JURISPRUDENCE: THEORY AND CONTEXT

NINTH EDITION

BRIAN H. BIX

SWEET & MAXWELL

18 Tel Aviv Law Review 463 (1994) (translated into Hebrew). I am grateful to the publishers of these texts for allowing me permission to use material from those articles.

I would like to thank the following for their helpful comments and suggestions: Mark Addis, Larry Alexander, Jack Balkin, Lisa Bernstein, Scott Brewer, Keith Burgess-Jackson, Kenneth Campbell, Tom Campbell, Jovana Davidovic, Richard Delgado, Anuj Desai, Anthony M. Dillof, Neil Duxbury, Neal Feigenson, John Finnis, Stephen G. Gilles, Martin P. Golding, Aristides N. Hatzis, Alex M. Johnson, Jr., Sanford N. Katz, Matthew H. Kramer, Kenneth J. Kress, Brian Leiter, Andrei Marmor, Jerry Mashaw, Linda R. Meyer, Martha Minow, Marcus Moore, Thomas Morawetz, Martha C. Nussbaum, Frances Olsen, Dennis Patterson, Stanley L. Paulson, Margaret Jane Radin, Julian Rivers, Daria Roithmayr, Jennifer Satterfield, Frederick Schauer, Scott Shapiro, A. J. B. Sirks, M. B. E. Smith, Larry Solum, Scott Sturgeon, Brian Tamanaha, Adam Tomkins, Lloyd L. Weinreb, Tony Weir, James Boyd White, Kenneth Winston, Mauro Zamboni, and Yushuang (Alex) Zheng. I am also grateful for the research assistance of Joshua Gitelson, Annie Jacob, Galen Lemei, Ruchita Sethi, Justin Stec, Jason Steck, Erin Steitz, James Thomson, and Alina Yasis.

Brian Bix
December 2022

TABLE OF CONTENTS

will be something of a simplification relative both to the full complexity of Kelsen's theory and to its transformation over time.

The Pure Theory of Law

4-02 Kelsen referred to his theory as "*reine Rechtslehre*", a "pure theory of law". In Kelsen's words, the theory was "pure" "because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly 'law'".[5] Moral judgments, political biases, and sociological conclusions were all to be pushed aside, as improper for a "scientific" description of the social institution of law.[6]

Chapter 3 noted the importance of the normative aspect of law for H. L. A. Hart's legal theory (it is central to the "internal aspect of rules", which in turn is central to Hart's theory and how it differs from empirical theories like that of John Austin). Within Kelsen's theory, the normativity of law is, if anything, an even more central and dominating factor. Most of what is puzzling to readers of Kelsen's legal theory can be better understood if one keeps in mind the theory's focus on normativity.

Kelsen had two basic starting points in his approach to legal theory. First, in Kelsen's view, normative claims—arguments for how one ought to act or for how things ought to be—can be grounded only on (justified by) other normative claims.[7] This is the argument, often attributed to David Hume,[8] that one cannot derive a normative conclusion from purely factual premises: it is sometimes phrased, "one cannot derive an 'ought' from an 'is'". In other words, a purely factual description of a situation will never be sufficient, by itself, to justify a conclusion that something ought (morally) to be done. Under this approach, one can only justify such a conclusion by first accepting or inserting a moral premise.[9]

Secondly, such lines of justification must necessarily come to an end at some

---

L. Paulson, "Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization", 18 *Oxford Journal of Legal Studies* 153 at 156–157 (1998).

5 Hans Kelsen, *The Pure Theory of Law* (Max Knight trans., University of California Press, California, 1967), p.1; see also Stanley L. Paulson, "The Purity Thesis", 31 *Ratio Juris* 276 (2018).

6 One should not over-read Kelsen's talks about a "science" of law. Here, "science" is the translation of the German "*Wissenschaft*", whose meaning and application generally is broader than the English "science". For example, it is usual and uncontroversial in German to use the term *Wissenschaft* when referring to literary theory, where in English one would not label it as a "science". See, e.g., Brian Leiter, "Legal Realisms, Old and New", 47 *Valparaiso University Law Review* 949 at 959 (2013).

