all the forms known to legal doctrine is a defined set of normative relationships between people considered precisely in so far as one or more of them is or might be concerned with some part of the world—some resource—which can be put to human use. The relevant kinds of concern with a resource (a *res* or thing) may, of course, be quite indirect and contingent, as in the case of money, shares, futures, patents, and the like. But always the ultimate source of the value of such intangibles is their potentiality to confer control over resources and the use of these resources to promote some (real or supposed) intrinsic good of a human person.

Although legal doctrine, for good technical reasons, contrasts *rights between persons* with *rights over things*, rights of the latter kind are always reducible to combinations of rights between persons, and always have as their primary point the regulating of relationships between persons (e.g. the exclusion of non-owners from the thing and its use). The entire law of property, every property right and relationship, and every item of property, is wholly in the service of human persons and just relationships between persons. No kind of physical relationship between particular persons and particular things—original and/or long-standing ‘occupation’, creation by personal labour working on other things, invention—constitutes by itself a normatively sufficient reason to acknowledge or rule that those persons have property in those things, still less that they rightly have ‘absolute’ ownership such as Roman *dominium* or common law fee simple in possession. The world’s resources pre-exist all of us, and since we are all fundamentally each other’s equals as persons the only reasonable normative baseline is that all those resources are to be treated at all times as for the benefit of everyone.

So property rights in all their forms (i) give particular persons rights to the use and/or fruits of resources in priority to all other persons (who are so far forth excluded from such enjoyment of the thing), but (ii) at the same time are morally subject to a kind of inchoate trust, mortgage, lien, or usufruct in favour of *all other persons*. This moral burden on property holdings is given legal *specificatio* by the various norms of private and public law—varying, like the forms of property right themselves, from system to system—which qualify owners’ priority of enjoyment and control: nuisance, prescriptive easements, taxation, eminent domain, ‘anti-trust’ (anti-monopoly law), and so forth.

Hence the classical natural law tradition accepts the position articulated in Aristotle’s apparently paradoxical slogan: property is to be private in possession but common (shared) in use.<sup>92</sup> This sounds paradoxical, since the point of possession is use, and the point of making possession private—the point of *appropriating* resources and rights to resources to particular people to the exclusion of others—is

<sup>92</sup> *Politics*, II: 1263a25, a 38.

(as Aristotle's and Aquinas's famous discussions<sup>93</sup> make clear and the sad experience of two generations of Bolshevism super-abundantly confirms) to provide incentives to careful, prudent, but dynamic and forward-looking management and exploitation of those resources. Such incentives lie in the owners' priority of use and enjoyment. How then can use rightly be called common? How can it be said that non-owners, who have contributed nothing to the creation or cultivation and management of the thing, have some right to participate in its enjoyment? The answer lies in the idea already mentioned, that the owners' rights of enjoyment, though conferring sufficient priority and benefit to incentivize owners to care and cultivation, are qualified by a residuary quasi-trust for the benefit of all whose needs might reasonably be served by some share in the resource's use or fruits. The institutions of redistributive taxation are the devices perhaps most characteristic of modern legal systems' recognition of this moral burden on private property. Provided that the point of the institution of property—the well-being of persons—is kept always in view, the Aristotelian dictum escapes paradox and prescribes an appropriate balance between naïve communism and raw capitalism. The fact that no such balance can be expected to be simply optimal, or permanently even appropriate, does not entail that the search for appropriate balance is pointless.

Just as various technical contours of a legal system's institutions of property are delineated not in the treatise on property but under the heading of tort (conversion, trespass . . .) and contract (passing of title in sale . . .), so the rules enforcing the orderly subjection of all owners' rights to the interests and moral rights of the needy are found in many corners of the law. Many legal systems contain no explicit qualification of the laws of theft to accommodate the starving—a qualification prominent in the writings of moralists in the tradition ('in necessity, all things are common'<sup>94</sup>). Such a lack can be justified, if at all, only by robust countervailing practices of prosecutorial and sentencing discretion. Forgetfulness of the tradition seems to contribute to the heavy weather recent jurists have made of *Vincent v. Lake Erie Transportation*.<sup>95</sup>

## 24 PHILOSOPHY OF INTERNATIONAL LAW

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Whether or not coined for English by Bentham, the term 'International law' translates the term *Jus inter gentes* which emerges in the sixteenth-century renovation of

<sup>93</sup> *Politics*, II: 1262b36–1263b26; Aquinas, *Summa Theologiae*, II–II q. 66, a. 2; Aquinas, 188–90.

