Introduction 1

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The question on which natural law focuses is the eternal question of what stands behind the positive law. And whoever seeks an answer will find, I fear, neither an absolute metaphysical truth nor the absolute justice of natural law. Who lifts the veil and does not shut his eyes will find staring at him the Gorgon head of power.[1]

I

The phrases 'natural law' and 'legal positivism' are surely familiar to anyone moderately versed in Anglo-American jurisprudence. On one standard account, the two approaches disagree on whether there is a necessary connection between law and morality.[2] Natural law theorists, it is said, argue that there is a necessary or conceptual connection, while legal positivists deny this claim. Within positivism, some allow the *possibility* of a connection between law and morality (so-called 'inclusive' legal positivists), while others deny even that ('exclusive' legal positivists).[3] But this neat schema offers a misleading picture of the theses and concerns of natural law jurisprudence – and, as it happens, of legal positivism.

The 'necessary connection' thesis suggests that natural law theorists hold the simplistic view that a norm's immorality or injustice is enough to make it legally invalid, even if it was enacted by the appropriate procedures – a claim captured in the slogan *lex iniusta non est lex* (an unjust law is not a law). But that slogan does not have the role in the

* Thanks to Sherif Girgis for invaluable and extensive editing assistance and to Jonathan Crowe and Mark C. Murphy for helpful comments on this introduction.

[1] Kelsen 1927: 54–55.

[2] See, for example, Meyerson 2007: 3. This way of framing the distinction derives primarily from Hart 1958.

[3] See Green 2016 for similar formulations. As noted below, Green rejects the definitional approach outlined.

natural law tradition that many think it has.[4] More representative are the views of two leading contemporary natural law theorists included in this volume, John Finnis and Mark C. Murphy. Although Finnis and Murphy approach unjust law from different perspectives, they both reject the simplistic view while affirming a strong connection between *central or non-defective* cases of (positive) law and practical reasonableness.[5]

Finnis, for example, has argued that an unjust law is not a law in the focal sense.[6] The notion of focal or central and non-central cases is implicit in ordinary speech. We might say that a fair weather friend is no friend at all. Someone's history with another person, that is, might make him count as friend (i.e. not an enemy or even a mere acquaintance) even though his unreliability when times get tough and when true or full friendship demands taking risks or making sacrifices for friendship's sake prevents him from being a friend in the full-blooded ('focal') sense. Likewise, a norm might meet a particular legal system's requirements for validity even though its injustice makes it a non-focal instance of law (considered from the critical-moral viewpoint of the practically reasonable person).

Murphy approaches the *lex iniusta non est lex* dictum in a more metaphysical key by reference to law's 'non-defectiveness conditions'. In Murphy's view, natural law theories characteristically assert theses of the form that '[l]aw exhibits N, where N is some normative feature' (like *being a legitimate practical authority* or *being just*).[7] On a strong reading, this core natural law thesis would entail a necessary universal generalization: e.g. that 'necessarily, if x is a law, then x is legitimately authoritative, or just'. On Murphy's favoured, weaker reading, it is necessarily the case that *non-defective* law 'is backed by decisive reasons for compliance'.[8] Falling short of this standard makes a law defective as such. This approach has the advantage of reconciling the tradition's

[4] As Norman Kretzmann has demonstrated, the dictum is not *directly* attributable to either Augustine or Aquinas in any case. See *De libero arbitrio* I, v, 11; ST I-II, q. 95 a. 2c and Kretzmann 1988: 100–1.

[5] See Finnis 2011a: 23–55; Murphy 2003; and Murphy 2005: 15–28. One significant way in which Finnis's position differs from that of Murphy is in the strong emphasis that it places upon the role of practical (rather than theoretical) reason in identifying central cases of law even within a descriptive general theory of law. See Finnis (this volume).

[6] Finnis 2011a: 364. [7] Murphy 2013: 5. [8] Murphy 2013: 5.

view that laws are rational guides to action, with an acknowledgement that defective laws may be valid in an intra-systemic sense.