7 See Kelsen, *The Pure Theory of Law*, pp.4–10.

8 See David Hume, *A Treatise of Human Nature* (2nd ed., with text revised and notes by P. H. Nidditch, Oxford University Press, Oxford, 1978), Section 3.1.1, pp.469–470. Kelsen's endorsement of a strong is/ought division can be found in a number of places in his work. See, e.g., Hans Kelsen, "What is the Pure Theory of Law?", 34 *Tulane Law Review* 269 at 269–270, 275 (1960). Kelsen was by no means alone among prominent legal theorists in viewing this is/ought division, attributed to Hume, as central to legal theorising. For other examples, see, e.g., Ronald Dworkin, *Justice for Hedgehogs* (Cambridge University Press, Cambridge, Mass., 2011), p.17; John Finnis, *Natural Law & Natural Rights* (2nd ed., Oxford University Press, Oxford, 2011), pp.33–48; Scott J. Shapiro, *Legality* (Cambridge University Press, Cambridge, Mass., 2011), pp.47–49. However, there are reasons to believe that "Hume's Law" has been overstated and misapplied in jurisprudential debates. See Samuele Chilovi and Daniel Wodak, "On the (In)significance of Hume's Law", 179 *Philosophical Studies* 633 (2022).

9 The moral premise in question can be "obvious" or something "everyone agrees with". While a number of contemporary theorists believe that one *can* derive an "ought" proposition from an "is" proposition, for present purposes one need note only that Kelsen's approach to law is grounded on the view that such a derivation is *not* possible.

point.[10] In day-to-day discussions, each (normative) argument put forward is based on (justified by) some more general or more basic argument. We tend to forget that, if we look closely enough at the chain of arguments in favour of a particular position, we will eventually come to an argument that is not justified by some other argument, and the validity of this final argument can only be based on its being tacitly or explicitly accepted (accepted "on faith", as it were).

Consider the following example. A religious person tells you that it is wrong to commit adultery. When you ask her why, she says, "because that is what is said in our sacred book". Being in an obstinate mood, you say: "So what?", to which her response is that the sacred book is the revealed word of God. To a second: "So what?", her patient response would be that we should all do as God tells us to do. However, if at this point you ask why that is so, you are likely to get no more than a puzzled (or hostile) look. This line of argument has come to an end; either one accepts that one ought to do what God says or one does not.[11] And there is a sense in which the foundational argument, "we ought to do what God says", is entailed by or implied by the religious person's initial assertion that "one should not commit adultery". (This is not to say that one could not reach the same normative conclusion using other starting points, but only that, for *this* person, *this* conclusion derives from or implies *that* starting point.)

Kelsen's argument was that there is a foundational argument implied ("presupposed") by legal statements just as there is a foundational argument implied by religious statements. In more technical language, Kelsen applied a "neo-Kantian" approach to legal theory, an approach based on aspects of Kant's theory of knowledge, in particular Kant's Transcendental Argument.[12]

The best way to understand Kelsen's project may be to think of him as asking: "What follows from the fact that some people treat legal rules as valid norms?"[13] Like many important philosophers, Kelsen tried to show what is interesting or paradoxical about matters that seem ordinary and unremarkable to us. For Kelsen, the ordinary and unremarkable fact to be considered is that while looking at a simple collection of actions, we sometimes see those actions as normative. Whenever one looks at people putting slips of paper into a box, and sees "voting"; or looks at an organised group of people raising and lowering their hands in various sequences, and sees "the passage of legislation", this translates empirical actions into normative meanings.[14] The translation is clearer on the occasions when someone says that since those certain actions have been done (the group of people raising and lowering their hands), one now "ought" to do something (e.g., pay a certain tax). The

---

10 See Kelsen, *The Pure Theory of Law*, pp.193–195.

11 That the argument could be stretched a step or two further does not alter the basic analysis. For example, the religious person could say, "one ought to do what God says because He created humanity and all the world", with the implied claim that one ought to obey the entity that created us. However, there is no particular reason why everyone must accept that normative position.

12 See, e.g., Kelsen, *The Pure Theory of Law*, pp.201–205; Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", 12 *Oxford Journal of Legal Studies* 311 (1992). A transcendental argument is one "that elucidates the condition for the possibility of some fundamental phenomenon whose existence is unchallenged or uncontroversial … . Such an argument proceeds deductively, from a premise asserting the existence of some basic phenomenon (such as meaningful discourse …), to a conclusion asserting the existence of some interesting, substantive enabling conditions for that phenomenon." Robert Audi (ed.), *The Cambridge Dictionary of Philosophy* (2nd ed., Cambridge University Press, Cambridge, 1999), p.925 (entry on "transcendental argument").

