Introduction

It might be tempting to begin a work on the normativity of law by stating in a succinct and pithy way *the* precise problem to which an account of the normativity of law is meant as an answer, to draw out *the* common conception of the problem of the normativity of law across different eras and perspectives. This will not be my approach, neither as a starting point nor a destination. The problem of the normativity of law is many, not one, and this is as it should be. Law – including its normativity – is interesting for several reasons and from diverse angles. A core aim of this Element is therefore quite modest: to map some of the numerous ways in which the problem of the normativity of law has been conceived and answered. Another aim will be to show some of the pitfalls of failing to observe the differences.

The expression "normativity of law" has no home in ordinary language; it is entirely a product of legal theory, and most likely legal philosophy in particular. And within legal philosophy, it has been understood in various ways, giving rise to various kinds of investigations with various goals. It would therefore be quite remarkable if, despite all appearances, legal philosophers working on the normativity of law were somehow all best understood as engaged in identical pursuits. Legal philosophers are, after all, a disagreeable bunch. They love to find fault, not just in the details but also with the entire character and objectives of each other's views. A brief survey should help to illustrate.

Early statements of the problem of the normativity of law took their cue from the normative language used in law, such as rights, obligations, duties, and responsibilities. Joseph Raz, for example, writes, "The problem of the normativity of law is the problem of explaining the use of normative language in describing the law or legal situations" (Raz, 1999, 170). Similarly, H. L. A. Hart notes, "I share with [Kelsen] the conviction that a central task of legal philosophy is to explain the normative force of propositions of law which figure both in academic legal writing and in the discourse of judges and lawyers" (Hart, 1983, 18). Hart was of course writing during a time when ordinary language philosophy was in its heyday, and though Raz framed his early work in the same way, it was not long until his approach became primarily one of practical philosophy, a special branch of philosophy concerned with the nature and operation of reasons for action. The prominence of practical philosophy as a way of doing legal philosophy itself gave rise to new statements and framings of the problem of the normativity of law. We find, for example, Gerald Postema elaborating on what he takes to be the problem that Hart (and Raz) have identified:

> A central task of philosophical jurisprudence is to explain and reconcile two (sometimes apparently conflicting) sets of widely shared beliefs about our

> legal practices. On the one hand, we recognize that the notion of law is essentially practical. "Law" lives in the familiar environment of "rights," "obligations," "reasonableness," and their cognates, all of which derive their distinctive character from the roles they play in the practical deliberation and guidance of rational agents . . . On the other hand, we believe that law is essentially a social phenomenon – a complex of social institutions which can be studied by external observers and participants viewing their practices as external observers . . . The problem of accounting for the normativity of law is the task of explaining, illuminating, and where necessary reconciling these beliefs. (Postema, 1987, 81)

In Scott Shapiro's work, an additional dimension is introduced to the problem of the normativity of law. In commenting on Hart's positivist theory, Shapiro articulates the problem in this way, which puts a key inference (or derivation) at the center: "How can normative judgments about legal rights and obligations be derived from purely descriptive judgments about social practices?" (Shapiro, 2011, 97). I shall suggest later that supposing there is an inference here that needs to be made and defended is a mistake; it not only distorts Hart's view but marks a significant misdirection of efforts. But for now it is worth continuing the brief survey.

Others, such as Fred Schauer, see much less of a problem for legal theory:

> Legal philosophers since Hart have tended to accept this account of how law can create obligations [that people take an internal point of view toward their legal rules], but they often make it more mysterious than necessary, typically by describing the issue in terms of a genuine puzzle about the source of law's "normativity." But the issue is not nearly as puzzling as these theorists would have us believe. Whenever we are inside a rule system, we have obligations created by that system. (Schauer, 2015, 33–34)

Schauer goes on to explain that morality, religion, chess, etiquette, and fashion, just like law, are systems of norms that, once accepted or internalized, give rise to system-relative obligations: "[i]f one accepts – internalizes, or takes as a guide to action – the system, then that system can create obligations for those who accept it" (Schauer, 2015, 34).

Though I sympathize with Schauer's view, it might be too swift to adopt such a relativistic understanding of normativity – that normativity is always categorized into some single domain and conditioned on acceptance or internalization. Questions remain. Is there something distinctive about how different types of norms create obligations? For example, obligations of fashion seem wholly conditional on acceptance, but is the same true of moral obligations? Is the normativity of obligations in one domain to be explained (even in part) by drawing on resources from other domains of normativity?

