Excerpt from the book

***Exploring the Nature of Law: Thomistic Juridical Realism and the Elements of Law's Ontology* (Washington, DC: The Catholic University of America Press, 2025)**

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Chapter One

Identifying an Alternative Persistent Question for Understanding the Ontology of Law

1. The "Old" Persistent Question: Morality in Law

Questions that continue to puzzle legal philosophers or issues on which there seems to be no permanent consensus among these scholars may be thought of as the dynamos of legal philosophy, the catalysts of a better and more profound understanding of the principal object of this discipline, namely, of the nature or the essence of law. In his 1961 seminal book *The Concept of Law*, which is usually considered as marking a new starting point in contemporary legal-philosophical analysis, H. L. A. Hart identified some of these persistent questions and then dedicated the rest of the book to elucidating answers to them. Each persistent question in that book, or in the works of other legal philosophers, presents an opportunity to better understand what law is. Even the most basic question regarding the ontology of law—namely, the question "What is law?"—continues to be a persistent question in legal theory, since we still do not seem to have a complete, definitive answer to that question apt to generate a broad consensus among legal scholars and practicing lawyers.

Perhaps the most intriguing and debated persistent question regarding law's ontology concerns the relationship between law and morality, and at least part of its allure consists in the conviction that different answers to this question allow us to successfully categorize their authors as either legal positivists or as proponents of a natural-law theory of law. However, it seems that this "promising" feature of this persistent question ultimately fails to establish a clear divide between positivists and natural lawyers. It is important to understand the causes of this failure, since legal scholars and practitioners of law are used to approaching the question of "What is law?" by assuming the existence of some essential discord between legal positivism and a natural-law theory of law.

In recent decades, it has become increasingly difficult to grasp the central tenets of legal positivism as well as the essential features of a natural-law theory of law with sufficient precision if one takes the quality of the connection between law and morality as the starting point.

In the positivist camp, even the most radical or exclusive legal positivists seem to maintain that there are some conceptual or necessary connections between law and morality, or broadly accept that there are certain evaluative features of law that make it possible for us to grasp law's nature. To give one example, Joseph Raz holds that the very institution of law has an essential moral task: "The law's task, put abstractly, is to secure a situation whereby moral goals which, given the current situation in the country whose law it is, would be unlikely to be achieved without it, and whose achievement by the law is not counter-productive, are realized."[1] Of course, Raz does not thereby argue that certain substantive moral values, such

[1] Joseph Raz, "About Morality and the Nature of Law," in *Between Authority and Interpretation*, 178. See also the following claims, advanced by legal positivists: "necessarily, law makes moral claims of its subjects" (Julie Dickson, "Legal Positivism: Contemporary Debates," in *The Routledge Companion to Philosophy of Law*, ed.

as, say, the inherent telic goods and essential properties of marriage, are immediately juridical on account of their moral correctness and that these values thus pertain to the legal world regardless of their proper inclusion in the content of valid norms of the relevant legal system. He still maintains that such moral goods become "juridicized" exclusively by reference to social facts, namely, by their inclusion in the content of valid posited legal norms, without the necessity of consulting substantive moral standards or verifying the moral merit of these norms for their juridical relevance. He cannot, however, be said to unqualifiedly belong to the camp of the so-called "legal descriptivists," namely, to the group of authors who advocate that the essential properties of law must be elucidated in a purely descriptive way, by reference solely to social facts. This is because he identifies at least some necessary or essential evaluative features or purposes of law, even if those features or purposes are merely systemic and never postulated in terms of non-posited substantive human goods that would somehow already be necessarily juridically relevant.

Furthermore, in some parts of the legal-philosophical universe over the last few decades, the term "natural law" underwent a thorough reconstruction and, at times, began to denote virtually any legal theory that made the necessary inclusion of certain evaluative features—even those that are purely systemic, procedural, or methodological—somehow central to the project of answering the question "What is law?"[2] Thus, on the conceptual map

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Andrei Marmor (Routledge 2012), 49); "[necessarily,] law is the kind of thing that can be judged by moral standards" (John Gardner, "Hart on Legality, Justice, and Morality," in *Law as a Leap of Faith* (Oxford University Press, 2012), 222); "necessarily, law regulates objects of morality," "necessarily, law is justice-apt," "necessarily, law is morally risky" (these last three claims are taken from Leslie Green, "The Inseparability of Law and Morals," in *The Germ of Justice: Essays in General Jurisprudence*, 186–93).

[2] For an assessment of the reconstruction of the term "natural law" in legal and moral philosophy, see Russell Hittinger, "Varieties of Minimalist Natural Law Theory," *The American Journal of Jurisprudence* 34, no. 1

of the main legal-philosophical accounts of law's ontology, which references this reconstructed notion of natural law, even Raz's account of the legal phenomenon and its essential moral task could now easily be seen as partially overlapping with a natural-law theory of law. The same could be said of Hart's more inclusive version of a positivistic account of the nature of law, which seems to necessarily or conceptually allow for the possibility or openness (rejected by exclusive legal positivists, such as Raz) that moral standards, even substantive moral values, be included among the criteria for the identification of valid law, provided that this inclusion is grounded in (or invoked by) posited sources of law, and thus ultimately in social facts.[3]

The frequent understanding of the term "natural law" according to its reconstructed features made it possible for the category of "natural lawyers" to be extended to include an

(1989): 133–70; Russell Hittinger, "Liberalism and the American Natural Law Tradition," *Wake Forest Law Review* 25 (1990): 429–99.