13 See Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", p.324.

14 See, e.g., Hans Kelsen, *Introduction to the Problems of Legal Theory* (Bonnie L. Paulson and Stanley L. Paulson, trans., Oxford University Press, Oxford, 1992), pp.6–12.

border between "is" and "ought" has seemingly been crossed, and the question is: what can be learned from that?

Here we need to return to the idea of the normative chain of justification. One starts with some simple legal-normative statement: for example, "one cannot park here (it is illegal to do so)". If the person making this statement was asked why it was so, she would probably note that this regulation was validly promulgated by some city council, judge or administrator. If the questioner pushes further, the chain could be followed back, e.g., that the administrator was authorised to act in this area by an act of the legislature, and the act of the legislature was passed according to the procedures set down in the constitution.[15] Things get slightly trickier when one gets to the constitution itself. The document might itself have been a modification of an earlier basic law, or it might have been drawn up under the authorisation of an earlier basic law. However, again, we will eventually come to a point either so foundational or so early in the society's legal history that one cannot go any further back, and no further justification can be offered.

Following the whole chain through then leads to the following implication: to assert the (normative) validity of the individual legal rule ("one cannot park on this street") is implicitly to affirm the validity of the foundational link of the chain (e.g., "one ought to do whatever Parliament orders"), for the same reason that affirming an individual religious belief implicitly affirms the foundational norm of the religion ("one ought to do whatever God commands"). To put the matter differently, the affirmation of the foundational norm is "presupposed" by any express or implied affirmation of individual legal rules. This foundational norm of a legal system ("one ought to do whatever is authorised by the historically first constitution") is what Kelsen calls the "*Grundnorm*" or "Basic Norm" of the legal system.[16]

For Kelsen, analysis and justification within law thus occurs at both a "static" and a "dynamic" level. It is static in the way that legal norms are justified by more general or more basic norms. It is dynamic in the way that more basic norms authorise the (later) creation of more specific norms by legal officials.[17] This hierarchical view of law and legal validity is sometimes known by the German "*Stufenbaulehre*" ("step structure doctrine"), and was adopted by Kelsen from the work of another Austrian theorist, Adolf Julius Merkl.[18]

---

15 There are complications for Kelsen's argument when an official acts within her area of delegated power, but acts in an unauthorised (illegal) way. See, e.g., Stanley L. Paulson, "Material and Formal Authorisation in Kelsen's Pure Theory", 39 *Cambridge Law Journal* 172 (1980).

16 See, e.g., Kelsen, *Introduction to the Problems of Legal Theory*, pp.56–60. Neil MacCormick helpfully adds: "[A]lthough a basic norm is indeed presupposed in the case of any working constitution, it is not a mere presupposition. It is the content of a living custom, a convention that can be articulated as an explicit norm." Neil MacCormick, *Institutions of Law* (Oxford University Press, Oxford, 2007), p.288. Kelsen introduced his notion of the Basic Norm in 1914, adapting ideas from Immanuel Kant and Rudolf Stammler. Stanley L. Paulson, "A Great puzzle: Kelsen's Basic Norm", in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, Oxford, 2013), pp.43–61, at pp.45–46.

17 See, e.g., Kelsen, *The Pure Theory of Law*, pp.108–278. Kelsen emphasised the importance of including a study of law's "dynamics, … because the law, unlike any other system of norms, regulates its own creation." Hans Kelsen, "The Pure Theory of Law and Analytical Jurisprudence", 55 *Harvard Law Review* 44 at 49 (1941).

18 See András Jakab, "Problems of the Stufenbaulehre: Kelsen's Failure to Derive the Validity of a Norm from Another Norm", 20 *Canadian Journal of Law and Jurisprudence* 35 (2007); Stanley L. Paulson, "How Merkl's Stufenbaulehre Informs Kelsen's Concept of Law", 21 *Revus* 29 (2013).

Reduction and Legal Theory

4-03

Hans Kelsen believed that all legal norms could and should be understood in terms of an authorisation to an official to impose sanctions: if A (citizen) does X (wrong action), then B (an official) is authorised to impose Y (a sanction).[19]

Thus, Kelsen would want us to translate "you shall not murder" into the following instruction to an official: if any citizen murders, you (the official) have the authority to impose a sanction upon that person. As the instruction to the official is only an authorisation, one might wonder how Kelsen can explain the fact that officials are *bound* to impose sanctions—it is not usually just a matter within their discretion. Kelsen would say that where officials have an obligation to act, this only means that there is another norm, instructing a higher official to the effect: "if the lower official does not impose a sanction in this situation, you are authorised to impose a sanction on that official"—and so it would go up the hierarchy.

