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THE WEAK NATURAL LAW THESIS AND THE COMMON GOOD

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ABSTRACT. The weak natural law thesis asserts that any instance of law is either a rational standard for conduct or defective. At first glance, the thesis seems compatible with the proposition that the validity of a law within a legal system depends upon its sources rather than its merits. Mark C. Murphy has nonetheless argued that the weak natural law thesis can challenge this core commitment of legal positivism via an appeal to law's function and defectiveness conditions. My contention in the current paper is that in order to make good on the challenge, the defender of the weak natural law thesis should appeal explicitly to the common good, understood as the principal normative reason in the political domain. In section I I outline the main implications of the weak natural law thesis and clarify a common misunderstanding regarding its explanatory role. Section II then argues for the indispensability of the common good to the natural law jurisprudential thesis on the grounds that it has an essential role to play in a natural law account of law's defectiveness conditions and the presumptive moral obligatoriness of legal norms. Finally, in section III I examine the compatibility of a strengthened version of the weak natural law thesis with legal positivism in light of the centrality of the common good to the natural law jurisprudential position.

I. THE WEAK NATURAL LAW THESIS

Legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgate

[Law is nothing other than an ordinance of reason for the common good, made by the person who has care of the community, and promulgated.][1]

[1] Aquinas, ST I-II q.90 a.4.

The dictum *lex iniusta non est lex* – an unjust law is not a law – is often assumed to be a core commitment of natural law jurisprudence.[2] Contemporary natural law theorists such as John Finnis and Mark C. Murphy have sought to avoid the counter-intuitive implications of interpreting this dictum to mean that unjust laws are necessarily legally invalid, whilst continuing to uphold a connection between central or non-defective cases of law and practical reasonableness.[3] Murphy's weak natural law thesis (henceforth WNLT) is perhaps the most systematic recent attempt to specify the core proposition of the natural law position along these lines. My intention in this section is to clarify the explanatory role of the WNLT for natural law jurisprudence, whilst also motivating the argument of the next section that it is necessary to strengthen the thesis through explicit appeal to the common good as the normative reason that explains the function of law.

Murphy's WNLT asserts that any instance of law is either a rational standard for conduct or defective.[4] The distinctive natural law commitment, Murphy argues, is the general claim that 'necessarily, law is a rational standard for conduct.'[5] Importantly, this claim does not refer to the relationship between law and morality, but rather to a connection between law and the requirements of practical reasonableness.[6] The claim also admits at least two interpretations. An advocate of a strong reading of 'necessarily, law is a rational standard for conduct' is committed to the view that it states a necessary condition on the existence and validity of laws. In other words, the claim 'necessarily, law is a rational standard for conduct' is the same kind of statement as 'necessarily, triangles have three sides.'[7] On this reading, a law that is not a rational standard for conduct (e.g., the

[2] As Norman Kretzmann has demonstrated, the dictum is not *directly* attributable to either Augustine or Aquinas. See Norman Kretzmann, 'Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience', *American Journal of Jurisprudence* 33(1) (1988): pp. 100–101 and Mark C. Murphy, 'Natural Law Jurisprudence', in *Legal Theory* 9(4) (2003), pp. 244–246. Murphy nonetheless uses the dictum as the starting point for his development of the weak natural law thesis and I proceed in a similar way here.

[3] See, in particular, John Finnis, *Natural Law and Natural Rights* (2d ed.) (Oxford University Press, 2011), pp. 23–55; Murphy, (2003), pp. 241–267; and Mark C. Murphy, (2005a), 'Natural Law Theory', in Martin P. Golding and William A Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law* (Blackwell), pp. 15–28.

[4] Murphy (2005a, p. 23).

[5] Murphy (2003, p. 244).

[6] Ibid. See also Finnis (2011, p. 15).

[7] Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006), pp. 10–11.

Fugitive Slave Act of 1850) is not in fact an instance of law. According to a weaker reading, of the kind defended by Murphy, the statement 'necessarily, law is a rational standard for conduct' makes the same sort of claim as 'necessarily, the duck is a skilful swimmer.' In this case the necessity attaches to the kind duck and the claim is best understood to assert that 'if X is a not a skilful swimmer, then X is either not a duck or is a defective duck.'[8] The WNLT consequently asserts that 'if X is not a rational guide to conduct, then X is either not a law or is defective law.'

In recent writings, Murphy has acknowledged the possibility of natural law accounts that do not focus primarily on law's status as a rational guide to conduct. What is characteristic of natural law positions is to assert theses of the form '[l]aw exhibits N, where N is some normative feature.'[9] Examples are *being a legitimate practical authority* or *being just*. The advocate of the strong natural law thesis interprets statements of this form to be, or to entail, necessary universal generalisations such as that 'necessarily, if x is a law, then x is legitimately authoritative, or just.' According to Murphy, however, the core natural law thesis is better understood as asserting that 'necessarily, anything that does not exhibit normative feature N is either not law or is defective.' Murphy's own interpretation of the core natural law thesis thus remains that law 'is backed by decisive reasons for compliance' and that positive law falling short of this standard is defective as law.[10]

One advantageous feature of the WNLT is that it seems to reconcile a traditional natural law commitment to the distinctive normative role played by law (serving as a rational guide to conduct) with an acknowledgement of the intra-systemic legal validity of defective laws. The wide scope of the WNLT entails that a radically unjust law may still be legally valid, despite its defectiveness. At least in earlier writings, Murphy thus argued that the WNLT is consistent with the letter of legal positivism, if not its spirit.[11] The WNLT is inconsistent with the spirit of legal positivism because it implies that it is not possible to provide an adequate descriptive theory of law's

[8] Ibid.

[9] Mark C. Murphy, 'The Explanatory Role of the Weak Natural Law Thesis', in Wil Waluchow and Stefan Sciaraffa (eds.) *Philosophical Foundations of the Nature of Law* (Oxford University Press, 2013), p. 5.

[10] Ibid.

[11] Murphy (2006, p, 23).

essential properties – its existence conditions – without an account of law's function to serve as a rational standard for conduct and hence its relationship with requirements of practical reasonableness.[12]

Unsurprisingly, the WNLT has come under attack from several directions. In particular, concerns have been raised as to (i) whether the WNLT is a distinctive and non-trivial jurisprudential thesis; and (ii) whether the WNLT implicates the legal theorist in a 'transparent change of the subject' from the demarcation problem regarding morality and law to the features of good law.[13] Murphy has dealt with these criticisms at length and there is no need to rehearse in detail his plausible responses here.[14] It is nonetheless worthwhile, in light of the argument that follows, to confront one major misunderstanding regarding the explanatory role of the WNLT, which seemingly informs both of the criticisms above.