[3] For an example of Hart's explicit commitment to what he called "soft positivism" (and what is now also called "inclusive legal positivism"), see H. L. A. Hart, *The Concept of Law*, 3rd ed. (Oxford University Press, 2012), 250–54. The disagreement between inclusive and exclusive positivism regards those situations when a posited legal norm, or a society's rule of recognition of valid law, affirms that a social norm that passes a certain moral test or possesses some sufficiently determinate moral merit has juridical status and is to be considered law in that society, or a part of that society's legal system. For example, imagine the following formulation of an article of the constitution of some legal system: "The evaluative content that pertains to the primary precepts of natural law, as understood in Thomas Aquinas's teaching on *ius naturale*, is to be considered law in this legal system." Soft positivism and hard (or exclusive) positivism have different assessments of the impact of such social-factual, source-based incorporation of moral standards on the nature of law. The main point of their disagreement is the question of whether such moral standards—broadly incorporated by legal sources or rules of recognition of valid law, but still in need of passing some moral test—become law upon passing that moral test (soft positivism), or require some further, formal social-factual recognition of passing that moral test, whether through additional legal norms or the practice of legal officials, to be fully incorporated in law (hard positivism).

anti-positivist author, such as Ronald Dworkin, who sees no problem in supporting a set of necessary connections between law and at least some elements of substantive morality. However, Dworkin's vision of legally relevant substantive morality is limited only to a minimalist set of moral values—or even only to one central moral good—which he deems architectonic for all the other manifestations of law: the natural right to equal concern and respect. He promotes this right as the political-moral core value that (1) models all other relevant moral and legal rights in a legal system and (2) provides the key for interpretation of all positive legal norms.[4] Interestingly enough, Dworkin is quite clear in his insistence that his architectonic natural right to equal concern and respect is fully juridical even in the absence of the exhaustive regulation of all its aspects in posited legal norms. His entire legal-philosophical project rests on the idea of the existence of non-posited or pre-positive elements of true juridicity outside of the "collection" of all posited legal rules that are identified as valid in a legal system.[5] Given this legal-philosophical framework, Dworkin sees no problem in

[4] See Ronald Dworkin, *Taking Rights Seriously*, 2nd ed. (Harvard University Press, 1978), xii, xv, 179–83.

[5] Already in his first book, *Taking Rights Seriously*, Dworkin argues that "legal positivism … is that theory that individuals have legal rights only insofar as these have been created by explicit political decisions or explicit social practice," while he, instead, suggests "an alternative conceptual theory which shows how individuals may have legal rights other than those created by explicit decision or practice" (Dworkin, *Taking Rights Seriously*, xii). This line of reasoning represents a longstanding argument in his legal theory. Dworkin reaffirms it in his last published book: "Interpretivism … argues that law includes not only the specific rules enacted in accordance with the community's accepted principles but also the principles that provide the best moral justification for those enacted rules. The law then also includes the rules that follow from those justifying principles, even though those further rules were never enacted … Legal positivism argues that … historical acts or conduct is exclusively decisive in deciding what legal rights people have. Interpretivism offers a different answer, in which principles of political morality also have a part to play." Ronald Dworkin, *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011), 402, 407.

acknowledging that his anti-positivist theoretical project possesses remarkable similarities to most of the key features of a natural-law theory of law,[6] if we disregard for a moment his reluctance to subscribe to a metaphysically richer range of the legally relevant aspects of the human good beyond the central value of equal concern and respect.

Perhaps even more interesting developments occurred, roughly during the same timeframe, in the camp of what is known as the restatement of a classical natural-law theory of law. It is usually thought that this camp is at least in principle immune to the aforementioned reconstruction of the term "natural law." John Finnis, certainly the most prominent contemporary proponent of a new classical natural-law theory of law, builds his account of the nature of law on the premise that understanding what law is necessarily includes the work of evaluation, of understanding the reasons for action that are apt to explain why we should have something like law at all, and why such an institution or social practice is an inherent good to be pursued in the social context of a political community. Faithful to his maximalist natural-law subscription to a full-range vision of the aspects of authentic human good, a significant part of Finnis's theoretical project is dedicated to showing why and how substantive moral goods, especially the so-called "basic human goods" (such as life and health, marital/procreative union, knowledge, etc.),[7] are inherently relevant for the juridical realm and necessarily connected to it.

[6] See his following remark: "If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law." Ronald Dworkin, "'Natural Law' Revisited," *University of Florida Law Review* 34, no. 2 (1982): 165.

[7] An "open-ended" list of basic human goods may be consulted in John Finnis, "Aquinas and Natural Law Jurisprudence," in *The Cambridge Companion to Natural Law Jurisprudence*, ed. George Duke and Robert P. George (Cambridge University Press, 2017), 18–19.

The somewhat surprising aspect of Finnis's theory is his insistence that the evaluative features and purposes of law as reasons for action, together with the basic human goods as the core content of those reasons, exist as something that is fully juridical—fully law—only when they are articulated according to descriptive social-factual features, that is, when they are *posited* as valid human law. Human law, including those parts of it that pertain to the protection and determination of basic human goods, is essentially and exclusively manifested as such—as law—based on the social fact of its positivity, so that basic human goods are not law before or outside of the hypothesis of their being somehow posited in valid legal norms. Indeed, they are non-law prior to their being posited. According to Finnis, the legal status of these substantive moral values, can never depend solely on their merits, their conformity with some objective moral truth, or with some other moral test not posited or invoked by valid law for the purposes of law-identification. Rather, the legal status of substantive (or other) moral values necessarily depends also on the social fact of their positivity, which satisfies the criteria of legal validity and other relevant conditions of law-identification established by the society's rule of recognition of valid law. As Finnis says, "law is all made—posited, even those parts of it that are made by adopting moral principles whose truth and applicability is not made but discerned."[8]