This is a slightly awkward formalisation of criminal laws as it stands, but its awkwardness becomes far greater when we try to put civil laws, in particular laws which confer powers, into the same form. For example, a statute authorising the formation of wills might read: if A creates a valid will (by following certain procedural and substantive requirements), and then dies, and A's executor refuses to follow the instructions of the will, then B (an official) has the authority to impose a sanction on A's executor.[20]

Reduction is the natural tendency whenever one posits a theory or a model of behaviour. In some ways, it is the essence of the activity. To the extent that one can discuss a complex social phenomenon, like law, in terms of one or two concepts, the process of theorising seems to be a success. There is no point in a theory that merely replicates the complexity of the phenomena about us; that gives us nothing. An explanation is necessarily an attempt to explain an activity in other, simpler terms.

And there is something satisfying about being able to say something like "law is basically or essentially …" (where the blank might be filled in by "orders backed by threats", "authorisations to officials to impose sanctions", or "plans"). To understand the essence of something has always been considered the core of wisdom, so we tend to welcome the opportunity, when a theorist tells us that she has "discovered" what the essence is of law (or government or property or marriage, etc.).

On the other hand, simplification is often distortion. The more one tries to recharacterise the variety of experience as though it were homogenous, the more awkward and inaccurate the description will be. All social theorists (economists and anthropologists as well as legal and political theorists) must consider the proper balance between descriptive accuracy and explanatory power. (It is a problem that is particularly significant in understanding the limitations of the law and economics movement, which will be discussed in Ch.18). Kelsen's theory lies toward an

---

19 Kelsen's actual terminology is that the official "ought" to impose the sanction, but Kelsen uses the word "ought" broadly, in a sense which is best summarised as "authorised to" rather than "should perform". See Hans Kelsen, "On the Basis of Legal Validity", 26 *American Journal of Jurisprudence* 178 at 178–179 n. b (1981) (Stanley L. Paulson trans.) (translator's note on Kelsen's use of "*bestimmen*" and "*sollen*").

20 See, e.g., Kelsen, Pure Theory of Law, pp.114–130.

extreme in reduction: an attempt to reduce all laws to a particular form.[21] However, as H. L. A. Hart pointed out when discussing John Austin's approach to law,[22] while such reductions seem to have the benefit of simplicity, this benefit is largely a surface matter, as the likely consequences of trying to force the various legal norms into a single structure are awkwardness, poor fit and a risk of misleading the reader.

Hart Versus Kelsen

Perhaps because of the limited dialogue between (or overlap in) H. L. A. Hart scholars and Hans Kelsen scholars, the differences between Hart and Kelsen are frequently poorly understood. Sometimes Kelsen is seen as an imperfect stopping point between Austin's mistaken views and Hart's solutions (a position that does not stand up long under close examination). One text stated that Hart is merely Kelsen in clearer prose.[23] Even if this is meant to be complimentary to Kelsen, it does a disservice to both theorists.[24] This section will briefly discuss some of the things that join and separate the two writers.

There is one question that theorists who focus on the normativity of law—and Hart as well as Kelsen would fit into this category—could be said to be trying to answer: how is a legal system to be distinguished from the orders of gangsters?[25] For Hart, this question led to an investigation of the differences in action and attitude between how we act when we think we are acting under an obligation and how we act when we are being compelled to do the same action. This, in turn, led to Hart's discussion of the "internal aspect" of rules and of law, which is basic to his approach to legal theory.

Kelsen's response to the gangster/law question would be simple: those who see the actions of the people in power in a normative way, and thus presuppose the Basic Norm in dealing with official promulgations, see the officials as legitimate authorities; those who do not see the actions this way will see the people in power as gangsters or their equivalent. In a sense, Kelsen's response is comparable to Hart's: the difference between the commands of valid law and the orders of gangsters is determined by, indeed is constituted by, the attitudes of the citizen subjects.

Here, we also see how legal positivism links Hart and Kelsen: both analyse the difference between gangsters and legitimate government by focusing on the more or less "neutral" question of citizens' attitudes. Hart and Kelsen's positions avoid making moral judgments. They pass by the more obvious answer to the gangster/law question, which would be quickly given by a natural law theorist: that the difference between legitimate leaders and gangsters is that the former act justly and for the common good, and the latter do not.

The differences between Hart and Kelsen are also interesting and significant.