The relevant misunderstanding concerns the status of the WNLT as a descriptive or normative thesis. What is at stake can be seen by reference to Aquinas' famous statement from the treatise on law in *Summa Theologiae* (1265–1274) that law is an ordinance of reason for the common good.[15] The first question that confronts the contemporary reader of Aquinas' statement is whether it is best interpreted as asserting a proposition of descriptive analytical jurisprudence or rather as a normative claim. On the first reading, Aquinas would be proposing a metaphysical thesis about the essential or necessary features of law. His definition of law would aim to provide us with a criterion of identity enabling us to say what makes something an instance of law and not something else. On the second reading, Aquinas would simply be asserting what constitutes good law; he would be stating what law should be, not what it is. Aquinas' statement seems obviously false if construed as a necessary universal generalisation. As I demonstrate in section III, it is highly implausible that Aquinas was committed to such a strong version of the natural

[12] Ibid. See also Murphy (2013, p. 7).

[13] See Scott J. Shapiro, *Legality* (Harvard University Press, 2011), pp. 408–409; Brian Bix, 'Robert Alexy, Radbruch's Formula, and the Nature of Legal Theory,' *Rechtstheorie* 37 (2006): pp. 139–149; Brian Leiter, 'The Demarcation Problem in Jurisprudence: A New Case for Skepticism,' *Oxford Journal of Legal Studies* 31 (2011), pp. 663–677.

[14] See, in particular, Murphy, (2013), and Mark C. Murphy, 'Two Unhappy Dilemmas for Natural Law Jurisprudence,' *American Journal of Jurisprudence* (2015).

[15] Murphy (2005a, pp. 15–22).

law thesis.[16] The alternative seems to be to understand Aquinas' statement as a normative claim, or perhaps as a claim that (in a distinctively pre-modern manner) conflates the descriptive and normative. Interpreted in this way, Aquinas is really stating that the intention of the just and prudent legislator should be to enact laws that are rational guides to conduct and which serve the common good. Many actual laws may fall short of this aspiration, but that is simply a predictable reflection of human failings.

The objections to the WNLT mentioned above both seem to assume that, despite appearances and Murphy's statements to the contrary, the thesis is to be construed as primarily normative rather than descriptive. On this interpretation, the WNLT asserts that many laws are defective laws and that we should endeavour to avoid enacting such laws. It is plausible that this reading informs Scott J. Shapiro's claim that the WNLT is insufficiently 'interesting' to constitute the core thesis of natural law jurisprudence.[17] This is because on a normative reading the WNLT would be consistent with most, if not all, versions of legal positivism. A positivist can certainly maintain that 'the law is ultimately grounded in social facts alone but that immoral laws are defective as law.'[18] Leiter's objection that contemporary natural lawyers are guilty of a 'transparent change of the subject' seems to set out from similar assumptions. The concern is that although natural lawyers claim to be addressing the 'demarcation' question on the line between morality and law, they are in reality concerned with what constitutes morally good law or the practically reasonable legal system.[19]

This reading of the WNLT is, however, incorrect. Murphy has been at pains to separate the WNLT from the 'moral reading' of the core claim of natural law jurisprudence. The moral reading asserts that Aquinas' claim is ultimately a disguised normative thesis that the only laws worthy of obedience are those serving as rational guides to conduct.[20] According to Murphy, such a thesis is 'excruciatingly uninteresting'; it is a claim

[16] See Murphy, (2013), p. 4. Perhaps matters are more complicated than is sometimes assumed. Examples of laws that are obviously unjust, such as the *Fugitive Slave Act* (1850), were not enacted by legislators completely lacking rationality or the intention to serve the common good of their political community. It is nonetheless plausible that there are many laws, including the *Fugitive Slave Act*, that, from the perspective of a reasonable moral agent, fall short of the ideal of rational ordinances directed at the common good.

[17] Shapiro (2011, pp. 408–409).

[18] Ibid. 408.

[19] Leiter (2011, pp. 663–677).

[20] Murphy (2004, p. 20).

almost every writer on law would accept.[21] In fact, Murphy explicitly agrees with Joseph Raz in regarding the aim of a theory of law to be to provide an account of necessary truths that explain it.[22] And, consistent with this methodological approach, Murphy offers the WNLT as a metaphysical thesis that attempts a descriptive specification of law's existence conditions or necessary properties. Although Murphy's concern with defectiveness conditions might suggest otherwise to the inattentive reader, the primary relevance of defectiveness conditions for the WNLT is that they form part of law's existence conditions.[23]

There are two points from this discussion that are particularly important for what follows. The first is that the WNLT seeks to identify the necessary conditions of law that explain it: it does not seek simply to assert normative claims regarding what law should be, but instead aims to provide a descriptive explanation of what law is. The second point is that the WNLT ultimately rests on the view that law has a distinctive function or purpose. It is this, in fact, that plausibly explains common confusions regarding the status of the WNLT, and other natural law theses, as descriptive. For the claim that law has a distinctive purpose entails that it is only by understanding the function of law – and the normative reason that it serves – that we can satisfactorily understand what law is.[24]

Given these assumptions, however, it would seem necessary for a functional analysis of law to have recourse to the common good as the primary normative reason in the political domain. It is useful to recall Aquinas' definition of law in this context. Aquinas' claim is not simply that law is a rational standard for conduct, but that law is a rational standard for conduct in light of the common good.[25] This

[21] Murphy (2006, pp. 9–10).

[22] Murphy (2013, p. 11); Joseph Raz, 'Can There Be a Theory of Law', in Martin P. Golding and William A Edmundson (eds.) *The Blackwell Guide to the Philosophy of Law* (Blackwell, 2004), p. 324.

[23] Murphy's explanation of the WNLT thus proceeds through a defence of metaphysical claims regarding defectiveness and hypothetical necessity. Murphy argues, for example, that 'defective' is an attributive rather than a predicative adjective because criteria of defectiveness are internal to a kind and hence the defectiveness conditions of law are at least partially definitive of the kind of law. See Murphy, (2013), pp. 11–12.

[24] I use the term 'function' here as follows: to say that a function of X is to φ is to say that it is part of the nature of X that it is for φ-ing, not simply that X φ's or that it would be good for X to φ. For similar uses of the term 'function' see Joseph Raz, *The Authority of Law* (Oxford University Press, 1979) and Mark Greenberg, 'The Standard Picture and its Discontents' in Leslie Green and Brian Leiter (eds.) *Oxford Studies in Philosophy of Law 1* (Oxford University Press, 2011), p. 87.