The nature of law is best explained, argues Finnis, by taking into consideration the reality that it has not one but two aspects or "lives," its descriptive or social-factual "life" and its evaluative or moral "life," both of which must necessarily be actualized for us to be able to say that an instance of the phenomenon of law exists, that it became manifest in human social reality. In sum, according to Finnis, morality must necessarily be "in" law, but there is no way

[8] John Finnis, "Reflections and Responses," in *Reason, Morality and Law: The Philosophy of John Finnis*, ed. John Keown and Robert P. George (Oxford University Press, 2013), 551.

to envision how law could be "in" morality, or really anywhere else, outside of the setting fixed by the positivized social-factual features characteristic of law's descriptive "life." Morality *and* legal positivity, taken together and only under that condition, make law what it is.[9]

The emphasis on the social-factual character of law in Finnis's theoretical enterprise is particularly intriguing, because of its shared premise with legal positivism's commitment to positivity as the decisive feature of law's nature. Robert Alexy, a legal philosopher who describes his theory as non-positivism disconnected from the natural-law premises, makes roughly the same theoretical move. In Alexy's estimation, law is necessarily both "real" and "ideal." All that law ideally should be, namely, its evaluative features and especially moral values, must be expressed through its "real" or properly positivized social-factual features in order to be considered as law in the true sense of that term.[10] Of course, the remaining differences between the approaches of authors such as the natural lawyer Finnis and the hard positivist Raz, are still quite easily perceivable, particularly the commitment of the former (and the refusal of the latter) to establish certain necessary connections between substantive moral values, such as certain basic human goods, and law. But at the same time, it has become increasingly difficult to grasp these differences when one takes as the starting point the

[9] For Finnis's thesis on the dual nature of law, see, for example, Finnis, "Reflections and Responses," 547–53. See also John Finnis, "A Grand Tour of Legal Theory," in *Collected Essays*, vol. 4, *Philosophy of Law* (Oxford University Press, 2011), 101–2, 107; John Finnis, "Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's Ideal Dimension," *The American Journal of Jurisprudence* 59, no. 1 (2014): 95–96; Finnis, "Aquinas and Natural Law Jurisprudence," 47–48.

[10] For a detailed assessment of Alexy's account of the nature of law from the viewpoint of his approach to the question of the connection between law and morality, see Petar Popović, "Are There Any Elements of Juridicity beyond Positive Law in Robert Alexy's Non-Positivism?" *Revus: Journal for Constitutional Theory and Philosophy of Law* 49, no. 1 (2023): 87–105.

positions of present-day positivists and natural lawyers with regard to the problem of the existence or nonexistence of any necessary connections between law and morality.

The important legal-philosophical work of Julie Dickson further testifies to that increasing difficulty. Dickson sees no problem in simultaneously (1) explicitly expressing her affinities to the central tenets of legal positivism and (2) advocating that a successful theory of law's nature should take into account its "key duality," namely, that law "exists both as institutional practice and social fact, and as a normative, reason-giving, and value-aspiring phenomenon."[11] In constructing accounts of the law's dual nature, she says, "legal philosophers must make evaluative judgments in selecting features of law which are important and significant to explain," but "without yet taking a view on whether those features of law render law morally bad or good."[12] According to Dickson, it is practically impossible to explain law's essence without recourse to certain evaluative standards from the outset of the project of explaining what law is. But those standards do not necessarily or otherwise conceptually entail an evaluative viewpoint that resorts to substantive moral goods.

Thus, positivists, non-positivists (such as Alexy), and some natural lawyers (such as Finnis), seem to take the reality of law's dual nature as their starting point. The main difference between their approaches to explaining the ontology of law, according to the line of reasoning presented so far, seems to be located at the level of the importance or even necessity (or lack thereof) that they assign to the moral, or substantively moral, elements pertaining to the evaluative aspect of law's nature in their efforts to adequately explain that nature. Simply said, the primary mode of establishing the difference between legal positivism and a natural-law

[11] Dickson, *Elucidating Law*, 87. For Dickson's acknowledgement of her affinities with the tradition of legal positivism see Dickson, *Elucidating Law*, 101.

[12] Dickson, *Elucidating Law*, 102.

theory of law (or, broadly speaking, non-positivism) seems to be organized around the question of how much morality should we fit "in" law to adequately explain its nature. If we understand morality to denote a Finnisian natural-law maximalist (hence, not a Dworkinian, or similarly minimalist) account of the legally relevant range of substantive basic human goods, then the standard versions of the law-morality separability thesis still maintain their intelligibility and still succeed in determining the limit between legal positivism and a natural-law theory of law. Instances of this standard formulation of the separability thesis may be found in the Hartian insistence on the "merely contingent" and never necessary or conceptual connections "between law as it is and law as it morally ought to be,"[13] as well as in the Razian argument that "determining what the law is does not necessarily, or conceptually, depend on moral or other evaluative considerations about what the law ought to be."[14] If the evaluative features necessary for both identifying law and for understanding its nature are so value-laden as to include an indispensable reference to substantive moral standards akin to Finnis's basic human goods, then positivists and natural lawyers are still quite easily identifiable and distinguishable. The more one envisions the evaluative features inherent to law's nature in broader, less-than-substantive, and minimalist terms, the more the divide between positivists and natural lawyers becomes progressively blurrier.

[13] H. L. A. Hart, introduction to *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983), 8.

[14] Joseph Raz, "The Argument from Justice, or How Not to Reply to Legal Positivism," in *The Authority of Law*, 2nd ed. (Oxford University Press, 2011), 319.