---

21 Kelsen is neither the first nor the last theorist to make such an attempt. See, e.g., J. W. Harris, *Law and Legal Science* (Oxford University Press, Oxford, 1979) (attempting to analyse all laws in terms of duties).

22 Hart, *The Concept of Law*, pp.27–42.

23 Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law* (revised ed., Westview Press, 1990), p.27.

24 One can find Hart's comments on Kelsen in H. L. A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, Oxford, 1983), pp.286–342. However, one often gets the impression that Hart did not entirely understand Kelsen's work, perhaps because Kelsen's starting point was so different from the Anglo-American tradition within which Hart wrote.

25 See Hart, *The Concept of Law*, pp.6–7, 20–25, 82–83; Kelsen, *Pure Theory of Law*, p.8.

While both Hart and Kelsen emphasised the normative aspect of law in response to and criticism of more reductive/empirical approaches, their notion of the "normative" differed.[26] Hart's view of the normative reduced it to a combination of certain types of social facts, while Kelsen resisted any reduction of "normative" to facts—that is, he denied that statements of what one ought to do (legally or morally) could be translated without loss into some descriptions of facts about the world.[27] While Hart's theory tried to track and explain actual social practices (with labelling of the work as "descriptive sociology", and the careful distinctions, e.g., feeling obliged versus having an obligation, acting out of habit versus following a rule, and the different kinds of rules), Kelsen's theory tended to be more abstract—appropriate for what purported to be a "pure theory" and a neo-Kantian analysis.

The most obvious differences may be ones of methodology, which have been noted in passing over the course of this chapter and the previous one. Hart's analysis builds on close attention to actual practices (and how they are perceived by their participants) and linguistic usage. On the other side, Kelsen is offering a kind of logical or structural analysis of law and of normative thinking in general.

There are also interesting similarities and differences between Kelsen's Basic Norm and Hart's rule of recognition. Both the rule of recognition and the Basic Norm rest on the idea of chains of normative validity: a particular legal norm is only valid because it has been authorised by a more general or more basic legal norm. This chain of validity must end somewhere, with a foundational norm that carries no further justification, other than its "acceptance"[28] or its having been "presupposed".[29] It is again important to note the difference of approach and methodology here: Hart's theory is meant as an analytical description of actual practices, while Kelsen sought a theory purified even of sociological observation, and is best understood as a neo-Kantian transcendental deduction from the fact that we treat certain rules as legal norms.[30]

Both the idea of a (single) rule of recognition and a (single) Basic Norm derive from assumptions that societies' legal regulations occur or are viewed as occurring in a systematic way—all the norms fitting within a consistent, hierarchical structure of justification. If one does not think that legal systems must be systematic in this way, then one could conclude that there could be more than one rule of recognition or more than one Basic Norm.[31]

On the Nature of Norms

In his last works, Kelsen became caught up in questions regarding the nature of norms. Analysis in (metaphorical) terms of one norm "justifying" or "generating" another, and inquiries regarding whether a legal system can contain norms with contradictory contents, seemed to create a confusion in Kelsen, "between a norm

---

26 Stanley L. Paulson, "Continental Normativism and Its British Counterpart: How Different Are They?", 6 *Ratio Juris* 227 (1993).

27 Paulson, "Continental Normativism and Its British Counterpart: How Different Are They?", p.236.

28 Hart, *The Concept of Law*, pp.100–110.

29 See Kelsen, *Introduction to the Problems of Legal Theory*, p.59.

30 See, e.g., Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law". For Kelsen, "the science of law … has [a] constitutive character—it 'creates' its object insofar as it comprehends its objective as a meaningful whole." Kelsen, *Pure Theory of Law*, p.72.

31 See Joseph Raz, *The Authority of Law* (2nd ed., Oxford University Press, Oxford, 2009), pp.122–145; Joseph Raz, *The Concept of a Legal System* (2nd ed., Oxford University Press, Oxford, 1980), pp.197–200.

as a kind of sentence or sentence-meaning and as a contingent entity created and repealed by certain social events."[32] Arguably, this line of inquiry was what was behind many of the changes in his theory over time, as well as some of the stranger notions of the later work.[33] The problem of the "existence", "meaning" and "logic" of norms remains a difficult one for all theorists, though H. L. A. Hart's work (see Ch.3) deals with those challenges much less awkwardly than Kelsen's last works do.