<sup>94</sup> Aquinas, 190–6; Grotius, *De Jure Belli ac Pacis*, II. ii. 6; Pufendorf, *De Jure Naturae*, II. vi. 5–8 (n. 5 above, pp. 301–9).

<sup>95</sup> 124 N.W. 221 (Minn. 1910): saving one's life in a storm by attaching one's ship to another's wharf is no trespass, even if it creates an obligation to compensate for damage thereby done to the wharf.

natural law theory after the breakdown of a unitary secular-ecclesiastical Christendom. Articulated in succeeding centuries as a law between *states* rather than nations or peoples as such, international law manifests in its contemporary development both the underlying complexity of human community—a complexity far exceeding the multiplicity of states—and the inaccuracy of the thought that a state is, without qualification, a *perfecta communitas*, a complete community entitled to constitute the ultimate and unconditional horizon of a just person's allegiance. Has an individual person, or a group which is not a state, standing to move international organs as a subject of international law with substantive and procedural rights derived from international law? Has an international organization such as the United Nations an international personality comparable to that of a state, and are its rights in international law limited to those conceded to it by the states party to its establishment? Can the same be said of a non-governmental organization such as the International Red Cross? If 'persons' other than states can be subjects of international law rights, can they also be creators of international law rules, as states can?

These issues have driven many of the developments in international law during the past fifty years. They all emerge from a developing understanding that new interdependencies, economic, environmental, and cultural, are bringing into being a worldwide human community that might in principle become a *perfecta communitas* equipped to supervise the doing of justice everywhere. On occasion, as at Nuremberg in 1945–6, such issues have laid bare the natural law foundations which alone could justify holding that some conduct can be, and concretely was, a 'crime against humanity', triable internationally.

Why is state law and government, with jurisdiction over the families, neighbourhoods, and other associations within a distinct and economically viable territory, needed and justified? Most fundamentally by the need for an authority that can be expected to administer coercive and irreparable punishments with the justice of impartiality and care for truth.<sup>96</sup> Historically, it seems that states and their governments have very often been constituted by a sheer taking of authority unauthorized by any pre-existing legal title or any other moral claim other than the prospect of being, *de facto*, likely to succeed in securing a degree of co-ordination and co-operation sufficient to allow justice to be not merely desired and ordered but actually done.<sup>97</sup> There is today no central-case type of international legislative, executive, or judicial authority because no person or group is capable of taking power, in the above sense, and because states tacitly concur in judging that no existing or envisageable authority could be relied upon to act with an effective justice sufficient to merit a general transfer or subordination of state jurisdiction to it.

Hence agreements (treaties) and to a lesser extent customary practice (especially of states) remain the primary sources of international law, which remains both descriptively and morally a relatively undeveloped, non-central case of law. Still, it

<sup>96</sup> *Aquinas*, 247–52.

<sup>97</sup> *Finnis, NLNR*, 245–52.

should not be called simply a primitive legal system; so far as they go, international legal processes are sophisticated applications of ‘the general principles of law recognized by civilized nations’<sup>98</sup> and of those techniques for stabilizing practical thought, and for rendering it an instrument of commonality and co-operation, which we call legal doctrine, as evidenced in the ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations.’<sup>99</sup> In these formulae, the terms ‘recognized’ and ‘civilized’, if not also ‘qualified’, point towards the assumption—fully justified—that there are true principles—traditionally called natural law—underlying this and every other legal order, principle, and doctrine.