[25] For present purposes I do not consider directly the requirements for law to be (i) enacted by the person who has care for the community (ii) promulgated. The validity of these requirements is, however, implicit in my arguments for the positivity of human law in section three.

introduces a purposive element to the characterisation of law: in terms broadly consistent with the WNLT, it can be taken to assert that law that is not in the service of the common good is defective as law. Aquinas' definition suggests that it is only by understanding the purpose and function of law – the good that it serves – that we are fully able to understand what law is. And this is consistent with a fundamental assumption of Aristotelian-Thomistic metaphysics, namely that final causes feature prominently in explanations of what it is to be an instance of a particular kind.[26] This assumption entails that the end, or purpose, of a kind of thing is constitutive of the identity of that kind of thing. An investigation into the necessary properties of a kind thus requires consideration of its final cause, understood as the end towards which that kind tends. All of this suggests that the common good has an indispensable explanatory role to play in an adequate natural law characterisation of law's existence and defectiveness conditions.

Whatever the status of Aristotelian-Thomistic final causes in the natural sciences, the more pressing issue in the current context is their explanatory role in the practical realm, i.e. in explanations of artefact kinds such as law. The notion of final causality operative in the realm of practical affairs can be understood as directedness towards an end in light of the fact that it is the nature of rational beings to act for that end.[27] In relation to human acts, moreover, which involve intentionality and the willing of an end identified by reason, the final cause has priority.[28] As Finnis has argued, the natural law position is accordingly informed by the view that it is a mistake to assume that, in relation to human matters such as law, one can adequately answer the question 'What is it?' before engaging with questions such as 'Why choose to have it, create it, maintain it, and comply with it.'[29] The natural law tradition, that is to say, begins from the assumption that it is not possible to provide an adequate answer to the question of law's identity except by addressing the purpose, function and end of law; the good that it serves and its normative point.

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[26] ST I-II, q. 91, a. 2. More generally, Aquinas takes over Aristotle's doctrine of four 'causes': efficient, formal, material and final. See, for example, ST II-II, q. 27, a. 3.

[27] *Summa Contra Gentiles* III. 2.

[28] ST I-II I, q. 1, a. 1 & 2.

[29] John Finnis, *Collected Essays IV* (Oxford University Press, 2011b), p. 45.

II. THE CENTRAL NORMATIVE ROLE OF THE COMMON GOOD IN NATURAL LAW JURISPRUDENCE

According to the natural law tradition from Aquinas to Finnis and Murphy, the common good is a normative reason for action that guides deliberation and the acceptance of its outcomes in the political and legal domains.[30] As the normative reason that explains the function of law, I argue in this section, the common good should be explicitly incorporated within the core natural law jurisprudential thesis. I support this claim with reference to the indispensable functional role played by the common good in a natural law account of law's non-defectiveness conditions and of law's status as morally obligatory. In closing the section, I address some more general concerns regarding the identification of the common good as the distinctive function served by law.

The notion of the common good that I am advocating as essential to the core natural law jurisprudential thesis is consistent with the traditional Thomistic understanding of that notion. For Aquinas the common good is an analogical concept applicable to a pre-political community, a political community and common participation in the universal good of God.[31] The common good is thus a concept that is not restricted to the political domain. Even if attention is restricted to the political domain, questions arise within the natural law tradition as to whether the common good is to be regarded as instrumental (the set of conditions that enable individuals to realise basic goods), aggregative (the flourishing of all individuals within a political community) or distinctive (the flourishing of the community as a whole).[32] For current purposes, I assume that these interpretations of the common good are ultimately reconcilable. The concept of the common good that I employ also does not demand acceptance of all aspects of the natural law account of practical reason – such as a privileged list of basic goods – although it does

[30] See the discussion in Mark C. Murphy, 'The Common Good,' *Review of Metaphysics* 59(1) (2005b): p. 134.

[31] Aquinas' wide-ranging use of *bonum commune* and closely related terms is set out in M.S. Kempshall *The Common Good in Late Medieval Thought* (Oxford University Press, 1999), pp. 76–129.

[32] For defence of the instrumental approach see John Finnis, 'The Authority of Law in the Predicament of Contemporary Social Theory', *Notre Dame Journal of Legal Ethics and Public Policy* (1984): pp. 115–137. For the threefold distinction between conceptions of the common good and a defence of the aggregative approach see Murphy, (2005b), pp. 133–164 and Murphy, (2006), pp. 61–90.

presuppose the falsity of a narrowly procedural or sceptical theory of practical reason and normativity.[33]

In the political domain, Aquinas characterises the common good as the justice and peace of a 'complete' community. Justice refers to the preservation of equality or a proper relation among persons.[34] Peace is both the proper ordering of citizens and the absence of strife and discord.[35] Justice and peace are thus conditions of the community as a whole; a just and well-ordered community is a unity of order that is in good condition. This identifies justice and peace as goods that are common, or shared, in the sense that a set of circumstances in which those conditions obtain is to the advantage of each and every member of the political community.[36] What is most distinctive of the traditional conception of the common good, however, is its status as a common end and organising principle. As suggested in section I, insofar as the common good is a reason for action, serving as an end for political deliberation and guiding the acceptance of its outcomes, it has a purposive aspect that is tersely expressed in Aquinas' statement that the common good is rightly said to be the common end.[37] The political common good, that is to say, is a shared normative reason or final cause in the Aristotelian sense. As long as its status as a normative reason is kept in mind, the common good can be defined in broad terms as *a state-of-affairs in which each individual within a political community and the political community as a whole is flourishing.*

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[33] More precisely, my argument presupposes the distinction between normative reasons in favour of a particular action and explanatory reasons that can serve in an account of why agents perform, or refrain from, an action. It also entails that reasons can motivate action. On normative reasons see in particular Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) and Derek Parfit, 'Normativity', in Russ Shafer-Landau (ed.) *Oxford Studies in Metaethics Vol. 1* (Oxford University Press, 2006), pp. 325–380.

[34] ST II-II, q. 57, a. 1.

[35] ST II-II, q. 29. a. 1.