Even in historical terms, the 'necessary connection' thesis conceals more than it reveals. The insight that despite the wide range of human customs and conventions, there are nonetheless standards of just or right conduct, finds expression in the works of Sophocles, Plato, Aristotle, Cicero, Augustine and Aquinas, to name only a few examples from the Western tradition. Theories of natural law can instructively be understood in the broadest sense as 'theories of rational foundation' – as attempts to uncover and articulate the rational basis for the foundations of morality, politics and positive law.[9] Now undoubtedly, on this understanding, consideration of the relationship between ethical and moral principles and positive law forms a central part of natural law jurisprudence. But defining this tradition in terms of a commitment to a 'necessary connection' between morality and law obscures its subtlety and breadth.

Consider the work of St Thomas Aquinas, the paradigmatic natural law theorist, on law's positivity: its status as the product of human will, decision and command. In the treatise on law in the *Summa Theologiae*, Aquinas sets out a fourfold division of analogous kinds of law. The eternal law is the exemplar of divine wisdom.[10] The natural law is the sharing in eternal law by intelligent creatures.[11] Intelligent creatures participate in the eternal law through reason, and the first principle of practical reason is that 'good is to be done, and evil avoided'.[12] On the basis of this first principle of natural law, further propositions can be derived, such as that life and knowledge are goods that are worthy of pursuit—not merely as means to other ends, but as ends in themselves. The divine law is the law promulgated with revelation.[13] Crucially, eternal, natural and divine law are not treated by Aquinas as juristic concepts in the strict sense. This status is reserved for positive law (*lex humanitus posita*), which Aquinas divides into *ius gentium* and *ius civile*.[14] The former is 'the law of peoples', or humanly posited laws deduced from the natural law common to all rational beings. The latter is 'civil law', particular instances of which derive their

[9] Finnis 2011a: 25. This of course raises the difficult question concerning what is 'natural' about natural law. See Finnis 2011a: 23–55 and Oderberg 2010: 44–75 for contrasting responses to this question.
[10] ST I-II, q. 93, a. 1. [11] ST I-II, q. 91, a. 2. [12] ST I-II, q. 94, a. 2. [13] ST I-II, q. 91, a. 4.
[14] ST I-II, q. 95, a. 4.

moral weight or status as reasons for action primarily from the fact that they are posited. Both kinds of law are products of human reason and will and depend for their existence upon concrete acts of legislation, application and adjudication. To be sure, part of the positive law, what Aquinas calls *ius gentium*, directly expresses the requirements of natural law. But this in no way detracts from its positivity. And Aquinas recognizes norms as part of *ius civile* (civil law) which are rational guides to action primarily because they were *posited*,[15] having been picked by relevant authorities from a *range* of reasonable schemes for serving the common good (a selection that Aquinas calls *determinatio*).[16]

Thus, Aquinas's claim that positive law – when not corrupt – is derived (either directly or indirectly) from natural law does not undermine its positivity.[17] Finnis has shown three important implications of Aquinas's account. Firstly, positive laws depend on human practical activity in the political and legal domains.[18] Secondly, there can be and are many immoral positive laws.[19] Thirdly, positive laws can be identified as intra-systemically valid prior to any reflection on the relationship such laws have with morality.[20] In sum, the views of Aquinas, the most eminent natural law theorist in a historical sense, are hardly captured by the thesis that there is a necessary connection between law and morality (as least as that thesis is typically understood by legal positivist critics of natural law theory).

Likewise, many contemporary *legal positivists* have expressed severe doubts about defining their view by the claim that there are '*no* necessary connections between law and morality'. John Gardner, for example, characterizes the view as absurd – as perhaps the most pervasive and pernicious myth regarding legal positivism – on the grounds that there are many necessary connections between law and morality.[21] Most important, perhaps, is that law and morality both comprise valid norms.[22] It is also plausible that the propositions that law 1) deals with moral matters, 2) makes moral claims on its subjects and 3) is apt for appraisal as just or unjust, are themselves necessary truths.[23]

[15] On this point see Finnis 2011b: 183 and George 1999: 102–112. [16] Finnis 2011b: 183.
[17] ST I-II, q. 95, a. 2. [18] Finnis 2011c: 185 (citing Raz 1986: 81–82).
[19] Finnis 2011c: 185 [20] Finnis 2011c: 185
[21] Gardner 2001: 223. See also Green 2016. [22] Gardner 2001: 223.
[23] Gardner 2001: 223. Green 2016.