## 25 PHILOSOPHY OF THE COMMON LAW

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The term ‘common law’ is found in Euripedes and Plato, and is well known (as *ius commune*) in legal and political thought in medieval civil (Roman law) and ecclesiastical law, in a meaning substantially the same as one aspect of its meaning in English legal and political thought: the general law of the realm, as distinct from local and personal customs pertaining to a family, or calling, or district. But another aspect of the common law is perhaps more significant: its distinction from statutes or other enactments—from law made by a body whose authority and primary function is precisely to change the law of the realm.

Lawyers in the tradition called common law in distinction from Roman or civil law have reflected for nearly a thousand years on the common law’s nature. The history of their reflections shows that there has never been a stable, articulate, coherent, and generally accepted account of the place or roles in its make-up of sources such as reason (moral principle), antiquity (permanence), popular custom, judicial precedent, or professional experience, opinion, and practice.<sup>100</sup> Nevertheless, two dimensions of the common law are identified, in one way or another, by everyone. The common law which it is the responsibility of the superior courts of justice to administer is a law which is inherently related to, indeed in some sense drawn from, *reason*, and it is somehow a matter of *usage*.

Each of these dimensions is complex. *Reason* signifies the principles of reasonable choice and action which have been called natural law or (with the same meaning and reference) law of reason or morality or human rights and human decency, or equity,

<sup>98</sup> Statute of the International Court of Justice, art. 38(1)(d).

<sup>99</sup> *ibid.*, art. 38(1)(e).

<sup>100</sup> This is amply demonstrated for the period 1150–1630 by J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore and London: Johns Hopkins University Press, 2000).

fairness, and justice. But the ‘reason’ of the common law has often been taken to include the ‘artificial reason’ of a learned profession, leaving unclarified the question how far this is a matter of moral wisdom based on more than ordinary experience, and how far it is a matter of technical doctrines, institutions, and practices *posited* by choices of professional lawyers who could reasonably have chosen differently. In the latter sense, the common law’s ‘reason’ merges with the second main dimension, usage, but retains the special sense that the doctrines and so forth posited by the legal profession’s practices are subject to a requirement of internal consistency and coherence with each other. (See also Sects. 3 and 14 above.)

Most of the old common lawyers’ confused and shifting discussions of common law’s nature could have been clarified by a firm grasp of the Thomistic idea that practical reason’s principles need to be extended and applied by *determinatio*.<sup>101</sup> As was noted towards the end of Section 3 and in Section 14 above, one of the unchanging principles that underlie any justifiable *determinatio* is the principle that like cases are to be decided alike. That grounds the common law’s acceptance of norms of *stare decisis* (judicial precedent), an acceptance which crystallized almost as soon as the preconditions (especially printed law reports) were in place. For judges confronted by an issue not settled by the plain meaning of a constitution or statute ought to try to settle it in the way that it would be settled by any other judges hearing the case on the same day in the same realm. (That is part of what is involved in administering *common* law, and common law judges often think of their realm as, for some purposes, as wide as ‘the common law world’.) But such synchronic (counterfactual) consistency of decisions requires that there be some standard of decision besides the statutes and any given judge’s moral response to the issue. The standard needs to be *salient*—identifiable by all and more easily identifiable than the answer to the question in issue. The fact that the issue has in the past been resolved in a particular way by judge(s) in the same general legal context is salient and so provides a standard presumptively and defeasibly appropriate for resolving the issue here and now.

## 26 PRIVATE WRONGS AND RECOURSE

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The law of private wrongs and remedies, of which tort law is one of the central types, certainly cannot be justified or well described by theories which overlook its

<sup>101</sup> Chief Justice Sir John Fortescue’s discussion of maxims, in his *De Laudibus Legum Angliae* (c.1469), appeals to Aristotle’s conception of self-evident principles, and Fortescue’s discussion of political community in *The Governance of England* (1475) appeals to Aquinas’s conception of limited government (see Finnis, ‘Is Natural Law Theory Compatible with Limited Government?’, n. 18 above), but he fails to advert to Aquinas’s development of Aristotle on law’s derivation from principle by *determinatio*.

fundamental structure as a set of primary and correlative rights and duties (e.g. not to be defamed and not to defame) whose violation (“breach”) is taken to *warrant* the recognition that *P*, whose primary right was violated, thereby acquires a remedial right of action at law for compensation, and that *D*, having been in breach of a primary duty, correlatively becomes liable, at *P*’s suit, to make such compensation to *P*. Breach of duty is violation of right and ‘*cause of action*’.