[36] On Aquinas' conception of the common good see also ST I-II q. 96, a. 4; I-II, q. 72, a. 4; q. 95, a. 4; II-II, q. 109, a. 3, ad 1 m; 114, 2, ad 1 m; 129, 6 adm; *De Regno*, I, 1; *In Ethic.*, IX, lect. 10, no. 1891; In Polit., 1, lect 1. Aquinas (e.g., at S.T. I-II q.90 a.3 ad 2 and *In Ethic.* X 14 nn. 13–18) endorses the Aristotelian teaching (*Politics* III. 5: 1280b33–35, 1281a1–4) that the *polis* is a community (κοινωνία) oriented by the goal of a complete and self-sufficient life of flourishing and virtue and not simply a partnership established for the sake of living together. Such passages should not be taken to imply a totalitarian or collectivist conception of the common good. For Aquinas the unit of civil society is a unity of order, which, consistent with Aristotle's critique of collectivism in the *Politics*, is to be distinguished from the unity of an individual person. See *In Ethic.*, I, lect. 1, n.5; *Summa Contra Gentiles*, III, 80. See also E.L. Fortin, 'The New Rights Theory and the Natural Law', *Review of Politics* 44(4) (1982), p. 590.

[37] ST I-II q. 90 a.3.

As Murphy has argued, two obvious constraints on a natural law conception of the common good are that it must be sufficiently *common* and sufficiently *good*. The constraint of commonness sets a condition on properly shared aims of political deliberation and action.[38] An account of the common good consistent with the natural law tradition must not be conceived so broadly that it includes Hobbesian-style theories which acknowledge the importance of social stability and peace, but regard the obtaining of such states-of-affairs as a wholly agent-relative end.[39] The constraint of goodness sets a condition on the good-making characteristics – the normative desirability – of the common good. The natural law common good must accordingly be understood as a reason for action that is worthy of promotion for the members of a political community.[40]

This outline of the natural law notion of the common good points to a significant advantage of a revised formulation of the core natural law jurisprudential thesis of the kind advocated here. Reference to the common good delimits the scope of the term 'rational standard for conduct' through restriction of its field of application to the political and legal domains. On the assumption – which informs the WNLT – that law is best regarded as a functional kind, then what is sought in a natural law identification of the necessary properties of law is a specification of law's function and characteristic activity.[41] It is doubtful, however, whether reference to rational guides to conduct are specific enough to pick out the distinctive role played by law in practical deliberation.

Brian Leiter has identified the relevant problem in this vicinity. Leiter argues that the attempt to define law functionally in terms of its capacity to guide conduct must fail because it does not adequately distinguish law from other normative practices.[42] According to Leiter, although it may be true that law sometimes attempts to guide conduct, this is also true of morality and even the rules of cricket.[43] If

[38] Murphy (2005b, pp. 134–135).

[39] Ibid.

[40] Ibid.

[41] Murphy (2006, pp. 29–36).

[42] It is important to note that Murphy himself does not claim that the WNLT, without further premises, is sufficient to distinguish law from other normative practices. See Murphy, (2006), pp. 25–60.

[43] Brian Leiter, 'Why Legal Positivism? (Again)' *Chicago Public Law and Legal Theory Working Paper No. 442*, (2013), pp. 6–7. Leiter also claims that not all laws aim to guide conduct, citing commemorations of national heroes as an example. Yet such commemorations can guide conduct by promoting a sense of national identity and civic virtue.

the function of law is understood as the rational guidance of conduct for the common good of a political community, however, then Leiter's objection loses its force. Obviously enough, the rules of cricket do not aim to guide conduct for the common good of a political community in any meaningful sense. Morality is a more complicated example because of the many conceptual connections between morality and law. Yet the natural law theorist can at this point join forces with the legal positivist in arguing for a differentiation of normative orders based on the positivity of human law: positive law belongs to a different normative order than morality insofar as its enactments for the common good seek to guide conduct in a way that makes a 'practical difference' by instructing a member of a community how they should act without the need for full consideration of the moral or prudential reasons that apply to her. The law, that is to say, aims to generate 'adequate determinacy in practical discourse in a community or polity.'[44]

This argument, however, depends upon a delimitation of the scope of the practical guidance provided by law through reference to the common good of a political community. As Aquinas emphasises, the law does not provide rational guidance to individuals only, but rather seeks to mediate between the reasonable interests and well-being of individuals and the political community as a whole.[45] Appeal to rational guides to conduct without reference to the common good misses what is distinctive about law with respect to its role in practical deliberation.

It is in large part for this reason that the common good plays such a central role in the traditional Aristotelian and Thomistic accounts of defective law. Aristotle's identification of the common advantage with justice reflects the central normative role of the good of the political community in his theory of constitutions (*politeiai*) and law.[46] What differentiates correct from deviant constitutions for Aristotle is the conformity of the former with the common advantage.[47] If a constitution serves the rulers or sectional interests, rather than the good of the community as a whole, then it is defective.

[44] Neil MacCormick, 'The Ethics of Legalism', *Ratio Juris* 2(2) (1989): p. 188. See also Raz (1994, pp. 210–237); Jules Coleman, 'Incorporationism, Conventionality and the Practical Difference Thesis', *Legal Theory* 4(4) (1998): pp. 381–425.

[45] ST I-II, q. 96, a. 3.

[46] *Pol.* 1279a18 and 1282b17–18.

[47] *Pol.* 1279a17–21. Cf. Aquinas *Sententia Politic.*, lib. 3 l.6 n.2.

Given the normative dependence of laws upon constitutions for Aristotle, the common advantage thus plays the central normative role in the assessment of the defectiveness of laws by transitivity.[48] As suggested above, Aquinas' definition of law explicitly identifies the essence of law in terms of the common good as an end.[49] Once more, the implication is that laws not enacted for the common good are defective instances of their kind because they fail to perform their function. The characteristic activity of law is to provide practical guidance as a response to the need for a community to resolve coordination problems and disagreement through determinations that are just and reasonable because they look to the good of all members of the community. Laws which fail to perform this characteristic activity because they serve particular interests rather than the common good are thus classifiable as defective instances of their kind.

Murphy has argued persuasively that the defectiveness conditions of a functional kind form part of the existence conditions of that kind.[50] On this view, the identity of a functional kind is in part determined by its constitutive ability to perform a certain function and the inability to perform this function makes an instance of the kind defective. Such an account of functional kinds, however, militates in favour of a traditional reading of the core jurisprudential thesis which incorporates reference to the common good in specifying the defectiveness conditions of law. On the traditional accounts above, the characteristic activity of law is to provide practical guidance in response to the need to resolve coordination problems and disagreements through concrete determinations for the common good. Such determinations may be unjust, in the sense that they unfairly distribute the benefits and burdens of communal life. They may also be unreasonable, in the sense that they fail to satisfy basic requirements of legality of the kind identified by Fuller.[51] Yet these broader criteria for defective law are only fully intelligible against the background of the function of law to provide order and guidance to political communities rather than individuals simply.