Suggested Further Reading

Brian H. Bix, "Rules and Normativity in Law", in Tomasz Gizbert-Studnicki, Krzysztof Płeszka, Michał Arszkiewicz and Paweł Banas (eds.), *Problems of Normativity, Rules and Rule Following* (Springer, Cham, Switzerland, 2015), pp.125–146.

Luís Duarte d'Almeida, John Gardner and Leslie Green (eds.), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing, Oxford, 2013).

Michael S. Green, "Hans Kelsen's Non-Reductive Positivism", in Torben Spaak and Patricia Mindus (eds.), *The Cambridge Companion to Legal Positivism* (Cambridge University Press, Cambridge, 2021), pp.272–300.

Carsten Heidemann, *Hans Kelsen's Normativism* (Cambridge University Press, Cambridge, 2022).

Hans Kelsen, *General Theory of Norms* (Michael Hartney trans., Oxford University Press, Oxford, 1991).

—, *Introduction to the Problems of Legal Theory* (B. L. Paulson and S. L. Paulson, trans., Oxford University Press, Oxford, 1992).

—, *Pure Theory of Law* (Max Knight, trans., University of California Press, California, 1967).

Andrei Marmor, "The Pure Theory of Law" (2021), in Edward N. Zalta and Uri Nodelman and Uri Nodelman (eds.), *Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/lawphil-theory*.

Stanley L. Paulson, "Continental Normativism and Its British Counterpart: How Different Are They?", 6 *Ratio Juris* 227 (1993).

—, "A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law?: Rejoinders to Robert Alexy and Joseph Raz", in Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, Oxford, 2012), pp.61–111.

—, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law", 12 *Oxford Journal of Legal Studies* 311 (1992).

Stanley L. Paulson and Bonnie Litschewski Paulson (eds.), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford University Press, Oxford, 1998) (includes contributions by H. L. A. Hart, Alf Ross, Carlos S. Nino, Joseph Raz, Neil MacCormick, and Georg Henrik von Wright).

Jeremy Telman (ed.), *Hans Kelsen in America—Selective Affinities and the Mysteries of Academic Influence* (Springer, Dordrecht, 2016).

Richard Tur and William Twining (eds.), *Essays on Kelsen* (Oxford University Press, Oxford, 1986) (includes contributions by Joseph Raz, Ota Weinberger, J. W. Harris, and Stanley L. Paulson).

Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford University Press, Oxford, 2007).

[32] Hartney, "Introduction", pp.xlii–xliii.

[33] For an overview of those changes and notions, see, e.g., Hartney, "Introduction", pp.xlii–liii; Paulson, "Kelsen's Legal Theory: The Final Round"; Duxbury, "Kelsen's Endgame". For example, in Kelsen's late works, "[t]he legal norm emerges as the meaning of an act of will, and the validity of the legal norm is 'conditional upon the act of will of which it is the meaning'". Paulson, "Kelsen's Legal Theory", p.266 (footnotes omitted). For evidence that the seeds for this late transformation were present earlier in Kelsen's work, see Stanley L. Paulson, "Metamorphosis in Hans Kelsen's Legal Philosophy", 80 *Modern Law Review* 860 (2017). There is one scholar who rejects the idea of changes in Kelsen's views over time. See Alexandre Travessoni Gomes Trivisonno, "On the Continuity of the Doctrine of the Basic Norm in Kelsen's Pure Theory of Law", 12 *Jurisprudence* 321 (2021).

CHAPTER 5

NATURAL LAW THEORY AND JOHN FINNIS

Introduction

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

Traditional Natural Law Theory

5-02 The approach traditionally associated with the title "natural law", historically has focused on arguments for the existence of a "higher law", elaborations of its content, and analyses of what should follow from its existence (in particular, how citizens should respond when the positive law—the law enacted within particular societies—conflicts with that "higher law").[3]

While one can locate a number of passages in the classical Greek writers that express what appear to be natural law positions,[4] the best known ancient formulation of a natural law position was offered by the Roman orator, Cicero (106 BC–43

---

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

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

3 Some of the modern writers who are sometimes associated with natural law, like Lon Fuller and Ronald Dworkin, have approaches far outside the tradition described in this chapter. Both Fuller (Ch.6) and Dworkin (Ch.7) are discussed in greater detail later in the book.