Any account which explains remedial rights, not as consequences of violation of primary rights but as means to maximizing social wealth or some other value (e.g. by reducing wasteful precautions and/or transaction costs incurred in attempted exchanges of rights), will fail to make sense of the pervasive rules and doctrines of our law of tort which deny *P* a remedial right where *D*’s breach of duty to *T* foreseeably caused harm to *P* but involved no breach of any primary duty to *P*. So economic analyses of tort, though helpfully drawing attention to certain side-effects of legal rules and proceedings, will not do. But equally, theories which put on the mantle of Aristotelian ‘corrective justice’ have failed to fill the gaps in Aristotle’s account: its insufficient attention to the *primary* rights and duties which make wrongs identifiable as wrongs, and its neglect to explain just how breach of primary right *warrants* tort’s normal judicial order of fully compensatory damages.

The recent account<sup>102</sup> of tort as founded on a ‘principle of civil recourse’ was offered as descriptive and ‘conceptual’, and disclaimed any ‘normative’ or justificatory purpose. Its critique of rival accounts powerfully demonstrated that economic, utilitarian, and (in different ways) Aristotelian corrective justice theories do not make sense of tort’s structure and many of its rules. And the account’s middle-level analysis of that structure rightly pointed to the way in which social conventions and other norms of fairness give some determinacy to tort’s primary rights and duties.<sup>103</sup> But at its deepest level, this theory of civil recourse fails by overlooking the radical dependence of descriptive or conceptual analysis on unrestricted critical engagement with issues of evaluation—with the normative truths which are the sole rational source of justifications (or condemnations). For a theory or account aspiring to any interesting level of generality cannot sufficiently ‘make sense of’ any rules or institutional structures without showing them to be warranted—if they are—by principles which the theorist not only can ‘suggest’ have ‘certain appealing normative justifications’<sup>104</sup> but can reasonably judge to *be justified* in the rich sense of justification sought by a conscientious judge deliberating about changing the whole life of *D*, or *P*, or both by making or refusing an award of damages. In the absence of such full-blooded normative justification the defeated rivals can reclaim the field of battle by

<sup>102</sup> Benjamin C. Zipursky, ‘Rights, Wrongs and Recourse in the Law of Torts’, *Vanderbilt Law Review*, 51 (1998), 1–100.

<sup>103</sup> Benjamin C. Zipursky, ‘Legal Malpractice and the Structure of Negligence Law’, *Fordham Law Review*, 67 (1998), 649–90 at 679–80. See more generally at n. 102 above.

<sup>104</sup> Zipursky, ‘Rights, Wrongs and Recourse’, 97.

denouncing as anachronisms those features of the law unaccounted for—not shown to be justified, or shown to be unjustifiable—by their rival accounts.

As a justification for tort's structure, the theory of recourse would be rejected by the classical theory of natural law. At its root the theory of recourse treats as worthy the emotional impulse of a victim of wrongdoing to 'get even',<sup>105</sup> by 'act[ing] against'—having recourse against—the rights-violator.<sup>106</sup> This impulse is in most if not all respects contrary to the true principle, do not answer injury with injury (Sect. 10 above). The recourse theory fails to explain why *P*'s impulse should be allowed for when it is a desire to seize the wrongdoer's goods but not when it is a desire to impose on *D* a hurt or harm like what *P* has suffered. It leaves unexplained why the remedial right of action granted by the law in recognition of and substitution for *P*'s emotional impulse should extend, as it does in tort, to full compensation for all foreseeable losses. But at the same time, though treating *P*'s remedial rights as independent of any supposed moral duty of *D* to *volunteer* full compensation, the theory provides no support for the thought (see Sect. 20 above) that our law is simplistic, unbalanced, and to some extent unjust and unjustifiable in maintaining a quasi-universal rule of *full* compensation for foreseeable losses caused by *D*'s breach of duty to *P*, however minor that breach and whatever the relative resources of *P* and *D*. Moreover, the recourse theory questionably offers to justify the institution of punitive damages, a part of the law of tort which, in its American forms, seems unjustifiably to commingle private with public (especially but not only criminal) law; even the more restrained forms of the institution of punitive damages, elsewhere in the common-law world, can be justified only to the extent that the institution amounts (if it does) to awarding damages for a distinct though hitherto implicit wrong of contempt for *P*'s personality, much like the Roman law delict (tort) of *Injuria*.