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[48] *Pol.* 1274b37.

[49] ST I-II q.90 a.4.

[50] Murphy (2015, p. 17).

[51] See Lon Fuller, *The Morality of Law* (Yale University Press, 1964), p. 39. The eight ways to fail to make law enumerated by Fuller are that laws may be insufficiently general, inadequately promulgated, retroactive, incomprehensible, contradictory, inconstant or ephemeral, require conduct beyond the power of subjects and administered in a way that diverges significantly from their obvious meaning.

This discussion of what makes for defective law points to a closely related reason why the core natural law jurisprudential thesis should incorporate explicit reference to the common good. As Michael S. Moore has suggested, natural law arguments for the moral obligatoriness of adherence to just and reasonable legal norms depend upon the thesis that the promotion of the common good is law's distinctive function. The core of these arguments is that if the essential or primary function of law is to serve the common good, and the common good can only be served if the members of a political community regard the law as morally obligatory, then it is a requirement of practical reasonableness that just and reasonable law is regarded as in fact morally obligatory.[52]

A contemporary variant of this argument is found in Finnis' instrumental theory of political authority and obligation. For Finnis, the common good is instrumental to the realisation of basic goods such as knowledge, health etc. at the level of individuals and families.[53] The political common good does not itself instantiate a basic good, but is rather instrumental to such goods. Practical reasoning about the common good reveals a wide range of projects, orientations, and commitments with respect to the basic goods, none of which can be regarded as definitively superior. This incommensurability establishes what Finnis refers to as coordination problems, which reflect not only the diversity of human projects, but also disputes about the most effective means for individuals to realise the basic goods.[54] It is against the background of incommensurability and coordination problems that the common good can serve as a normative reason that provides the basis for a resolution of otherwise insoluble disputes. Finnis gives an example of the rival interests of environmentalists and farmers in relation to river pollution to demonstrate the role of the law in providing authoritative and binding solutions to coordination problems arising out of competing projects and interests.[55] The farmer in this case is confronted with a law on river pollution that goes against their economic self-interest.

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[52] Michael S. Moore, 'Law as Justice' *Social Philosophy and Policy* 18 (2001), p. 119.

[53] Finnis (2011, pp. 85–90). See also John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press, 1998), pp. 82, 97–98.

[54] This sense of a coordination problem is to be distinguished from the narrower sense found in game-theory, which Finnis regards as constrained by an 'emaciated ... instrumental rationality.' Finnis (1984, pp. 115–137).

[55] Ibid., pp. 133–137.

Yet the farmer also has reason to believe that the law provides her with benefits (protection of property, subsidies etc.) that could not be realised other than through an authoritative legal system.

Despite its prioritisation of the flourishing of individuals, Finnis' instrumental theory argues for the generic and presumptive obligatoriness of legal directives on the basis of the need for authoritative determinations in the absence of unanimity. Finnis' argument relies on the premise that a legal system – because of its capacity to resolve coordination problems – is the most effective instrument for achieving the morally obligatory goal of the common good, the promotion of which is in turn necessary for the well-being of every member of a political community. If the common good is an end that we have a moral duty to promote, and the only way we can promote this end is by accepting the authority of a system of laws, then subjects are 'not permitted to pick and choose' which laws to obey.[56] Hence our obligation to obey the law reflects a moral requirement that is generic in relation to each law as an instance of law independently of its content. Of course, this generic obligation to obey the law needs to be balanced by recognition of the possibility of grossly unjust laws. Finnis thus acknowledges that our obligation to obey the law is presumptive in that it may be defeated by countervailing moral considerations.[57]

The central normative role of the common good in a natural law account of law's defectiveness conditions and the moral obligatoriness of adherence to legal norms speaks strongly in favour of incorporating reference to the common good in the core natural law

[56] Ibid. p. 120.

[57] A significant difficulty for any natural law account of the common good, in the context of the expansion of international law, is whether it can justify a commitment to the particularity requirement, i.e. that an agent has a particular obligation to obey the laws established in their own political community. See Leslie Green, *The Authority of The State* (Oxford University Press, 1990), pp. 227–228 and A.J. Simmons, *Moral Principles and Political Obligation* (Princeton University Press, 1979), pp. 30–35. For a cautious natural law response, based upon Aristotelian assumptions, see Murphy, (2006), pp. 171–176. A related problem is the right way for the natural law theorist to characterise legal norms that require a response to the good of someone outside of a particular community where such a response is morally required, for example, in the case of a law forbidding cooperation in the killing of non-resident non-citizens. This appears to be a case where a legal norm is non-accidentally obligatory, but not for reasons of the common good. As Finnis points out, however, a commitment to the priority of the common good of a limited political community such as a nation-state must be qualified by recognition that the good of individuals 'can only be fully secured and realised in the context of international community.' See Finnis (2011), p. 150. This entails that it would be incorrect to view national legal order as the exclusive source of legal obligation and the need to extend the notion of the common good to the international context. I am grateful to an anonymous reviewer for pressing me on this point.

jurisprudential thesis. There is, however, a significant general objection to a functional view of law based on the common good which must be addressed by any defender of such a view. This is the difficulty, identified by Moore, of specifying a distinctive good that is served only by law. Moore assumes that the best way to defend the natural law jurisprudential thesis is by reference to the distinctive function served by law and that the best candidate end is the common good.[58] In order to determine the essential properties of law by reference to a distinctive function, however, it is necessary to isolate an end that law, and only law, serves.[59] Yet the claim that the common good is the required distinctive end runs up against the difficulty that the common good can be 'served by institutions that are obviously pre-theoretically extra-legal.'[60] More generally, the concern is that just because the law is a functional kind that is suitable to serve the end of the common good, this does not in itself entail that the common good is part of the function or characteristic activity or non-defectiveness conditions of law. It not only seems indubitable that there are other normative systems capable of performing this function, but what is distinctive about law also needs to be clearly identified.