So we need a more fine-grained analysis to distinguish divergent approaches in contemporary legal theory. Gardner's own statement of a central claim of legal positivism is now often taken as canonical. According to the principle he labels LP*, in 'any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits (where the merits, in the relevant sense, include the merits of its sources)'.[24] According to Gardner, that is, the best way to formulate the core legal positivist thesis is in terms of the descriptive (normatively inert) proposition that legal validity is solely a function of 'sources, not merits'.

It is arguable that LP* does not *itself* provide a principled basis for distinguishing legal positivist and natural law approaches. Finnis, as suggested above, acknowledges a sense – consistent with LP* – in which laws that are clearly unjust from the perspective of a practically reasonable agent may nonetheless be valid from an intra-systemic point of view, insofar as they meet formal criteria of legality.[25]

Nonetheless, not all contemporary natural law theorists would accept LP*. Robert Alexy, in his contribution to this volume, maintains a long-standing commitment to Radbruch's Formula that extreme injustice can deprive appropriately enacted and socially efficacious norms of their legal validity. In recent work, Murphy has also questioned LP* on the ground that law's function is to serve as a rational guide to conduct, which requires it to be constitutionally capable of doing so – the latter criterion being a merit, not a source.[26]

One thing that is clear is that LP* is not a complete legal theory. As Gardner himself suggests, LP* cannot even 'distinguish law from a game'.[27] In a similar spirit, Leslie Green has written that no 'legal philosopher can be only a legal positivist', at least if legal positivism is equated with the claim that legal validity is a matter of sources and not merits. As Green notes, this thesis says nothing about what kinds of things could count as merits of law; what role law should play in adjudication; what claim (if any) law has on our obedience; and 'the pivotal questions of what laws we should have and whether we should have law at all'.[28] On these, LP* is silent; it is thus a claim that might be affirmed or denied by a range of legal theories.

[24] Gardner 2001: 201. [25] Finnis 2011c: 105 and 112. [26] Murphy 2013: 19–20.
[27] Gardner 2001: 227. Cf. Green 2016. [28] Green 2016.

The last of the further questions enumerated by Green – about 'what laws we should have and whether we should have law at all' – has undoubtedly been a particular focus for theorists in the natural law tradition. In this spirit, Julie Dickson has argued that 'positivist' and 'natural law' theories are best distinguished by whether they give priority to law's social facticity or its 'normative point'.[29] Dickson rejects the latter approach on the ground that it demotes or neglects features of law that sound theories must explain.[30] It might, she thinks, lead us to overlook the law's often bad outcomes, for example, or to think that its mere existence gives us reason to comply with it.[31]

It is not clear whether Dickson proposes this distinction as a principled boundary or merely as a difference in emphasis. In the background of Dickson's argument is a further distinction between, on the one hand, indirect evaluative judgements about what it is important for jurisprudential theories to explain in order to construct an adequate jurisprudential theory and, on the other, direct moral evaluations as to whether the law is, or is not, morally good.[32] This distinction helpfully reveals that argument is required to get from the premise, common to Dickson and Finnis, that any theory of law involves evaluation on the part of the legal theorist to a substantive moral claim such as that 'law is rightly conceived of as by its nature morally valuable'.[33] Yet nothing prevents a theorist such as Finnis, who gives priority to law's normative point in developing his legal theory, from also acknowledging the importance of law's social facticity. Dickson's analysis is potentially misleading insofar as it can be taken to suggest that giving less explanatory priority to something means deeming it unimportant.

At this point, legal positivists keen to maintain a clear-cut contrast with the natural law tradition might shift from a methodological to a metaphysical key. Scott Shapiro, for example, suggests that there have been two fundamentally different answers to the question of the nature or essence of law.[34] Legal positivists from John Austin to the present day, Shapiro claims, have argued that it is a necessary property of law that 'all legal facts are ultimately determined by social facts alone'.[35] By contrast,

[29] Dickson 2012: 56–58. [30] Dickson 2012: 56–62.
[31] See Green 2008 for discussion of some of the immoral outcomes the law makes possible.
[32] Dickson 2001: 44. [33] Finnis 2011c: 27. [34] Shapiro 2011a: 27.
[35] Shapiro 2011a: 27.