2. The Emergence of Another Persistent Question

But there is another, more successful way of distinguishing and categorizing the various approaches to understanding the nature or the essence of law. This alternative strategy does not take as its staring point the query of how much morality should we fit "in" law to adequately describe its essential nature. Instead, it relies on a different persistent question that does not entirely overlap with the question regarding the separability thesis or the correct relationship between law and morality. And in my opinion, this persistent question contributes to a better grasp not only of the differences, but also of the shared elements, between legal positivism and a natural-law theory of law (or at least some versions of it).

The analysis of this different persistent question is the starting point for this book. I deem it highly important and perhaps even decisive for approaching the query into "what is law?" I propose that, instead of beginning with the question of "which kind of" or "how much" morality must be necessarily or contingently implemented in law in order to correctly describe its essential nature, due attention should be given to a different, though not entirely separate, question: *what is law "in"?* In other words, where can law be found? What are the criteria for determining the precise differences between law and non-law? What are the exact boundaries or limits of law, beyond which law is no more, and where we enter into the field of other non-legal domains, like non-juridical morality or some other evaluative field that is in some sense usually thought to be emptied of any necessary reference to juridicity?

Of course, if we assume that law has a dual nature, and that each manifestation of law must necessarily be somehow humanly posited, then the task of identifying of the nature of

law, or of the boundaries of law, may be approached by inquiring into how much morality should be included in law.

My intention, instead, is to question the boundaries or limits of law by asking whether law may be found "in" domains, realities, things, states of affairs, or norms beyond the instantiations of humanly posited law, that is, beyond the convention-based or purely artefactual conditions for recognizing what counts as valid humanly posited law. In sum, are there any elements of juridicity to be found beyond, or in abstraction from, the domain of humanly posited valid law? Is there some intelligible and philosophically sound way of maintaining that it is possible and reasonable to claim that law may somehow be found "in" morality? Or, more precisely, are there some evaluative or moral features that are already somehow fully juridical prior to or in abstraction from law's descriptive, social-factual, posited features? Can we detach law's evaluative, ideal, or moral "life" from its descriptive social-factual "life" and still claim that at least some of the detached evaluative features are fully law? Does morality contain instances of non-posited law, and if so, according to which conditions can we identify such instances of juridically relevant morality?

I find it remarkable that a version of this alternative persistent question concerning the existence of the elements of juridicity beyond humanly posited valid law was formulated (and answered in the negative) within legal positivism. In a recently published *Cambridge Companion to Legal Positivism*, the positivist Leslie Green notes, in continuity with the line of argument presented in the preceding section, that "it is hard to find contemporary positivists who still hold that … there are no necessary connections between law and morality"—a claim "*once associated* with legal positivism."[15] Green then claims to have found one distinctive

[15] Leslie Green, "Positivism, Realism and Sources of Law," in *The Cambridge Companion to Legal Positivism*, ed. Torben Spaak and Patricia Mindus (Cambridge University Press, 2021), 39 (emphasis added).

feature of legal positivism on which there is no disagreement in the positivist tradition: "Any theory of law that a positivist would be willing to call 'positivist' endorses a version of the following claim: *All law is positive law*."[16] In other words, there are no necessary elements of juridicity outside the scope of humanly posited valid law that could alter the basic ontological fabric of law, namely, its impossibility to exist as something different than a posited source-based social fact.

It is quite surprising that Alexy, a non-positivist, and Finnis, a proponent of a natural-law theory of law, fully agree with this central tenet of legal positivism that all law is positive law. As previously mentioned, both authors are firmly convinced that, within law's dual nature, an essential aspect or "life" of law is manifested through its positivity. Positivity is a "necessary" property of law, claims Alexy.[17] Finnis holds that "the *whole* of community's existing law, however completely just and decent, is *posited*, *somehow humanly posited*."[18] Elsewhere, Finnis even attributes this account of the nature of law, namely, that all law is positive law, to Thomas Aquinas:

[16] Green, "Positivism, Realism and Sources of Law," 40–41. Green reiterates this argument in Green, introduction to *The Germ of Justice*, 10. John L. Mackie previously highlighted this formulation of a central tenet of legal positivism, perhaps with even more precision: "Law is, as I have maintained that morality also is, a human product … This amounts to saying that *all law is positive law*: it is law wholly in and by being 'posited' by some society or institution." John L. Mackie, *Ethics: Inventing Right and Wrong* (Penguin Books, 1977), 232–33 (emphasis added).

[17] Robert Alexy, "The Dual Nature of Law," in *Law's Ideal Dimension* (Oxford University Press, 2021), 36.

[18] John Finnis, "The Truth in Legal Positivism," in *Collected Essays*, vol. 4, *Philosophy of Law*, 185 (emphasis added).

In Aquinas's clarification and adjustment of the Aristotelian and Roman juristic categories and nomenclature, *all human law is positive law*.[19]

This rather wide consensus regarding the thesis that all law is positive law, between legal positivists, non-positivists, and natural lawyers, is quite telling. It suggests that the map of legal-philosophical approaches to explaining law's nature is radically rearranged when we focus on the question of the existence of elements of juridicity beyond humanly posited valid law, instead of concentrating on the question regarding the quality of the law-morality connection. If we focus on the question of the so-called separability thesis between law and morality, we end up with the following results: legal positivists could be placed on one side of the divide and non-positivists together with natural lawyers on the other, even if that divide is occasionally blurry, as shown above. However, when the question of the presence of morality

[19] John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998), 266 (emphasis added). This is not the only example of Finnis's claim that, for Aquinas, all law is necessarily humanly posited. See also the following claims: "Aquinas, in his later work, describes the whole of the law administered by a state's courts as 'law humanly posited' or 'positive law,' even though part of it … is wholly or substantially part of, or a deduced conclusion from, the permanent principles and precepts of natural law" (Finnis, *Aquinas: Moral, Political, and Legal Theory*, 268); "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" (Finnis, "A Grand Tour of Legal Theory," 100); "Law, as Aquinas speaks of it, in its central case [is] human positive law" (Finnis, "Aquinas and Natural Law Jurisprudence," 45); "Aquinas treats all human law as 'posited' and (synonymously) 'positive,' even those of its rules that are restatements of, or authoritatively promulgated deductions (*conclusiones*) from, general moral principles or norms" (John Finnis, "Aquinas's Moral, Political, and Legal Philosophy," in *The Stanford Encyclopedia of Philosophy* (Spring 2021 Edition), ed. Edward N. Zalta, accessed October 31, 2024, https://plato.stanford.edu/entries/aquinas-moral-political/).