Murphy's response to these difficulties in his defence of the WNLT is to attack Moore's strict understanding of functional kinds by incorporating the characteristic activity of a kind within a definition of its function. This allows Murphy to assert that 'the (or a) function of law is to impose order by laying down rules with which agents have decisive reasons to comply.'[61] Murphy, that is to say, suggests that the natural law thesis takes its warrant not from the distinctive end served by law, but rather from the characteristic activity of law in serving this end.[62] It is doubtful, however, whether this way of dealing with Moore's concern regarding the distinctive function of law will work without the addition of further premises. For if it is plausible that the common good can be served by institutions other than law, it is equally as plausible that there are normative practices other than law which can lay down rules with

[58] Michael S. Moore, 'Law as a Functional Kind', in Robert P. George (ed.) *Natural Law Theory: Contemporary Essays* (Oxford University Press, 1992), p. 223.

[59] Ibid.

[60] Murphy (2006, p. 31).

[61] Ibid., p. 32.

[62] Ibid.

which subjects have decisive reasons to comply. It is far from inconceivable, for example, that customary morality would be able to perform the activity of creating social order through the imposition of rules binding upon a reasonable agent.

Arguably a better approach is to confront Moore's concern directly and deny that the common good can be *equally as well* served by systems that are pre-theoretically extra-legal. For it would seem to be a non-optional feature of the natural law position that specifically legal order is the privileged method of securing the common good.[63] The claim is not that extra-legal normative practices are incapable of serving the common good. It is rather that law is much better able to serve the common good than extra-legal normative practices such as customary rules. As H.L.A Hart suggests, the development of a mature legal system with higher-order or secondary rules may be regarded as 'a step forward as important to society as the invention of the wheel.'[64] This is particularly the case with respect to the complex coordination problems discussed above. It is thus plausible that due to its comprehensive scope and capacity to render determinate the outcomes of deliberation in the political domain, law has a privileged – and hence distinctive – status with respect to the realisation of the common good.[65] Indeed, contrary to the prejudice that natural law theories of authority and obligation are undermined by the political circumstances of modernity, the force of a view of authority and obligation that sets out from the common good is particularly evident in relation to pluralistic communities informed by significant disagreement on substantive values and whose members face competing choices between incommensurable manifestations of human good. Legal authority is legitimate, on the natural law conception, insofar as it is effective (serves its function) in making determinations that promote the well-being of the individual members of a political community and that community as a whole.[66]

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[63] See, for example, ST I-II q. 90, a. 2 and Finnis (1984, pp. 115–137).

[64] H.L.A Hart, *The Concept of Law* (2d ed.) (Oxford University Press, 1994), pp. 41–42.

[65] On the importance of comprehensiveness, purported supremacy, and absorptive capacity for central cases of legal systems see Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999), pp. 150–154.

[66] I here assume that appeals to legitimacy are especially pertinent where people disagree and yet it is necessary for there to be collective deference to a decision on the best course of action. See Jeremy Waldron, 'The Core of the Case against Judicial Review' *Yale Law Journal* 115 (2006), pp. 1386–1387. On the 'task-efficacy' account of legitimate political authority see, in particular, Leslie Green, 'The Duty to Govern' *Legal Theory* 13(3) (2007), pp. 165–185 and Stephen Perry, 'Political Authority and Political Obligation', in Leslie Green and Brian Leiter (eds.) *Oxford Studies in Philosophy of Law* (Oxford University Press, 2013), pp. 1–74.

As Moore himself suggests, the natural law theorist would seem in any case to have sufficient explanatory resources to respond to the distinctive end difficulty through appeal to the inclusive nature of the common good.[67] It might be thought that the natural law position is undermined by the fact that law, if it is not to be compatible with injustice, must be able to have as its distinctive good 'all the goods there are.'[68] The source of this concern is that if the distinctive function served by law is a particular good – such as, for example, liberty – then this is consistent with the law promoting deleterious outcomes along other dimensions of morality. As Moore points out, however, the natural law conception of the common good is compatible with the assumption that the function of law is to promote 'all the goods there are' precisely insofar as it represents the normative goal of the promotion of the overall human good. The function of law can thus be understood as the promotion of a comprehensively good state-of-affairs in which each individual within a political community and the political community as a whole are flourishing.[69]

The foregoing discussion supports the conclusion that the advocate of natural law jurisprudence should appeal explicitly to the common good in the formulation of the core jurisprudential thesis. Although it is certainly true that, according to the natural law tradition, law aims to serve as a rational guide to conduct, it does so in light of the common good as a shared normative reason in the political and legal domains. Without reference to the common good it is doubtful whether the defender of the natural law position has sufficient explanatory resources to give a satisfactory account of law's non-defectiveness conditions or to provide a convincing justification of the morally obligatory force of legal directives. The WNLT is accordingly misleading if it is taken to suggest that we can assess the existence conditions of law – and hence its defectiveness conditions – by reference to practical reasonableness independently of the common good of a political community. In the final section of this paper, I will now demonstrate that reference to the common

[67] Moore (1992, p. 223, 2001, p. 124).

[68] Moore (1992, p. 223).

[69] Moore tentatively suggests that Finnis' instrumental account in particular has the conceptual resources to deal with the 'distinctive' good difficulty in this way. There seems no reason in principle, however, why a defender of the aggregative or distinctive conceptions of the common good would not be able to draw on similar arguments. See Moore (1992, p. 215, 2001, p. 124).

good is essential to an adequate account of law's normative point and explore the ramifications of this for debates between natural law theorists and legal positivists.

III. THE NATURAL LAW JURISPRUDENTIAL THESIS AND LEGAL POSITIVISM

From the perspective of the classical natural law theory of Aquinas, I argued in section I, the function of law to serve the common good plays an indispensable role in the determination of law's existence conditions. This function, on the strengthened version of the weak natural law thesis advocated in section II, explains the normative role of the common good as a shared reason for action that allows for an identification of law's defectiveness conditions and also provides the natural law theorist with the explanatory resources to justify the presumptive obligatoriness of adherence to legal norms. I now close the paper by discussing the implications of the arguments above for an assessment of the compatibility between natural law jurisprudence and legal positivism.

On the currently influential minimalist reading of the core legal positivist thesis proposed by John Gardner, it would seem that there is little basis for an assertion of the incompatibility between natural law jurisprudence and legal positivism. Gardner understands the legal positivist to be committed to the normatively inert claim that whether a norm is legally valid within a legal system 'depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources).'[70] There are two important implications of this definition of legal positivism. The first is well-captured by Leslie Green when he states that legal positivism is not a complete theory of law and is compatible with a range of jurisprudential theories.[71] The second is that there is little to prevent a natural law theorist from endorsing legal positivism understood in this way.