These are only a few statements, all drawn from just one subfield of analytical legal philosophy: they are all attempts to make sense of the problem of the normativity of law as Hart conceived it. Hart is of course not the whole of legal philosophy, so other views will be surveyed. As we will see, as soon as we broaden our scope, the range of views can quickly become truly dizzying. The first aim of this Element is therefore to survey, though not exhaustively, the diversity of conceptions of the problem of the normativity of law. A second aim will be to highlight some of the dangers (wasted energies and misadventures) of failing to observe such diversity.

There are not only different answers to the problem of the normativity of law, but different conceptions of what the problem is. I believe they fall into three general categories, which I shall treat as individually defensible and necessary[1] for investigations into understanding the normativity of law. My approach could therefore be described as, at the risk of using an overused term, *pluralistic*. The three categories are (i) *conceptual or analytical*, which investigates, using descriptive–explanatory methods, the foundations of legal normativity and the distinct kind(s) of normative claims law purports to make; (ii) *evaluative*, which investigates, using forms of critical assessment, the reasons officials have to create, apply, and enforce some laws as opposed to others, and the reasons nonofficials have to comply with law or not (while there may be many such reasons, I shall focus on moral and prudential reasons); and (iii) *empirical*, which investigates, using tools from the natural and social sciences, the empirical (which includes causal and cultural) contexts of law's normative claims and effects. There are, of course, relations between these categories, but such relations are compatible with their distinctness. Most importantly, collapsing one approach into another is to be avoided; they are each irreducibly basic.

It is not my view, however, that there is no common topic across diverse views. While not all theorists agree on what the problem of the normativity of law is, those to be surveyed can all be understood in one way or another as concerned with explaining the relation between law and reason. What I want to insist on, however, is that a common topic does not amount to identity of particular questions, identity of conceptions of the problem, or identity of methodological approaches. Not all theorists are asking and answering the same question or problem, or using the same methods. The different categories of investigation – conceptual, evaluative, and empirical – each offer something of distinct importance and value, which together combine for a balanced and broad understanding of law's normativity. This ought to be a matter of course,

[1] I deliberately refrain from saying "jointly sufficient," for there may be other general ways of exploring the normativity of law. While I shall try to be as capacious as possible in subsequent sections, I make no claim to being comprehensive.

but unfortunately it requires defense. This will be another aim I set out to accomplish: that questions about the normativity of law are not limited to conceptual or philosophical questions, but cover a much wider range of disciplines and types of investigation. Simply put, to suppose that the problem of the normativity of law is solely a philosophical problem is a mistake.

This Element is divided into three parts. In Part I (Sections 1–4), I provide a survey of various conceptions of the problem of the normativity of law across a highly selective sampling from within the history of Western legal theory (though not so selective that the sampling cannot serve its purpose in identifying some core ideas, themes, and differences). This first part, perhaps unsurprisingly, will be devoted to examination of natural law theory and legal positivism. What might be surprising, however, is that I shall not follow the conventional approach of identifying and dwelling on the disagreements between natural law theorists and legal positivists. Instead, I shall emphasize the similarities, as there is much to learn by appreciating these. I therefore focus on the long-standing debate between natural law theory and legal positivism, not out of blind adherence to this common way of framing issues in the philosophy of law, but rather to show that the kind of reasonable diversity in legal philosophy I seek to highlight can be found even here, despite prevailing urges to see nothing but opposition.

Section 1 presents some key aspects of the natural law theories of Aristotle, St. Thomas Aquinas, and John Finnis. Each notes that human, positive law has a special force, but in a way that is tied to moral standards external and prior to its existence. On their accounts, explanation of law's moral normativity, or the moral dimension to law's normativity, is essential to explanation of the normativity of law, given the nature of law.

Section 2 highlights key claims in the views of early positivists such as Thomas Hobbes, Jeremy Bentham, and John Austin, who, in slightly different ways, focused attention on the distinctive place of human law in securing obedience through the use of threats of sanction. Their views will simply be introduced in this section. In Section 7, I will return to the relation between law and coercion, and explain why coercion – including some dominant views to the contrary – also forms an essential part of explaining the normativity of law.