Shapiro insists, natural law theorists believe that it is a necessary property of law that its 'existence and content are ultimately determined by social and moral facts' – that in this respect, 'the nature of law is similar . . . to the nature of political morality'.[36] Formulating matters this way, Shapiro suggests, provides a clear boundary between alternatives within analytical jurisprudence.[37]

Setting aside the accuracy or usefulness of Shapiro's formulations, his own project points to the difficulty of upholding the thesis that legal facts derive exclusively from social facts.

According to Shapiro, laws can be identified with plans, or plan-like norms.[38] This 'planning' theory of law can purportedly make good on Hart's intention to ground norms in social facts because 'the existence of fundamental legal rules' is secured by a shared master plan that is adopted and practiced by a political community.[39] Shared master plans (plans *for* legal planning) exist when certain social facts obtain: namely, that the plan has been designed for a group, that it authorizes some members of the group to plan for others, and that it is publicly accessible and generally accepted.[40] In this way, Shapiro argues, plans are better suited than Hart's rules to vindicate the legal positivist thesis.[41] Both the social facticity of plans and the evident possibility of evil plans seem to guarantee that the law's existence is one thing, its merits another. If a primary function of plans is to resolve doubts and disagreements about the best way to act, moreover, then it must be possible, Shapiro insists, to determine the plan's content without reference to moral facts.[42]

At two points, however, the planning theory is arguably in tension with Shapiro's own definition of legal positivism. Firstly, although on

[36] Shapiro 2011a: 28. This emphasis upon political morality reflects Shapiro's problematic failure to draw an explicit contrast between the normative jurisprudence of Dworkin and the analytical project of Finnis and Murphy. Dworkin's 'particular jurisprudence' renders dubious his status as a natural law theorist because, as Murphy puts it, a 'parochial natural law theory is no natural law theory at all'. Murphy 2003: 241.

[37] Shapiro 2011a: 50. [38] Shapiro 2011a: 119–120. [39] Shapiro 2011a: 181.

[40] Shapiro 2011a: 180.

[41] Shapiro 2011a: 26–27 and 45. An ultimate fact is a fact that does not exist in virtue of other facts. Legal facts are never ultimate facts; i.e. they always exist in virtue of other facts. So the question of the ultimate source of legal authority for Shapiro is the question as to the basic facts in virtue of which legal authority obtains.

[42] Shapiro 2011a: 177. For critique of this assumption see Hershovitz 2014.

Shapiro's account moral facts play no role in determining the existence or content of law, some principles of practical rationality do.[43] Plans, Shapiro says, possess a 'limited' normativity insofar as they are governed by the instrumental principle (IP) that if you intend an end (E) and judge that a certain action is a necessary means (M) to E, then you should also intend M. In particular, this norm of instrumental rationality plays a central role in Shapiro's resolution of the so-called 'possibility' puzzle about legal authority.[44] The puzzle is that the existence of legal authority seems to require the prior existence of authoritative legal norms, which in turn seems to presuppose the existence of legal authority. Shapiro breaks the vicious circle by pointing out that IP is not itself a plan, created by any authority, but a rationally valid principle.[45] This suggests that on his account, the existence of law does not depend on social facts alone, but also on the normative fact 'that planning agents have the rational authority to give themselves plans'.[46] As for the second point of tension, Shapiro asserts that the constitutive aim of legal activity is to resolve deficiencies (of a morally significant type) that are associated with the complexity, contentiousness and arbitrariness of pre-legal communal life. Social planning is *desirable* because it helps to resolve these problems.[47] Yet this claim, as many commentators have noted, seems to bring the planning theory in close proximity to natural law theory.[48]

We cannot demonstrate here that Shapiro's robust form of legal positivism must ultimately agree that law's existence depends on some normative facts. But it becomes more difficult to deny the latter claim if one grants that law must be capable in principle of offering reasons for action – a tension that Murphy has shown in his insightful discussion of Joseph Raz's argument that law necessarily claims authority.[49]

At this point it is instructive to return to Hans Kelsen's critical statements on natural law cited in the opening. It is certainly the case that all the contributors in this volume would deny Kelsen's claim if it is to be