The recourse theory rightly identifies central features of our law of tort which have long been misunderstood or undervalued, and central issues of explanation or justification of those features. But it leaves those issues scarcely resolved. The needed resolution will have to recognize that not every feature of tort can be justified; some of the features in need of reform are of very long standing, but others are recent importations under the influence of economic and other 'policy-oriented' approaches. Resolution will come from recognition that, like other parts of the law but in its own distinctive way, tort law's foundations are judgments about what kinds of relationship between people are fair and reasonable, both generically and in particular kinds of context. These judgments are the main basis for recognizing primary rights and duties. The remedial right to compensation in the event of *D*'s violation of *P*'s right invokes a further judgment about fairness and reasonableness in re-establishing the fair relationship between them that *D*'s conduct ruptured. Very often—but by no

<sup>105</sup> What Zipursky calls a desire for retribution has nothing to do with the retribution argued for in the account of crime and punishment proposed in Sect. 22 above, a theory in which the desires of the victim, and even the *desires* of the law-abiding, have no normative significance.

<sup>106</sup> Zipursky, 'Rights, Wrongs and Recourse', 85.

means always—remedial fairness calls for that restoration of equality which is the rationale for what tort law (and in many cases only tort law) provides: *D* so far as possible restoring *P* to the position *P* would have enjoyed had *D*'s breach of duty to *P* not occurred.

## 27 CONSTITUTIONAL AND STATUTORY INTERPRETATION

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Interpretation of texts and other statements is sometimes simply historical: what did a given author or set of authors intend to communicate in their text or other statement? That question, even when it concerns a text with multiple authorship, often has a determinate answer in whose accuracy one can reasonably have high confidence. (If you think this claim is over-optimistic, you have understood it and done your bit to verify it.) Often, however, the question cannot be given so determinate and reliable an answer, other than: we do not know and have no means of knowing what the author(s) intended to communicate on such-and-such a matter, to which their text seems more or less closely relevant. Often this uncertainty has its source in the limitations which make human beings unable to foresee all relevant issues or to address exhaustively even those issues they do foresee.

In adjudication and the practice of law, interpretation of constitutional and statutory texts and statements can never reasonably be exclusively historical. Constitutions and statutes arise for consideration—indeed, exist as *law*—only in a context of the interpreter's intention to serve persons and their well-being, the common good, for example, by doing justice according to law as a judge. Constitutions and statutes call for historically accurate understanding, so far as it is possible. To say otherwise is to deny their authority to *settle* any of the questions of social life which need to be settled by law. But constitutions and statutes—and what those who enacted them wrote, said, and intended to communicate and to bring about—also need to be interpreted as parts of a whole of immense complexity and scope: the community's constituent settlements and compromises amongst its constituent peoples, its past investments of every kind, its present needs including the overcoming of present sources of conflict, the wisdom and craftsmanship, and narrow-mindedness and selfishness, of its legal organs and other elites, and many other aspects of its common good. It is only as parts of this whole, conceived of as oriented to the present and future common good, that constitutions and enactments have any legal authority whatsoever, or any claim, legal or moral, to guide anyone's present deliberations.