It would moreover be misleading to view these points as indicative of recent convergence between natural law and legal positivist theorists, let alone as a concession by contemporary natural

[70] John Gardner, 'Legal Positivism: 5 ½ Myths,' *American Journal of Jurisprudence* 46(1) (2001), p. 201.

[71] Leslie Green, 'Legal Positivism' in *The Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/entries/legal-positivism/ (last accessed 11 January 2016). See also Julie Dickson 'Legal Positivism: Contemporary Debates' in Andrei Marmor (ed.) *The Routledge Companion to Philosophy of Law* (Routledge, 2012), pp. 53–54.

lawyers in the face of compelling counter-arguments. Aquinas clearly acknowledges the positivity of human law and such an acknowledgement is consistent with other core natural law commitments. In the *Summa* Aquinas operates with a fourfold division of analogous kinds of law. The eternal law is the exemplar of divine wisdom, which directs the motions and acts of all things.[72] The natural law is the sharing in eternal law by intelligent creatures.[73] The way that intelligent creatures participate in the eternal law is through reason, and the first principle of practical reason is that 'good is to be done, and evil avoided.'[74] On the basis of this first principle, further propositions of natural law can be derived, such as that life and knowledge are goods that are worthy of pursuit. The divine law is the law promulgated with revelation; it is required because the natural resources of humans are inadequate for a true appreciation of our supernatural end.[75] It is important to note that eternal, natural, and divine law are not juristic concepts in the strict sense.

Aquinas divides positive law, or *lex humanitus posita*, into *ius gentium* and *ius civile*.[76] The former is 'the law of peoples,' understood as humanly posited laws deduced from natural law and thus common to all rational beings. The latter are laws that derive their moral weight primarily from the fact that they have been posited.[77] Both kinds of law are the result of human reason and will; they depend upon concrete acts of legislation and adjudication. Although some human laws are also norms of natural law, insofar as they articulate requirements of practical reasonableness, this in no way detracts from their positivity. In the case of laws whose formulation involves a significant level of human choice – laws arrived at by determination – there is a greater degree of autonomy and (reasonable) discretion on the part of the legislator than with laws deduced from the natural law.[78] Nonetheless, even laws deduced from the natural law retain their status as positive. Aquinas' claim that

[72] ST I-II q. 93, a. 1.

[73] ST I-II, q. 91, a. 2.

[74] ST I-II, q. 94, a. 2.

[75] ST I-II, q. 91, a. 4.

[76] ST I-II, q. 95, a. 4.

[77] On this point see John Finnis, 'The Truth in Legal Positivism' in *Collected Essays: Volume IV* (Oxford University Press, 2011b), p. 183 and Robert P. George, 'Natural Law and Positive Law' in *In Defense of Natural Law* (Oxford University Press, 2001), pp. 102–112.

[78] Ibid.

positive law – when not corrupt – is derived from the rational set of standards referred to as natural law is thus in no way incompatible with the positivity of humanly established law.[79]

Finnis has mapped out three important implications of Aquinas' discussion. Firstly, positive laws are the outcome of human practical activity in the political and legal domain.[80] Secondly, there can be and are many immoral positive laws.[81] Thirdly, positive laws can be identified as intra-systemically valid prior to any reflection on the relationship that such laws have with morality.[82]

Prima facie these implications are more congruent with Gardner's normatively inert characterisation of legal positivism than a strong counter-intuitive reading of *lex iniusta non est lex*. It is therefore tempting to conclude that setting up an opposition between legal positivism and natural law theory is of little methodological or explanatory value in contemporary jurisprudence. Julie Dickson, however, has pointed to a significant issue that remains at stake. This is the relative importance given by the legal theorist to the status of law as (1) a social fact and (2) a rational activity with a normative point.[83]On Dickson's view, the primary focus of the legal theorist should be upon the social facticity of law, whereas from the perspective of a natural law theorist like Finnis, it is the 'normative point' of law (the practically reasonable resolution of coordination problems for the common good) that has priority. In what follows, I endorse Dickson's demarcation of legal positivist and natural law methodologies, but also argue that it reveals legal positivism's limitations. For whilst a natural law position can incorporate the 'sources, not merits' thesis and also give a cogent account of the nature of law, the same does not hold for legal positivism.

Before I turn to Dickson's arguments, it is instructive first to re-examine the compatibility of the 'sources, not merits' thesis with Murphy's WNLT. In his early defence of the WNLT, Murphy argues that the natural law theorist should concede the separability of law and practical reasonableness (which includes moral reasons as a

[79] ST I-II q. 95, a. 2.

[80] Finnis (2011, p. 185) citing Joseph Raz *The Morality of Freedom* (Oxford University Press, 1986), pp. 81–82.

[81] Ibid.

[82] Ibid.

[83] Dickson (2012, pp. 56–58).

subset) to the legal positivist.[84] Murphy upholds the claim that the *existence* of law is a matter of social fact, and he justifies this claim by reference to Raz's practical difference thesis that law must be identifiable apart from the reasons on which it depends if it is to serve its role of allowing persons to act on the practical reasons that apply to them. It is ultimately on the basis of these commitments that Murphy asserts the compatibility of the WNLT with the letter of legal positivism. Consistent with the discussion of the compatibility of natural law theory with legal positivism above, the WNLT does not deny the possibility of valid laws that only unreasonable people would comply with.[85] Rather it asserts that such laws would be defective from the perspective of the function of law to serve as a rational guide to conduct.

Murphy's claim that the WNLT nonetheless goes against the spirit of legal positivism rests upon the claim that, if the WNLT is true, then it is not possible to provide 'a complete descriptive theory of law without having a complete understanding of the requirements of practical reasonableness.'[86] This is because a complete descriptive theory of law based on the WNLT presupposes an account of law's defectiveness conditions, where the defectiveness of law is understood in terms of constitutive inability to serve as a rational guide to conduct. The advocate of the WNLT, Murphy suggests, must thus reject positivist methodology insofar as the latter assumes that it is possible to provide an adequate descriptive theory of law without recourse to considerations of what actions are practically reasonable for individuals and communities.[87]

In more recent writings, Murphy has gone further and queried the consistency of the WNLT with the sources thesis. The primary concern of the advocate of the WNLT remains with the existence conditions of law and this is the same as to ask after law's essential properties.[88] If one accepts that *being constitutionally capable of being a rational standard* is both a merit and a part of law's existence conditions, however, then a statement of the existence conditions of law includes reference to merits.[89] Murphy notes that the practical dif-

[85] Ibid, p. 23.
[86] Ibid.
[87] Ibid, p. 24.
[88] Murphy (2013, p. 7).
[89] Ibid., pp. 19–20.

ference thesis, and arguably also Raz's contention that the law necessarily claims to be a legitimate practical authority, depend on an appeal to law's function that is not reducible to a claim about sources.[90] The WNLT thus purports to challenge the sources thesis by making the constitutional capacity to serve as a rational standard for conduct – which is best classified as a merit – essential to law's existence conditions.