In Section 3, I present some elements of the views of Hans Kelsen and H. L. A. Hart. Both Kelsen and Hart attempted to isolate, in more general terms than their predecessors, the precise way in which law stands as a special category of normative thought or special kind of reason for action. Both were also engaged in investigations into the foundations of legal order, which for Kelsen had to be presumed, and for Hart had to be socially created. They agreed that the normativity of law required explanation of the place of individual legal

norms in legal systems (to explain the distinct kind of "oughtness" of legal norms), but they disagreed on how this explanation went: Kelsen thought sociology and psychology could play no role in explaining the normative character of law, while for Hart these social sciences, or at least the kinds of facts upon which they were built, were essential to understanding the existence, character, and normativity of law.

In Section 4, I outline some of the elements of Joseph Raz's view of law as a special kind of practical reason – namely, a kind of second-order reason that is meant, and claims, to play a distinctive role in the practical reasoning of subjects. I believe Raz's emphasis on the claim to legitimate authority, together with emphasis on the conditions of truth of that claim, present a valuable example of the kind of pluralism about the normativity of law that we would do well to observe.

Part II (Sections 5–7) turns to critical examination of what I take to be some misguided steps in work on the normativity of law. In Section 5, I examine so-called third theories or antipositivist theories of law – those of Ronald Dworkin and Lon Fuller – which try to generate law's normativity by examining its internal morality (whether substantive or procedural). While there is great value in their theories, their conception of the normativity of law, cast as the task of deriving moral value from within law itself, misses the mark, and needlessly so. Theirs is a mistake of collapsing the problem of the normativity of law into just one problem, and of expecting too much from a single kind of approach.

In Section 6, I turn to recent positivist accounts of law, focusing here on those that try to generate "robust," "real," or "genuine" normative reasons from social facts alone. These accounts turn to developments in philosophy more broadly, such as work on "shared cooperative activities" or "artifacts," to explain law's normativity in a way free from moral assessment. I shall argue that the problem with these theories is, remarkably, of the same kind as the problem with Dworkin's and Fuller's view: they attempt to generate too much normativity from within the practice of law itself. They would do better, I argue, to connect questions of law's claim to moral normativity with investigations that draw directly from wider and more external sources of reasons.

In Section 7, I consider some recent debates about the relation between law and coercion, here suggesting that while the conceptual question about whether law and coercion are necessarily connected is important, its central role in legal theory has had the unfortunate effect of excluding empirical questions about law's coercive force as irrelevant to investigations about the normativity of law. This is a significant misstep in need of correction.

Part III (Sections 8 and 9) looks back and forward. In Section 8, I collect the observations and lessons drawn from Sections 1 to 7 and sketch some ways of

thinking pluralistically about the normativity of law. Section 9 then ventures ahead to where I think new and important directions lie.

Two preliminary notes should be added about the approach taken in this Element. First, my focus in Parts I and II is what could be called major-figure-centric. This is not meant to be disrespectful of the work of contemporary theorists who offer important and nuanced elaborations of the views of Hart, Dworkin, and Raz, among others, but only to suggest that there are some key lessons still to be learned by returning to these key figures. Second, for the most part, I will not go deeply into particular contemporary disputes as these have grown and developed. One reason is space, as this is only a short work, but the other is skepticism that depth is always a sound metatheoretical principle, especially when pursued with too much enthusiasm or for its own sake. Sometimes, a really deep account just takes us down a really deep hole, with no additional insight. More importantly, really deep accounts often ignore key first steps or observations that can prove much more valuable.

PART I

1 The Moral Normativity of Law: Aristotle, Aquinas, Finnis

This section will highlight three familiar natural law theorists – Aristotle, St. Thomas Aquinas, and John Finnis – whose sustained views have come to shape mainstream natural law theory in the Western and European tradition in many ways. The goal will not be to defend any of their particular views, but to introduce (and, I will confess, endorse) the general idea that a necessary part of understanding the normativity of human law must lie outside of human law itself. The key claim for each of Aristotle, Aquinas, and Finnis is that moral evaluation is a necessary dimension to investigation of the normativity of law – what we might call law's moral normativity. Or, in other words, it is an essential part of understanding the normativity of law that we understand under what conditions there are moral reasons to create, apply, enforce, and obey law. As such, the theories of Aristotle, Aquinas, and Finnis can all be understood as *evaluative* theories, and specifically *morally evaluative* theories, as outlined in the Introduction.