4 These include passages in Plato, "Laws", Book IV, 715b, in *Plato: The Collected Dialogues* (Edith Hamilton and Huntington Cairns (eds.), Princeton University Press, Princeton, 1961), p.1306 ("enactments, so far as they are not for the common interest of the whole community, are no true laws"); and Aristotle, "Nicomachean Ethics", Book V, 7:1134b18-1135a5, in *The Complete Works of Aristotle* (Jonathan Barnes (ed.), Princeton University Press, Princeton, 1984), vol.2, pp.1790–1791; as well as Sophocles, "Antigone", in *The Oedipus Plays of Sophocles* (Paul Roche, trans.,

BC). Cicero was strongly influenced (as were many Roman writers on law) by the works of the Greek Stoic philosophers (some would go so far as to say that Cicero merely offered an elegant restatement of already established Stoic views). In this brief paragraph from Cicero, one comes across most of the themes traditionally associated with natural law theory:

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

As noted, many of the themes of traditional natural law are already present in Cicero: natural law is unchanging over time and does not differ in different societies, and every person has access to the standards of this higher law by use of reason. Additionally, as Cicero stated elsewhere, only just laws "really deserve [the] name" law, and "in the very definition of the term 'law' there inheres the idea and principle of choosing what is just and true".[6]

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

As one moves from the classical writers on natural law to the early Church writers, aspects of the theory necessarily change, and raise different issues in relation to morality and law. For example, with classical writers, the source of the higher standards is said to be (or implied as being) inherent in the nature of things. For the early Church writers, there is a divine being who actively intervenes in human affairs and lays down express commands for all mankind.[9] To the extent that the natural law theorists of the early Church continued to speak of higher standards

Mentor, New York, 1958), p.210: "I never thought your mortal edicts had such force [that] they nullified the laws of heaven, which unwritten, not proclaimed, can boast a currency that everlastingly is valid".

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

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

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

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

9 This contrast may overstate matters somewhat, as the classical writers referred to a (relatively pas-

inherent in human nature or in the nature of things, they also had to face the question of the connection between these standards and divine commands: for example, whether God can change natural law or order something that is contrary to it, a question considered by Ambrose and Augustine (among others) in the time of the early Church, and by Francisco Suárez and Hugo Grotius hundreds of years later.

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

Aquinas identified four different kinds of law: eternal law, natural law, divine law, and human (positive) law.[10] For present purposes, the important categories are natural law and positive law. According to Aquinas, positive law is derived from natural law. This derivation has different aspects. Sometimes the natural law dictates what the positive law should be: for example, natural law requires that there be a prohibition of murder. At other times, the natural law leaves room for human choice (based on local customs or policy choices):[11] thus, while natural law would probably require regulation of automobile traffic for the safety of others, the choice of whether driving should be on the left or the right side of the road, and whether the speed limit should be set at 55 or 65 miles per hour, are probably matters for which either choice would be compatible with the requirements of natural law. The first form of derivation is like logical deduction; the second Aquinas refers to as the "particularisation" or "concretisation" (*determinatio*) of general principles.[12]

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

The phrase *lex iniusta non est lex* ("an unjust law is not law") is often ascribed to Aquinas, and is frequently given as a summation of his position and the natural law position in general.[15] This view is somewhat misleading, on several counts. Aquinas never used the exact phrase above, though one can find similar expressions: "every human positive law has the nature of law to the extent that it

sive) God, and the early Church writers would sometimes refer to the rules of nature as expressing divine will.

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

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

12 Aquinas, Summa Theologiae, I-II, p.288. A similar distinction is drawn in Aristotle, "Nicomachean Ethics", Book V, 7:1134b18-1135a5, in *The Complete Works of Aristotle*, vol.2, pp.1790–1791.

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

14 Aquinas, Summa Theologiae, I-II, pp.325–326.

15 A good discussion of "*lex iniusta non est lex*", its meaning in general and its significance in Aquinas'

is derived from the Natural Law. If, however, in some point it conflicts with the law of nature it will no longer be law but rather a perversion of law";[16] and "[unjust laws] are acts of violence rather than laws; as Augustine says, 'A law that is unjust seems not to be a law'".[17] (One also finds similar statements by Plato, Aristotle, Cicero and Augustine—though, with the exception of Cicero's, these statements are not part of a systematic discussion of the nature of law.)