"in" law is substituted with the question regarding the conditions for the presence of law "in" morality (or completely outside of the realm of positive law), some non-positivists and natural lawyers will be categorized together with the legal positivists and adhere to what these latter theorists consider to be the core positivistic "all law is positive law" thesis, thereby forming a single, united camp.

One would normally expect a more or less elaborate justification of the grounds for the meta-positive existence of law from a natural-law theory of law (perhaps even from non-positivistic accounts of law's nature), that is, a full-fledged account of the elements of juridicity existing beyond the realm of humanly posited valid law. Even authors who are not natural lawyers are on record as saying that they expect such arguments from natural law theorists. Thus, for example, Jeremy Waldron, certainly not an exponent of the natural-law theory of law, argues:

> We should expect natural law to be law-like. It should be *like law* … Natural law should manifest itself as something capable of ordering our actions and interactions in something like the way that positive law orders our actions and interactions. Otherwise we would not call it "law" … The experience of being governed, ruled, and ordered by natural law should add to our repertoire of being governed, ruled, and ordered by law.[20]

Now, if legal positivists, leading non-positivists, and prominent natural lawyers maintain that all law is positive law, that all that law is must be necessarily and essentially posited, the

[20] Jeremy Waldron, "What is Natural Law Like?" in Keown and George, *Reason, Morality and Law*, 73.

question that must be addressed now is: does anybody remain on the other side of the divide, established by the persistent question of the existence of meta-positive law? Is there a divide at all? To what degree is this question even persistent? Do all legal philosophers generally agree that all law is necessarily posited, whichever position each holds regarding the necessary connections between law and morality?

3. The Other Side of the Divide

The answer to the aforementioned question is, yes, there are some approaches to explaining law's nature that maintain that certain elements of juridicity exist beyond humanly posited valid law.

Ronald Dworkin is one such author. We already had the chance to present the foundational idea in his legal philosophy, according to which law includes not only the sum of all posited valid rules, but also certain principles or standards of political morality that point to fully legal rights (e.g. Dworkin's architectonic right to equal concern and respect) that persons have and should be able to claim and enjoy, even in the absence of their posited recognition or determination. Thus, such meta-positive evaluative or moral principles, values, or standards may constitute authentic legal rights—they are already fully law or a source of law—before their positivization. The task of a legal official, perhaps more often a judge in a supreme court or in a constitutional court (e.g., Dworkin's Hercules), is to declaratively (hence, not constitutively) identify these meta-positive principles, values, or standards as existing law in

cases where such identification is difficult, as well as to be attentive to their pertinence in all cases, whether easy or hard.[21]

In sum, to argue in favor of the existence of law as a non-posited entity, Dworkin had to inquire into the issue of the boundaries of law[22] by addressing both issues of (1) what law is "in" and (2) under which condition(s) law may be thought to be "in" morality.

There is good evidence for holding that the core issue in Dworkin's long-term famous debate with Hart—arguably the most important legal-philosophical debate on crucial persistent questions in this scholarly field—was their radical divergence regarding the question of the existence of the elements of juridicity beyond humanly posited valid law, or beyond the standards for identification of such law. If we asked Hart to briefly explain to us what law is "in," he would say that law is essentially and exclusively "in" positive law. He would probably add that law is thus "in" all those rules or standards for conduct—indeed, in all those "things," broadly speaking—that are picked out and thereby juridicized or rendered legal by the law-identifying conditions contained in the rule of recognition of valid law. He would quite likely also tell us that principles of substantive morality or justice may be a source of law only if they are explicitly identified as included either (1) in the content of valid law or (2) among the relevant conditions for identifying valid law by the rule of recognition.[23] According to Hart, then, law is only and necessarily "in" descriptively ascertainable social facts: from the fact of

[21] Ronald Dworkin, *Law's Empire* (The Belknap Press of Harvard University Press, 1986), 265–66. See also Ronald Dworkin, *Justice in Robes* (The Belknap Press of Harvard University Press, 2006), 54–55, 68.

[22] Some authors acknowledge Dworkin's theoretical account as his inquiry into law's boundaries. See Nicos Stavropoulos, "The Debate That Never Was," *Harvard Law Review* 130, no. 8 (2017): 2091; Frederick Schauer, "Law's Boundaries," *Harvard Law Review* 130, no. 9 (2017): 2455–56.

[23] Hart, *The Concept of Law*, 250–54.

the existence of a posited social source containing a rule or standard for conduct, to the fact that this rule satisfies determinate criteria of legal validity accepted and followed in the unified practice of legal officials. If we then asked Dworkin the same question, he would respond that law is not only to be found "in" those rules and moral (or otherwise evaluative) principles that Hart envisions to be identified and rendered juridical by a rule of recognition, but that law or elements of juridicity may be found also "in" certain evaluative standards that are not identifiable by a Hartian rule of recognition. Whatever else the Hart-Dworkin debate may be about, it is at least about starting to make sense of this important difference in approaching the nature of law.[24]

One way to start making sense of this fundamental difference is to view it as not only a characteristic of a debate between two legal philosophers, namely, Hart and Dworkin, but instead as a divide that pervades the entire segment of legal philosophy dedicated to the analysis of the question "What is law?" Each legal-philosophical approach to understanding and describing the nature of law may be categorized (among different, equally effective standards for categorization) according to a position taken by that approach regarding the existence of the elements of juridicity beyond humanly posited valid law, or, conversely, regarding the thesis that all law is positive law.