On the interpretation of the core natural law jurisprudential thesis outlined in sections I and II, it is necessary, in order to understand what law is, and provide an adequate descriptive theory of its existence conditions, to characterise the function of law in terms of the common good. The best way to ground a natural law account of law's existence conditions, I suggested, is thus to strengthen the WNLT by specifying the scope of practical reasonableness by reference to the common good as the shared normative reason that guides political deliberation and decision.

A consequence of this analysis is that a normative fact regarding the constitutive function of law in serving the common good is part of the existence conditions of law. Explicit reference to the common good as the normative reason that plays a constitutive role in the determination of law's existence conditions, and thereby allows for an assessment of central and defective instances of law, thus results in a position that is incompatible with more metaphysically robust versions of legal positivism. It is incompatible, for example, with Scott J. Shapiro's planning theory, which asserts that the existence and content of law can be determined by reference to social facts alone.[91] Although Shapiro acknowledges that the aim of legal 'planning' is to resolve 'the circumstances of legality', the claim that the existence conditions of law can be determined without reference to normative facts conflicts with the claim that it is impossible to give an account of law's necessary features without an understanding of law's purpose and end.[92]

As suggested above, the incompatibility of the natural law account defended here and the less metaphysically robust positivist positions is not so obvious. The fundamental difference of orienta-

[90] Ibid., p. 20. See also, Raz (1994, p. 202).

[91] Shapiro (2011, p. 178).

[92] The circumstances of legality are those social conditions that obtain whenever a community 'has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary'. See ibid pp. 170 and 213.

tion, however, is well-captured by Finnis in the first chapter of *Natural Law and Natural Rights*. Finnis' appeal to focal meanings and central cases should not be regarded as an optional extra for contemporary a versions of natural law jurisprudence, but rather understood as a core methodological commitment. Focal meanings identify central cases or instances based on an evaluation of 'significant and salient characteristics.'[93] In investigating a legal system, for example, Finnis suggests we should focus on those features of such a system that would justify us in treating it as providing presumptively obligatory reasons for action, and on the perspective of the practically reasonable agent, rather than on defective or corrupt legal systems, or the viewpoint of the irrational and unjust agent.[94] In so doing, Finnis argues, the investigator is better able to isolate those characteristics that explain the intelligibility of the domain in question. Now the key question for current purposes is whether the central characteristics of law form part of the existence conditions of law. The answer to this question in turn hinges upon whether it makes sense to think of an exemplary instance of a kind as privileged in the determination of its existence conditions. A commitment to this view grounds the core natural law thesis on law defended in this paper and also seems a presupposition of Murphy's WNLT. The claim that non-defective law is a rational standard for conduct entails that it is only by understanding the function of law – its normative point – that we can arrive at an adequate understanding of what law truly is.

It is now possible to confront more directly the compatibility of the natural law position with legal positivism. The above analysis of the common good suggested that the requirements of practical reasonableness operative in relation to law are not the same as those confronting an isolated individual choosing between competing alternatives. Rather, they are requirements that follow from the law's status as a social practice with a privileged role in coordinating the competing and incommensurable ends of individuals and groups.[95] Now these sorts of considerations are not ruled out by the sources' thesis if this is taken to be concerned solely with setting out the existence conditions of law from the perspective of intra-systemic

[93] Finnis (2011, pp. 9, 280, and 366).

[94] Ibid, p. 15.

[95] See Finnis (1984, pp. 129–130).

legal validity. Yet the claim that the existence conditions of law need to be understood by reference to law's purpose – understood in terms of enactments and rulings that are directed towards the common good of a political community – is incompatible with the view that one can identify the essential features of law without reference to normative claims about law's purpose. According to the natural law theorist, instances of law that do not serve the common good may be intra-systemically valid, yet they are nonetheless defective insofar as they do not instantiate law in the central sense.

Dickson is thus correct to locate the real issue at stake between contemporary natural lawyers and legal positivists in this vicinity in her critique of Finnis. Correctly noting Finnis' commitment to law's positivity and his acceptance of the 'social fact' or intra-systemic sense in which unjust laws may still be regarded as valid laws, Dickson focusses her criticisms of Finnis' position on his tendency to 'demote' law's social or conventional nature to a subordinate status.[96] According to Dickson, this is a mistake because law's 'social facticity ... has a profound effect upon the social reality of people's lives irrespective of whether it fulfils any moral task it may have.'[97] This way of formulating what is at issue between the natural lawyer and the legal positivist is helpful, because it shifts attention from misleading disputes as to the conditions of legal validity and the relationship between law and morality to the question of whether law's status as a social fact or as a form of practical activity with a normative point is the primary explanatory concern of the legal theorist.

One might question whether it is really necessary to choose between a theory of law that focuses upon law's status as a social fact and one that focuses on its normative point. An adequate theory of law should obviously not neglect the status of law as a social fact and there is no reason why any natural law theory would need to do so. Finnis' argument for the methodological priority of normative considerations, for reflection on the practical point of law, is nonetheless difficult to contest on the very weak assumptions – assumptions surely acceptable to the vast majority of legal positivists – that law must be understood as both a social practice and as an

[96] Dickson (2012, pp. 56–58).

[97] Ibid. p. 57.

artefact kind. It is difficult to imagine an adequate theory of law that does not feature an explanation of the purpose of law. The purpose of law can certainly be articulated in a vocabulary that does not refer explicitly to the common good: as 'a normative order that attempts to bring about a certain behaviour' or as the resolution of 'the circumstances of legality' that confront rational persons attempting to engage in social planning.[98] It is nonetheless by reference to such reasons and purposes that law becomes intelligible as a social artefact brought into being through the practical activities of rational persons. The study of law is in this way different from the study of natural phenomena such as the molecular structure of plants or the rotation of the planets. For when we study law, as Raz says, in 'large measure' what we study 'is the nature of our own self-understanding.'[99]

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[98] Hans Kelsen, *Pure Theory of Law* (trans. Max Knight) (Lawbook Exchange, 1967), p. 62 and Shapiro (2011, pp. 170 and 213).

[99] Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009), p. 31.