Since law and legal thought are entitled to little respect or consideration unless they serve, or can be brought to serve, every person whom they could benefit, all the basic human rights should be regarded as controlling every otherwise open question of interpretation. The basic error of the Supreme Court in *Dred Scott v Sandford*<sup>107</sup> was to approach the interpretation of the Constitution's provision, for example, in relation to the congressional power of naturalization, without a strong presumption that, whatever the assumptions and expectations of its makers, every constitutional provision must, if possible, be understood as consistent with such basic human rights as to recognition as a legal person. An essentially identical error is made by those judges, such as Justice Scalia, who interpret the Fourteenth Amendment's unelaborated references to 'persons' as permitting states to treat as non-persons and to authorize the killing, or the enslavement (in embryo banks), of the unborn, whom these same judges know to be in reality human persons.<sup>108</sup>

When unequivocal violations of fundamental human rights are not in issue, very little of wide generality can be said to resolve determinately the many issues of interpretation which call for a proper balance to be made between fidelity to the text, fidelity to the intentions of its makers, fidelity to the historic law, consistency with other parts of the law, respect for the division of constitutional responsibilities between legislatures, courts, and administrative agencies, the needs of present and foreseeable future persons, and the judge's own hunches about the likely consequences of alternative decisions and alternative developments of the law.

## 28 RESPONSIBILITY

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The abstract noun 'responsibility' emerges only towards the end of the eighteenth century; its first user recorded in the *Oxford English Dictionary* is Hamilton, followed by Burke. But this word from the Enlightenment richly conveys a cluster of insights each of which the enlightened philosophies of Hume, Kant, Bentham sought to banish, or rendered needlessly obscure. They are insights familiar to common sense, today as much as with Plato and his interlocutors. They are essential to making sense of the idea of obligation, with which this chapter began.

A first insight is that one can really bring about, *cause*, effects in the world, including benefits and harms to one's fellows, one's neighbour, and any or all other human persons. None of this is well explained in terms of observed constant conjunctions.

<sup>107</sup> (1857) 60 U.S. 693; Finnis, 'The Priority of Persons', n. 48 above, at 7–8.

<sup>108</sup> See Finnis, 'Public Reason, Abortion, and Cloning', *Valparaiso University Law Review*, 32 (1998), 361–82 at 373–4.

One's causal power, not least one's mind's power over matter, is a reality one both experiences and understands (albeit not in a fully explanatory way) in every act by which one carries out what one intended, for example, to say to one's class the audible words 'Hume and Mill refuted classical natural law theories'.

A second insight is that when *A*'s conduct has harmed *B*, it is sometimes true (albeit sometimes not) that *A* is answerable, *liable*, to *B*, that is to say, ought to do something to rectify the present relationship between them and to restore a former, more appropriate relationship. Sometimes this ought is entailed by some rule of a legal system under which *A* can be required to answer—*respond* . . . in Latin and then modern languages—to *B*'s complaint, both by denying or acknowledging his causal responsibility for *B*'s harm, and by repudiating or accepting his duty to compensate *B* in some measure.

Liability-responsibility thus has at its core an instance of a wider insight: one may, and often or in some respects always does, stand in such a relationship to other human persons that one has the *role*, function, obligation to render them some service, perhaps only of taking care not to harm them, perhaps of positively caring for them in some way, as the person responsible for the advancement of their well-being in some or all respects. This is associated with the important practical truth that government, properly understood and carried on, is not a matter of lording it over others but of doing them some service, so that—speaking always of the central case, from conscience's internal point of view—*authority over* is a consequence of *responsibility for*. Authority ('power'), like law itself, is a means to an end which those in authority are responsible for promoting, the common good of (all who pertain to) the community in and over which they have whatever authority they do have.

A fourth insight is that what one does, and thereby what one causes, is peculiarly one's own if and only if one had the *capacity* to choose to do otherwise. One is, then, a responsible agent if one has this capacity of free choice between open alternatives—that is, if there are occasions when one envisages alternative options and nothing (whether inside or outside oneself), save one's choice of one option in preference to others, settles what one does. This status of capacity responsibility is, not etymologically but really (ontologically, metaphysically), at the core of the cluster of realities understood in the insights articulated in the fourfold analogy of responsibility.

All this leaves, of course, much to be said to explain the cluster's interrelationships and implications. But here this chapter reaches the limit of its transgression of limits. The classical theory of natural law is open to development and new insights in every dimension. So one can expect succeeding chapters in this *Handbook* to add much of value to this chapter, and to correct it in various respects without overturning any of the main classical theses it has rearticulated.