Are there other authors, besides Dworkin, who stand on his side of the divide and hold that all law is not posited, and that law may indeed, under certain conditions, be found "in" morality? In this book, I will argue that there is at least one other author who stands on

[24] For a detailed analysis of the Hart-Dworkin debate seen through the prism of their major difference regarding the existence of non-posited law, that is, of the elements of juridicity beyond humanly posited valid law, see Petar Popović, "And Then There Were Two: Further Remarks on Identifying the Core Question in the Hart-Dworkin Debate," *Rivista di filosofia del diritto* 11, no. 2 (2022): 415–34.

Dworkin's side of the divide, namely, Thomas Aquinas. Throughout the book, I will present Aquinas's legal-philosophical line of reasoning, according to which, to introduce only a few central claims of the book, (1) not all law is positive law, (2) political communities genuinely need positive law for justice to be fully secured, and thus the existence of human positive valid law constitutes a form of human good, (3) positive law may indeed be, and usually is, law, (4) there is humanly posited and valid non-law, on account of the injustice of its content, and (5) there are elements of juridicity beyond humanly posited valid law.

These and other claims, which will be further elaborated in various chapters of the book, originate in an approach to analyzing the essence of law or the juridical phenomenon that is most adequately referred to as Thomistic juridical realism. This approach thus stands on the other side of the divide when compared to legal-philosophical accounts that fully endorse the thesis that all law is positive law. However, I am highlighting the terms "divide" and "division" with the sole intention of pointing to a somewhat neglected standard of categorization of accounts of law's nature, which originates in the persistent questions of "What is law in?" and of whether there are certain elements of juridicity beyond humanly posited valid law. Everything in this book related to highlighting the differences between diverse accounts of the nature of law, is meant as an exercise in contributing to what Julie Dickson labels the "plurality" of jurisprudential accounts of law's nature, in the sense that, as she says, "each of those properties which make law into what it is can be examined from different angles, in response to different puzzles and questions which strike us as interesting at any given time."[25]

Of course, it would be absurd and dishonest to suggest that Thomistic juridical realism and, say, legal positivism, may be seen to fully overlap. Quite the contrary, it is important to identify the crucial differences between them as clearly as possible to avoid superficial

[25] Dickson, *Elucidating Law*, 58.

misconceptions. But, at the same time, I firmly hold that the legal-philosophical landscape should not be thought of as a world of perennial irreconcilable divides, with walls of separation and entirely parallel scholarly approaches without any places of contact, which at some point simply stopped the conversation. I personally prefer Anthony Honoré's metaphor of perennial finals of the "World Cup" of legal theory,[26] where legal positivism and the natural-law theory of law continuously play against each other, knowing that they cannot play this "game" by themselves, acknowledging and even applauding brilliant moves made by the other team, helping the opponents to get back on their feet if they fall, instead of seeking to annihilate their agency entirely.

Hence, even if the casual reader, a practicing lawyer, or a legal scholar and philosopher of law will not be able to fully support or identify with all of the theses of Thomistic juridical realism, I believe that this reader may profit from engaging, even critically, with Aquinas's legal theory and its peculiar way of conceptualizing law. One of the reasons why I though it appropriate to write a short introductory book on Thomistic juridical realism is my conviction that the main features of this legal-philosophical approach are largely unknown in present-day legal philosophy, especially in the Anglophone world. In addition, just as legal positivism has its internal tensions between various fractions of a positivistic way of conceptualizing law, there seems to be more than one account of law's nature that invokes Aquinas as the leading source of inspiration. I believe that the Thomist legal theory presented in this book is faithful to Aquinas's original insights, but, as will become evident throughout the book, it significantly differs in various aspects from other versions of a Thomist natural-law theory of law.

[26] Anthony M. Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford University Press, 1987), 32.

[…]

Chapter Four

Ius and *Lex—Ius Naturale* and *Lex Naturalis*

[…]

3. Elements of Juridicity beyond Humanly Posited Valid Law?

The subtitle is phrased as a question, because in today's legal-philosophical landscape there seem to be very few approaches to elucidating law that might appear as eccentric as the one advocating the existence of true law that is not humanly posited according to the agreed upon conditions of legal validity. It is almost as if a legal philosopher who would argue that not all law is posited, might be considered to operate with an account of law's nature that inhabits a parallel conceptual universe of legal philosophy, a universe that has little in common with the one that today's legal philosophers and practitioners populate.[27] Indeed, apart from Dworkin, who is seen as one of the "giants" of contemporary legal philosophy,[28] it is rather difficult to

[27] Such a legal philosopher may be subject to even stronger charges, along the lines of the following claim, the "inclusive" character of which leaves much to be desired: "The concept of law is the concept of an artifact, that is, something that necessarily owes its existence to human activities intended to create that artifact … Those who might want to deny that law is an artifact concept are not my concern here; the extravagance of their metaphysical commitments would, I suspect, be a subject for psychological, not philosophical investigation" (Leiter, "The Demarcation Problem in Jurisprudence," 666).

[28] Neil M. Gorsuch refers to the period when Ronald Dworkin, Joseph Raz, and John Finnis, among others, regularly gave lectures and participated in mutual debates at the University of Oxford, as "a time when legal giants

find an author who would be prepared to systematically challenge the "all law is positive law" thesis.