[43] Shapiro 2011b: 69. [44] Shapiro 2011a: 181. [45] Shapiro 2011a: 181.
[46] Shapiro 2011b: 69. [47] Shapiro 2011b: 69.
[48] Murphy 2011: 369; Waldron 2011: 894; Edmundson 2011: 273–291; Plunkett 2013: 563–605. Shapiro defends his positivist credentials by emphasizing that the fact law necessarily has a moral aim does not entail that it is successful in satisfying that aim. Shapiro 2011a: 277–280.
[49] Murphy 2013: 18–19.

understood as asserting that *all* that lies behind the veil of positive law is the Gorgon head of power. Now in one sense it would be quite unhelpful to characterize natural law jurisprudence as the rejection of Kelsen's claim. For all its rhetorical charm and apparent hard-headed realism, Kelsen's characterization of the ultimate determinants of positive law in terms of power is, at least when interpreted in a robust sense, manifestly implausible.[50] Few legal positivists today – certainly not Raz, Gardner, Green or Shapiro – would subscribe to such a one-sided picture with its crude reduction of the normative considerations that inform the enactment, adjudication and application of law to facts about power. The recent focus of the vast majority of contemporary legal theorists on normative considerations and the interaction of law with our capacity for practical reason, however, speaks in favour of the need for caution regarding the continued usefulness of framing jurisprudential debate in terms of a distinction between 'legal positivists' and 'natural law theorists'. In the broadest sense, what distinguishes the natural law approach, including the contributions in this volume, is a self-conscious commitment to investigating the relationship between positive law and its rational foundation. This theme, however, must surely be addressed by any attempt to provide a cogent and explanatorily adequate theory of law.[51]

II

The architecture of this volume reflects both the distinguished and complex history of the natural law tradition and its awareness of the impossibility of providing a satisfactory legal theory without reference to wider considerations of practical reason, normativity and justice.

Part I brings together four chapters on the historical and metaphysical foundations of natural law jurisprudence. John Finnis opens the

[50] Of course, it is also important to distinguish between Kelsen's critical statements regarding natural law and his own positive account of the content and implications of legal normativity.

[51] The centrality of the relationship between positive law and its rational foundation or normative basis to contemporary political and legal theory is itself sufficient to dispel the common prejudice that natural law theory has little to offer contemporary political and legal reflection under conditions of liberal value pluralism, social differentiation and 'the rationalization of the lifeworld'. See Habermas 1996: 95.

volume with a treatment of Aquinas's thought. Touching on the themes discussed throughout this volume, Finnis's contribution shows that Aquinas's jurisprudence has much to offer to contemporary reflection. In the second chapter, Robert P. George illuminates some of the foundational concepts of the natural law tradition, including knowledge of human goods and moral principles, human rights and dignity, and our susceptibility to moral failure. George also addresses the relationship of theism to natural law and its principles. The third chapter focusses on the natural law tradition's enormous and sometimes unacknowledged influence on the early modern period. In that third chapter, Knud Haakonssen emphasizes the diversity of early modern natural law theories and questions the widespread opinions that such early modern natural lawyers were either the seedbed of modernity's human rights or a pale reflection of scholasticism. In the final chapter of Part I, Jonathan Crowe considers the metaphysical foundations of natural law approaches to ethics and jurisprudence. Crowe demonstrates how the claim that law is necessarily a rational standard for conduct raises fundamental questions about the nature of law and presents his own account of the metaphysical status of law as an artefact kind.

Part II turns to the themes of practical reason, normativity and ethics. Christopher Tollefsen opens with an explication of the influential natural law account of practical reasoning and moral deliberation developed by Finnis, Germain Grisez and Joseph Boyle. Tollefsen discusses the foundational role that a variety of basic goods play (on this account) in our practical deliberation, and he contrasts natural law conceptions of practical and moral reasoning with contemporary rivals. In her chapter on the relationship between law and practical reason, Verónica Rodríguez-Blanco draws on Elizabeth Anscombe's influential action theory to elucidate central features of law such as authority and normativity. Rodríguez-Blanco closes by arguing that competing conceptions of law are parasitic on the core idea that law is the result of our practical reason. Thomas Pink's chapter examines the relationship between two conceptions of the self: one that concentrates upon our capacity to reason and the other that focusses upon our susceptibility to attributions of positive and negative personal worth. Pink explores how the marriage of these two conceptions produced important tensions within the natural law theory of obligation. In the final chapter of Part II, Jacqueline Laing illustrates the natural law tradition's