1.1 Aristotle

Though the expression "normativity of law" is relatively recent, as a general topic in the philosophy of law it is very old and dates back at least to the ancient Greeks. Aristotle, for example, draws a distinction between two types of justice or rules, precisely along the lines of the different sources of their force:

> Of political justice part is natural, part legal – natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep shall be sacrificed . . . (Aristotle, 2009, 92)

Aristotle was of course among the first natural law theorists and set out to explain the binding force of human-made law precisely in terms of how well it provided the conditions for humans to attain their natural perfection: a life of virtue and flourishing. Aristotle believed humans were indeed special, but not so special that our laws stood somehow outside of the natural order of the world, which was to be understood with a teleological metaphysics through and through. In nature Aristotle observed balance, harmony, and the absence of excess as conducive to flourishing, and reasoned that human laws ought also to strive at balance, harmony, and the means to create and maintain the conditions for human flourishing. The problem of the normativity of law was therefore conceived very early as recognition of external or prior constraints on fallible human laws, which gave human laws their reason and purpose. This is the hallmark of natural law theory. While conceptions of natural law have changed and varied, they all share this basic structure and idea: that there are objective, universal standards and values, and these constrain and act as the binding force of any justified laws humans might make for themselves.

1.2 St. Thomas Aquinas

The natural law theory of Aquinas takes a similar structure to Aristotle's, but with an important difference. Aquinas also believed that there are natural, objective moral standards that all human laws must match to be morally binding and obligatory, but for Aquinas these standards originate from a theistic, and in particular Christian, worldview: for human laws to be binding and have normative force, they must conform to the natural law, understood as a system of principles of reason divinely designed for humans and discoverable through rational reflection.

But more important than this difference, Aquinas drew a similar distinction to Aristotle's between natural justice and legal (or conventional) justice. In Aquinas's work, this is the difference between the natural law and human laws. The two ways in which human laws are to be derived from the natural law are essential to understanding Aquinas's view about the normativity of law. The first is by way of deduction, or simple syllogism, where a major premise and a minor premise combine to produce one, and only one, conclusion. Aquinas offers a familiar example of this type of derivation: the conclusion

that "one must not kill," a common human law, is derived deductively from the natural law principle that "one should do harm to no man" (major premise) and the fact or observation that "killing is an instance of harm" (minor premise) (Aquinas, 2017, 39). In this example, the normative force or bindingness of the human law derives entirely from its source in the natural law. The second form of derivation, however, centers the force or bindingness of human laws on human laws themselves. In what Aquinas refers to as "*determinatio*," the exercise of choice is required, and introduces some arbitrariness in deriving human laws from the natural law. Such arbitrariness explains why there can be justifiable variation in human laws across time and place, and also why human laws are necessary to supplement the natural law. Human laws are necessary to determine – that is, render more determinate – what the natural law leaves general and open. To take a familiar example, consider a law governing a typical coordination problem, such as the problem of settling on a particular side of the road on which everyone is to drive. Presumably, the natural law is indeterminate with respect to whether we should drive on the right or the left. Both possible solutions to the coordination problem, introduced by the need to have everyone drive on the same side of the road, are consistent with the natural law, but a choice needs to be made. Reason alone does not, and cannot, tell us which side to drive on, though it does tell us that it should be one side or the other. So a choice must be made, to render one of the options salient – the option the natural law requires that we pursue once a human authority (or established custom) has chosen it for us.

In commenting on the two modes of derivation, Aquinas makes this observation:

> Accordingly both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, *have no other force than that of human law.* (Aquinas, 2017, 40; emphasis added)