On the other hand, the claim for the existence of meta-positive legal content continues to be closely associated with the central tenets of a natural-law theory of law. In his already quoted exchange with Finnis, Waldron expresses his amazement that Finnis's natural law theory is really only a "natural law account of *positive* law," wherein "natural law" means nothing other than "a well worked out moral and ethical theory."[29] Waldron, however, wants to take the word "law" in the term "natural law" seriously, and he argues that a natural lawyer should be expected to support the claim that natural law is, indeed, fully law or at least law-like, namely, "something that is capable of fulfilling the governance functions of law in the absence of positive institutions',[30] including the very institution of positive law. In a similar vein, in his overview of the natural-law theories in the 20th century, Francesco Viola notes that the doctrines of natural law "are linked by the persistence of an identical problem," namely, "that of the existence of law not produced by man."[31]

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roamed Oxford's spires." Neil M. Gorsuch, "Intention and the Allocation of Risk," in Keown and George, *Reason, Morality and Law*, 413.

[29] Waldron, "What is Natural Law Like?" 74 (emphasis added).

[30] Waldron, "What is Natural Law Like?" 74.

[31] Viola really only confirms that the cited problem is indeed the main concern of the natural-law theories of law when he immediately adds that there is another, "more modest" aspect of the same problem, namely, "the presence in positive law of some strictly legal elements not posited by man." Francesco Viola, "Introduction: Natural Law Theories in the 20th Century," in *A Treatise of Legal Philosophy and General Jurisprudence Legal Philosophy in the Twentieth Century*, vol. 12, *Legal Philosophy in the Twentieth Century—The Civil Law World (Tome 2: Main Orientations and Topics)*, ed. Enrico Pattaro and Corrado Roversi (Springer, 2016), 3. In the same text, he will again restate that "in the authentic tradition, ancient and modern alike, natural law is law in the strict sense"

Therefore, it seems that the claim in favor of the fully juridical status of meta-positive content is generally seen to be congenial with the natural-law theories of law. The question that remains is *how exactly* it is possible to hold that there are elements of true juridicity beyond humanly posited valid law. Before presenting an answer to that question, it is important to note that, if there is indeed a way to advocate the juridicity of non-posited normative content, this circumstance necessarily alters and models the very nature of law. Just as the "all law is positive law" thesis amounts to the conclusion that positivity is a necessary feature of law's ontology, so too the claim that there are non-posited elements of juridicity shapes our understanding of law's essence in the following way: not all law is humanly posited according to the relevant criteria for legal validity.

To the extent that it endorses the latter claim, Thomistic juridical realism supports the existence of an alternative account of law's nature when compared to the account of law's nature modelled according to the "all law is positive law" argument. What law is according to the "all law is positive law" thesis and what law is according to the "not all law is posited" thesis are two different accounts of law's nature. Throughout this book, I will highlight that regardless of the differences, there are surprisingly many overlaps and compatibilities between the two accounts of what law is. For example, both accounts advocate the claim that there exists, at the level of law's nature, the necessity (or the need) for having positive law.

(Viola, "Introduction: Natural Law Theories in the 20th Century," 79). These claims are even more incisive when seen against the backdrop of Viola's essential agreement with Finnis that "all law is positive law" (Francesco Viola, *Il diritto come pratica sociale* (Jaca Book, 1990), 133) and that "if it exists as law and as a condition for its existence as law, natural law is indeed an element that is internal to positive law" (Francesco Viola, "Positivizzazione del diritto tra immanenza e trascendenza," in *Verità e prassi tra immanenza e trascendenza: prospettive di etica, politica e diritto*, ed. Tommaso Allodi, Elvio Ancona, and Shaban Zanelli (Perugia Stranieri University Press, 2020), 151).

Nonetheless, it is important to note that we find ourselves before two significantly different positions regarding the nature of law, two dissimilar sets of properties of juridicity, and ultimately two divergent meanings of the term "law."

Under which conditions may one affirm that not all law is posited and that there are non-posited elements of true juridicity? The shortest answer advanced by Thomistic juridical realism is: the virtue of justice must be taken as the starting point in conceptualizing law. If it is possible to identify certain things or realities (*res*) that are attributed to determinate titleholders by non-posited titles, and if these things or realities stand in the sphere of at least potential interference of persons different from the titleholders, relationships of justice emerge and the things in question are constituted as juridical phenomena, that is, as law (*ius*). In other words, whenever the evaluative standard of justice appears in reference to things that are attributed to their titleholders according to titles different than humanly posited valid law, these things constitute elements of true juridicity, regardless of the lack of positivization of these elements and of the fact that they stand beyond the reach of the conditions for intra-systemic legal validity. Again, according to Thomistic juridical realism, it is justice that juridicizes things, not their incorporation, by reference, into the content of valid positive norms.

Whatever the relevant posited or non-posited titles of attribution and duty in justice, it is important to keep in mind that for Thomistic juridical realism, law is essentially a thing, not a norm or a right in any subjective sense of that term. Thus, the elements of law or *ius* beyond (or in abstraction from) humanly posited legal norms are always certain concrete things (*res*), which are attributed as owed in the relational framework of justice between determinate persons. Accordingly, since the very nature of law is altered by the inclusion of meta-positive elements of juridicity, the best way to understand this alteration is to envision, in the ontology

of law, a structural openness to elements that are best described as non-posited things (*res*) owed in justice.