Another question goes to the significance of the phrase. What does it mean to say that an apparently valid law is "not law", "a perversion of law" or "an act of violence rather than a law"? Statements of this form have been offered and interpreted in one of two ways. First, it might mean that an immoral law is not valid law at all. The 19th century English jurist, John Austin, interpreted statements by the English commentator, Sir William Blackstone (e.g., "no human laws are of any validity, if contrary to [the law of nature]"[18]) in this manner, and pointed out that such analyses of validity are of little value. Austin wrote:

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

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

A more reasonable interpretation of statements like "an unjust law is no law at all" may be that unjust laws are not laws "in the fullest sense".[20] As we might say of some professional, who had the necessary degrees and credentials, but seemed nonetheless to lack the necessary ability or judgment: "she's no lawyer" or "he's no doctor". This only indicates that we do not think that the title in this case carries with it all the laudatory implications that it usually has. It may well be that, for our purposes, knowing that this doctor is not competent is the most important fact; however, the fact that she does have the required certification is not thereby negated or made entirely irrelevant. Similarly, to say that unjust laws are "not really laws" may only be to point out that they do not carry the same moral force or offer the same reasons for action that come from laws consistent with "higher law". Accord-

---

work, can be found in Norman Kretzmann, "Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience", 33 *American Journal of Jurisprudence* 99 (1988).

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

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

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

19 John Austin, *The Province of Jurisprudence Determined* (W. E. Rumble (ed.), Cambridge University Press, Cambridge, 1995), Lecture V, p.158, quoted in H. L. A. Hart, "Positivism and the Separation of Law and Morals", 71 *Harvard Law Review* 593 at 616 (1958).

20 John Finnis traces the notion to Aristotle's idea of "focal meaning" and Max Weber's concept of "ideal types". See Max Weber, *The Methodology of the Social Sciences* (Edward A. Shils and Henry A. Finch, eds., Free Press, New York, 1949), pp.90–106; Aristotle, "Nicomachean Ethics", Book VIII, 4:1157a (different kinds of friendship): "Eudemian Ethics", Book VII, 2:11236a (different kinds of friendship); "Politics", Book III, 1:1275a–1276b (different kinds of citizen), in *The Complete Works of Aristotle*, vol.2, pp.1829, 1958, 2023–2024; John Finnis, *Natural Law and Natural Rights* (2nd ed., Oxford University Press, Oxford, 2011), pp.9–11, 20.

ing to some commentators, this is the sense in which Aquinas made his remarks,[21] and the probable interpretation for many proponents of the position.

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

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

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

Medieval and Renaissance Theorists

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

---

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

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

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

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

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

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

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

Suárez's writings strongly influenced Hugo Grotius (1583–1645), whose work on natural law theory established the foundations of modern international law, though Grotius did not share Suárez's focus on "will". Grotius wrote of the rules based on Reason that constrain what governments can legitimately do, and how nations can legitimately act towards one another.[31] As based on Reason, this was a natural law, as Grotius himself wrote, that would exist and bind us even if there were no God. By speaking of constraints on government based on individual rights, and by offering the possibility of a secular natural law theory, Grotius opened the path for the later liberal natural rights theories of, e.g., John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778).[32]

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

To return to natural law theory and to summarise: it is normally a mistake to try

---

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

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

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

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

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

32 This is of course a simplification, and a lot of intellectual history to condense into a single short paragraph. At a minimum, one should also note the early social contract theory of Thomas Hobbes, and the great systematiser of natural law, Samuel Pufendorf (1632–1694). See, e.g., Wieacker, *A History of Private Law in Europe*, pp.239–248. For an overview and criticism of the "marriage" between natural law and natural rights, see Tracey Rowland, "The Case against the Marriage of Natural Law and Natural Rights", in Tom Angier, Iain T. Benson and Mark D. Retter (eds.), *The Cambridge Handbook of Natural Law and Human Rights* (Cambridge University Press, Cambridge, 2022), pp.74–87.

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

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

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

One further point: while the natural law tradition, at least since Aquinas, has been associated with the Christian Church in general, and (later) the Catholic Church in particular,[35] there are natural law traditions (or comparable schools of thought) associated with other faith traditions.[36]

John Finnis

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

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

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

---

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

36 See, e.g., Knud Haakonssen, "Protestant Natural Law Theory: A General Interpretation", in Natalie Brender and Larry Krasnoff (eds.), *New Essays on the History of Autonomy* (Cambridge University Press, Cambridge, 2004), pp.92–109; David Novak, *Natural Law in Judaism* (Cambridge University Press, Cambridge, 1998); Anver M. Emon, *Islamic Natural Law Theories* (Oxford University Press, Oxford, 2010); Anver M. Emon, Matthew Levering, and David Novak, *Natural Law: A Jewish, Christian, and Muslim Trialogue* (Oxford University Press, Oxford, 2015).

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

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

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