Unfortunately, Aquinas slips up in the last sentence, which can only be understood as a misstatement (Finnis, 1998, 267). It is of course true that the decision that creates a human law (that we ought to drive on the right side of the road) plays a decisive role in the creation, and therefore force, of the human law. But – and this is crucial – the force of such a human law still requires conformity with the natural law: that harm ought to be avoided, safety and efficiency ought to be pursued, etc. It is remarkable just how often Aquinas's misstatement is missed, so it is worth spelling out the idea in full. The rule "drive on the right side of the road" would conform to and so derive its force from the natural law principles of

avoiding harm, pursuing safety, efficiency, etc. Likewise, the rule "drive on the left side of the road" would also conform to, and so derive its force from, the very same natural law principles. In both instances, a human decision (drive on the right or drive on the left) is essential, but in both instances conformity with the natural law is still required to give force to the human law. The nonsense of a human law saying that we ought to drive in the middle of the road clearly shows there are moral limits, imposed by the natural law, on what human laws could justifiably be. So, even when there is choice, it is choice constrained within certain parameters set by the natural law, which ultimately explains the force of all human laws. To say that correctly derived human laws, by way of determination, "have no other force than that of human law" obscures this important point.

1.3 John Finnis

Aquinas's natural law theory has been carefully and meticulously elaborated and developed by John Finnis, though with one important difference. While Aquinas works from within a theological worldview (in the thirteenth century over most of Europe, this was a safe, indeed necessary, commitment), Finnis aims to develop a natural law theory of law and morality free from such a presumption. Finnis supposes we can identify what is good for human beings and societies by relying solely on our nature and capacity as rational beings – beings who can think and reason about what is good for them.

This difference aside, there are important similarities between Aquinas and Finnis. The main similarity is agreement over the purpose of philosophy of law. In Aquinas's philosophical system, everything is to be understood in terms of its purpose or end, and law is no exception. For Aquinas, the purpose of law is the common good, and the basic precept of the natural law is that good ought to be pursued and evil avoided (Aquinas, 2017, 35). Finnis shares these beliefs without reservation and offers a sophisticated account of what the good is. In Finnis's view, there are in fact seven basic human goods: life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion (Finnis, 1980, 85–90). These goods are basic, irreducible, exhaustive, incommensurable, objective, universal, self-evident, and known by reason and fact. They also represent the objectives of meaningful, long-standing projects, not momentary, fleeting options. In this sense, they provide the basic values that humans have reason to pursue.

Finnis also shares Aquinas's view that human laws can be derived from what is objectively and universally good for humans. To see how his argument works, we first need to elaborate on one of the basic goods: practical reasonableness.

Practical reasonableness begins with some basic observations about us and our lives – namely, that we cannot pursue fully all of the basic goods in our life, nor are we all equally suited to pursue each and every basic good. It is also important to observe that the basic goods are not presented, on their own, as norms or rules of any kind. How should we then structure our attitudes, dispositions, and actions with respect to them?

As Finnis explains, practical reasonableness is constituted by several principles that are meant to guide our choices, actions, attitudes, and commitments (Finnis, 1980, ch. 5):

(i) We should structure our life by means of a coherent plan, which takes one or more of the basic goods as the basis of long-term commitment(s).
(ii) We cannot have arbitrary preferences amongst the goods.
(iii) We cannot have arbitrary preferences amongst persons.
(iv) We must be both detached and committed to our projects.
(v) Consequences and efficiency matter in the assessment of our actions, but they are not of overriding importance.
(vi) We must respect, in every act, every basic good.
(vii) We have a responsibility to promote the common good.
(viii) We must follow our conscience.

The product of these requirements of practical reasonableness, supplemented by their guidance in considering particular issues, is morality, but not just any morality. The requirements and their implications represent the true, objective, universal morality, regardless of how much it might not be recognized or may have been ignored.

Together, the requirements of practical reasonableness offer guidance to individuals about how to live well. Yet they also offer guidance to lawmakers who have the responsibility to devise morally sound laws. Here is an example.[2] Consider the first requirement – that we should structure our life by means of a coherent plan, which takes one or more of the basic goods as the basis of long-term commitment(s). This means that we must not drift without commitment to any of the goods, nor attempt to live according to a blueprint of life where thought and judgment are replaced by mechanical rule-following. Nonetheless, changes to life plans are permissible, so long as they are made thoughtfully and reasonably, with the basic goods in mind. Now, making and following commitments and plans depends – as a kind of precondition – on a fairly stable environment where our expectations enjoy some degree of security. To establish

[2] I do not mean to suggest that this example, especially as it is presented here, is a precise reproduction of Finnis's argument. It is, rather, a simplified version of the kind of derivation Finnis presents much more elaborately (Finnis, 1980, 270–73).