4. *Ius Naturale*: A Meta-Positive Law

In legal philosophy, Aquinas's natural law theory is famous for being, in Hart's words, the "clearest, perhaps, because it is the most extreme form of the expression" of the point of view according to which "between law and morality there is a necessary connection."[32] Raz notes that the Thomistic version of the natural-law theory of law is a paradigmatic expression of the thesis according to which "law [is] good in its very nature."[33] These are very important claims, but they need some unpacking to correctly understand their complexity. What does it mean to say that Aquinas's account of natural law tells us something about the thesis that law is good in its very nature and that this natural-law account represents a strong version of the claim that law and morality are necessary connected?

There are certainly many ways to convey what these arguments might mean. One way to describe their meaning relies on the prior premise that all law is positive law, and that natural law imposes a series of moral constraints on the content of positive law. In that framework, roughly corresponding to Finnis's legal theory, the primary meaning of the term "law" is reserved only for positive law, and the natural law remains only analogically law to the extent

[32] Hart, *The Concept of Law*, 153.

[33] Raz, "About Morality and the Nature of Law," 167.

that its precepts are not infused with the feature of positivity.[34] However, in a Finnisian framework, the presence of natural law "in" positive law—we could also say: the unity of law's evaluative and descriptive "lives"—does have certain effects on law's ontology. Natural law serves as an evaluative guide for the creation and interpretation of positive law, since the harmony of positive law and natural law amounts to what is called the "central case" of law. When that harmony is ruptured, that is, when positive laws run afoul of the requirements and constraints of natural law, the ontological unity of law's two "lives" enters the mode of, so to speak, schizophrenic disbalance or a split between what law is and what law ought to be. Unjust and immoral laws thus denote peripheral cases of what law is, while still remaining law. In addition, when confronted with unjust and immoral laws, citizens' moral (not legal) obligations to obey these laws may collapse. Finally, according to Finnis, the infringement of moral constraints on law in the case of immoral or unjust posited laws, never amounts to a collapse of positive law's juridical character. Said differently, unjust posited laws retain their legal status, regardless of their defects in justice and morality. More will be said on the status of unjust laws in both Finnis's legal philosophy and Thomistic juridical realism in the sixth chapter of this book.

Aquinas proposes various ways in which the goodness of law should be taken into account when conceptualizing necessary connections between law and morality. In the previous chapter we saw that the final cause of all law is always a determinate justice-based

[34] For Finnis's claim that natural law is only "analogically law" on account of its essentially moral status in the absence of the feature of positivity, and for an example of his claim that the fully juridical—or, as he says, "focal"—meaning of the term "law" is reserved only for positive law, see Finnis, *Natural Law and Natural Rights*, 276–81. For his line of reasoning on the legal status of unjust laws, see Finnis, *Natural Law and Natural Rights*, 351–66.

form of human good, namely, giving to each person her own *ius*. Law's essential goodness may also be seen to be operative at another level, namely, in grasping how certain moral values or goods become constituted as law. Aquinas's proposal for this latter level of analysis is not primarily based on exploring the ways in which morality is somehow present in positive law, which is the strategy adopted by authors such as Finnis and Alexy. Rather, Aquinas suggests that there are important ways in which law can be said to be already present in certain segments of the moral realm, even prior to humanly posited declarations or determinations of such presence.

There are two basic kinds of *ius* titles, according to Aquinas's theory. As he says, "a thing can be adjusted [*adequatum*] to a man" (or "a thing can be made just [*aliquid facere iustum*]") in two ways. First, "by its very nature [*ex ipsa natura rei*]," and second, by acts of human will according to which the attribution of a thing to a titleholder is posited either by private agreement (e.g., a contract) or by a public agreement (e.g., a posited legal norm).[35] In this chapter, I will focus on the ways in which something may be adjusted to a person as owed by others in justice according to what Aquinas calls "nature" (*ex ipsa natura rei*), that is, according to a natural, non-posited title.

Aquinas makes it clear that what he calls a natural *ius* is brought into existence when a thing becomes an object of justice according to a natural, non-posited title. Keeping his thesis on the thingness of law in mind, a natural *ius* is essentially a thing, and thus not a legal norm, nor a subjective right of the titleholder. This is particularly important, since the English translation of *ius naturale* is "natural right," which should not be understood to denote subjective claims, powers, faculties, etc., and should not be comprehended according to a more objectivist reading of *ius* as essentially a set of duties to others. *Ius* is a concrete thing, and *ius*

[35] *ST* II-II, q. 57, a. 2.

naturale is also a concrete thing, reality, or state of affairs that is attributed to a titleholder according to a non-posited title somehow corresponding to the nature of a thing, or to the human nature of the titleholder, to the extent that the thing in question forms part of the nature of the human person.[36] For example, life and psycho-corporal integrity, as well as other examples Aquinas provides of what natural lawyers refer to as instantiations of *ius naturale* are all concrete things or realities that are assigned to a human person as the titleholder, and which other identifiable persons may interfere with and denature, thereby "owing" them in justice. Thus, the term *ius* does not refer here to the faculties or powers that a person has *over* her life or to the cluster of norms the *content* of which may be said to attribute life to that person; rather, life itself *is* the *ius* in question, the concrete thing-centered manifestation of law.

[36] When this Aquinas's argument from the *Summa* is read in light of his treatment of the same argument in the *Commentary to Aristotle's Nicomachean Ethics*, it becomes obvious that he envisions *ius naturale* to be grounded, as its title or *ratio*, not only in some abstract concept of the nature of a thing (*ex ipsa natura rei*), but also and more specifically in the primary precepts of natural law: "Natural justice does not consist in what seems or does not seem to be, i.e., it does not arise from human conjecture but from nature. … In practical matters there are some principles naturally known as it were, indemonstrable principles and truths related to them, as evil must be avoided, no one is to be unjustly injured, theft must not be committed and so on; others are devised by human diligence which are here referred to as that which is legally just" (*Sent. Eth.* V, lec. 12, n. 1018).